DECISION

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

4 yearly review of modern awards – Supported Employment Services Award 2020

(AM2014/286)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT SAUNDERS
COMMISSIONER CAMBRIDGE SYDNEY, 10 NOVEMBER 2022

4 yearly review of modern awards – Supported Employment Services Award 2020.

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ABBREVIATIONS TABLE

Abbreviation	Definition
ABI	Australian Business Industrial and the NSW Business Chamber
ABI response submissions	Submissions filed by ABI and NDS in reply to the AEDLC's 13 May 2022 jurisdictional submissions on 8 July 2022
ABI Structure	Alternative classification structure developed by ABI
ABI Trial	Parallel trial of the proposed new wages structure, organised by ABI and performed by select ADEs that are members of ABI
Activ	Activ Foundation
ACTU	Australian Council of Trade Unions
ADE	Australian Disability Enterprise
AEDLC	AED Legal Centre
AEDLC March outline	Outline of jurisdictional objections filed by the AEDLC on 16 March 2022
AEDLC May submissions	Submissions filed by the AEDLC on 13 May 2022 outlining its jurisdictional objections
AEDLC July reply submissions	Submissions filed by the AEDLC on 20 July 2022 in reply to the ABI response submissions
AEDLC September reply submissions	Submissions filed by the AEDLC on 28 September 2022 in reply to the DSS response submissions
AHRC Act	*Australian Human Rights Commission Act 1986* (Cth)
AIRC	Australian Industrial Relations Commission
ARTD Trial	Trial of proposed new wages structure, commissioned by Department of Social Services and conducted by ARTD Consultants
BGA	Balmoral Group Australia, the consultants that conducted the financial analysis associated with the ARTD Trial
BSWAT	Business Services Wage Assessment Tool
CRPD	United Nations *Convention on the Rights of Persons with Disabilities*
DD Act	*Disability Discrimination Act 1992* (Cth)
DEA	Disability Expertise Australasia
December 2019 decision	[2019] FWCFB 8179
Disability Royal Commission	Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability
DS Act	*Disability Services Act 1986* (Cth)
DSP	Disability Support Pension

Abbreviation	Definition
DSS	Commonwealth Department of Social Services
DSS response submissions	Submissions filed by the DSS in response to the AEDLC May submissions on 9 September 2022
FW Act	*Fair Work Act 2009* (Cth)
Greenacres	Greenacres Disability Services
HSU	Health Services Union
January 2020 statement	[2020] FWCFB 343
Knoxbrooke	Knoxbrooke Incorporated
March 2020 decision	[2020] FWCFB 1704
Modified SWS	Proposed changes to Schedule D of the SES Award pursuant to the preferred approach, set out at paragraph [374] of the December 2019 decision
NPA	National Panel of Assessors
NDIS	National Disability Insurance Scheme
NDS	National Disability Services
Nojin	*Nojin v Commonwealth of Australia* [2012] FCAFC 192; 208 FCR 1; 298 ALR 410
NMW	National minimum wage
Our Voice	Our Voice Australia
Preferred approach	The approach set out at paragraphs [367]-[380] of the December 2019 decision, including the proposed new wages structure and the modified SWS
Proposed new wages structure	Structure described at paragraphs [372] and [373] of the December 2019 decision
Report	ARTD's *Fair Work Commission New Wage Assessment Structure Trial Evaluation – Department of Social Services – Final Report*, 24 November 2021
SAGE	SA Group Enterprises Incorporated
SES Award	*Supported Employment Services Award 2020*
SS Act	*Social Security Act 1991* (Cth)
SWS	Supported Wage System
UWU	United Workers' Union

INTRODUCTION AND BACKGROUND

[1] This decision is intended to finalise, subject to some issues concerning transitional provisions and other technical matters, the 4 yearly review in respect of the provisions of the *Supported Employment Services Award 2020* (SES Award) concerning minimum wage rates for employees with a disability.[1]

The December 2019 decision

[2] On 3 December 2019, a differently-constituted Full Bench issued a decision[2] in this matter (December 2019 decision) which dealt with claims seeking variations to the wages provisions of the SES Award.[3] The December 2019 decision contains a detailed summary of the background to this matter, the parties' positions and evidence received prior to the last substantive hearings in 2018, as well as historical context that we do not propose to repeat here. The Full Bench, after reviewing the extensive evidence before it, made four findings about the supported employment sector covered by the SES Award which were, in summary, as follows:

(1) The employment opportunities which the supported employment sector provides to disabled persons is of immense value to Australian society. Disabled persons place great weight upon the companionship, stimulation, independence, learning opportunities and the sense of dignity, achievement and self-worth which supported employment provides them. For the carers and family members of disabled persons employed in Australian Disability Enterprises (ADEs), the support and respite which employment in ADEs provides them, and the positive personal effects such employment has on the disabled person, is regarded as being of huge worth. Additionally, ADEs are not just employers of disabled persons in the normal sense, but also provide a range of additional support services which an ordinary employer does not, including training in life-skills as well as vocational training, counselling and behavioural support, and transport assistance.[4]

(2) The nature of employment is markedly different in the supported employment sector than in the general labour market. The normal state of affairs is that employers will establish a job for the purpose of the performance of certain work functions which it requires to be performed in order to carry on its business, and will then hire a person whom it considers capable of performing those functions to the required standard to fill that job. ADEs operate in a different paradigm. The purpose of their existence is to provide employment opportunities for disabled persons who have restricted work capacity, typically on a not-for-profit basis. Accordingly, they seek only those business opportunities which will generate jobs capable of being filled by disabled persons, which necessarily limits the types of commercial activity they can engage in. Further, they do not arrange their workforces simply on the basis of a job structure that will allow the necessary

[1] Throughout this decision the expression "employees with a disability" is used where necessary because this is consistent with the terminology used in the *Fair Work Act 2009* (Cth) and the SES Award. However, we acknowledge that such employees are also commonly referred to as "employees with disability" and "persons with disability".

[2] [2019] FWCFB 8179

[3] Then named the *Supported Employment Services Award 2010*

[4] [2019] FWCFB 8179 at [245]

work to be performed in the most productive and efficient fashion, and then recruit persons to fill those jobs. Rather, they create or tailor jobs in such a way that they are capable of being performed by a particular person with a particular disability or by persons with a class of disability. This may mean, for example, that a set of work functions which is capable of being performed as a single job by a single person not relevantly affected by disability is broken up into a number of discrete tasks, each of which will be made into a separate job that aligns with the work capacities of a particular disabled person.[5]

(3) Arising from the low-productivity nature of ADE operations, they cannot financially be sustained by commercial revenue alone and are dependent to a large degree upon government funding. This was previously done using a case-based model, but funding is transitioning to the National Disability Insurance Scheme (NDIS) model. Having regard to the revenue sources of ADEs, it is apparent that the capacity of ADEs to respond to any significant change in minimum wages levels is far more restricted than for ordinary businesses. They have no capacity to increase the substantial proportion of their revenue which comes from government funding to pay the increase (unless there is an independent decision of government to adjust its funding levels accordingly). An ADE's capacity to increase the prices it charges to its commercial clients is likely to be limited due to the low-productivity nature of the goods and services ADEs provide. Nor can ADEs reduce employment and improve productivity without vitiating the very purpose of their existence. This means that the exercise of considerable caution is necessary in considering changes to the wage structure in the SES Award lest ADEs be rendered financially unviable.[6]

(4) Although the evidence demonstrated that supported employees under the SES Award earn, on average, about $7.00 per hour, consideration of the appropriate minimum wage setting mechanism for disabled employees in ADEs must necessarily take into account the fact that such employees are invariably also in receipt of the disability support pension (DSP). For a single person 22 or more years of age, the basic fortnightly rate of the DSP (including the pension supplement and the energy supplement) is currently $933.40.[7] Receipt of the DSP is subject to an income test by which, for every dollar a recipient earns over $174.00 per fortnight, the DSP is reduced by 50 cents. This means, as an example, that for a disabled employee currently working only 15 hours per week at an assessed rate of $5.00 per hour, a pay increase of a dollar an hour would result in a reduction of the fortnightly pension payment of $15.00. Thus, the benefit of the pay increase is significantly mitigated, although not entirely diminished, as a result of the tapering of the DSP payment. An employee in receipt of gross employment income of about $461.20 per week will receive, together with their income-tested DSP payment, a gross weekly income equivalent to the national

[5] Ibid at [247]-[248]

[6] Ibid at [249]-[252]

[7] This dollar amount and the amounts immediately following are as at the date of the December 2019 decision.

minimum wage (NMW). The income needs of disabled employees in ADEs must be considered in this context.[8]

[3] The Full Bench engaged in detailed analysis of the history of wage fixation for employees with disability, and stated the following conclusions:

> "(1) Independent reports concerning the appropriate method of wage fixation for disabled persons who would, because of their level of disability, be unable to obtain employment in the labour market at full award rates, have consistently recommended that their wage rate be assessed by use of a hybrid mechanism which takes into account the value of the work they perform and the employee's level of productivity in performing that work. Views consistent with this approach have been stated in the Ronalds Report, the Dunoon/Green Report, the First KPMG Report, the First HOI Report and the Second HOI Report.
>
> (2) The SWS was not designed or intended for use in the ADE sector, and its use in that sector has only even been envisaged as being subject to major adaptive change or as one of a number of available wage assessment tools. However, as a measure of productivity *simpliciter*, it has been recognised (particularly in the Second KPMG Report) as fair and objective.
>
> (3) The *Nojin* litigation demonstrates that the work value element of the wage assessment of a disabled employee in an ADE environment should not proceed on the basis of notional core or industry competencies which have no substantive relationship to the classification descriptors for minimum pay rates in the applicable award or to the work actually performed by the employee. An assessment carried out on this basis will be likely to be inherently disadvantageous to and thereby discriminatory towards intellectually disabled employees."

[4] In relation to the AED Legal Centre's (AEDLC's) claim that the Supported Wage System (SWS) should become the sole wage assessment tool under the SES Award, the Full Bench accepted that the existence of a number of wage assessment tools in clause 14.4 of the 2010 version of the SES Award does not achieve the modern awards objective in s 134(1) or the minimum wages objective in s 284(1) of the *Fair Work Act 2009* (Cth) (FW Act). However, the Full Bench did not accept the AEDLC's case that the SWS should be the sole wage assessment tool, operating in conjunction with the existing classification structure, finding that the SWS was not *by itself* an effective wage-setting mechanism for employees with disability in ADEs and suffered from a number of other difficulties.[9] The Full Bench also did not accept Australian Business Industrial and the NSW Business Chamber's (ABI's) proposal for a new work value classification structure for employees with disability to sit below the current classification structure, finding that the proposal was not properly based on work value and lacked objectivity, transparency, simplicity and enforceability.[10]

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[8] [2019] FWCFB 8179 at [253]

[9] Ibid at [348]-[364]

[10] Ibid at [365]-[366]

[5] The Full Bench then set out what it described as the "preferred approach". The Full Bench said that the wage fixation mechanism in the SES Award for employees with disability must remunerate all workers in a manner consistent with the value of the work they perform, and not price them out of a reasonable prospect of employment.[11] At the same time, the Full Bench expressed the view that any wage fixation mechanism must not cause commercial disruption to ADEs by suddenly increasing employment costs.[12] The Full Bench considered that these objectives should be achieved by establishing a new hybrid wages structure (the proposed new wages structure) which took into account the value of the work performed by the employee and the employee's productivity level where this is affected by disability.[13] In respect of employees with disability for whom jobs are created or tailored for the purpose of providing work which is within their capabilities, the Full Bench concluded that new classifications with pay rates below the NMW should be established.[14] In addition, the descriptors for the existing classification structure would be modified so that they are expressed in terms of generic indicators in work value.[15] In respect of the assessment of employee productivity, the Full Bench determined that the SWS, modified in certain specified respects, was to be the only assessment tool (modified SWS).[16]

[6] As to this new hybrid wage structure, the Full Bench said:

> "[372]…
>
> (1) There should be two new classifications (Grades A and B) below the current Grade 1 in the SES Award. The classifications should be applicable only where the employer has created a position consisting of tasks and a level of supervision that has been tailored or adjusted to meet the circumstances of the employee's disability and which does not fall into Grades 1-7 of the classification structure. We emphasise here that we are not talking about the situation where an employer simply makes a reasonable adjustment to allow a disabled person to perform a pre-existing vacant position. Additionally, the employee must meet the criteria for eligibility to receive the DSP.
>
> (2) Grade A shall provisionally have a rate of $7.00 per hour, and shall apply to employees who perform one or more simple tasks consisting of up to three sequential actions under direct supervision and constant monitoring.
>
> (3) Grade B shall provisionally have a rate of $14.00 per hour, and shall apply to employees who perform one or more simple tasks consisting of more than three sequential actions, which may involve the use of mechanical or electrical equipment or tools, under direct supervision with regular monitoring.

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[11] Ibid at [367]

[12] Ibid

[13] Ibid at [369]

[14] Ibid at [371]

[15] Ibid at [373]

[16] Ibid at [374]

[373] The classification descriptors for the existing Grades 1-7 will be modified so that they are expressed in terms of generic indicators of work value. We consider that the current lists of indicative tasks should be removed to make it clear that the mere performance of one of those tasks in circumstances in relation to job which has been established or tailored to align with a disabled employee's level of capacity is not sufficient or intended to fall within any of these grades. Instead, alignments with other award classifications which provide for the performance of work commonly performed in the ADE sector will be included to provide proper guidance as to the work intended to be comprehended at each classification level. Grades A-B and 1-7 will, taken together, provide a classification structure which accommodates in a comprehensive way the jobs which the evidence shows actually exist in the ADE sector and properly reflects their work value.

[374] We consider that disabled employees classified in any grade (Grades A and B or 1-7) may be paid a percentage of the specified rate for the classification based upon an assessment of their productivity as compared to that of a relevantly non-disabled person. The only wage assessment tool which may be used for that purpose will be the SWS, subject to the following modifications:

(1) Where an employee performs more than one major task in their job, the SWS assessment must measure a representative sample of the tasks performed and weight them appropriately.

(2) The SWS assessor must independently determine that benchmark to be used for the assessment is valid and appropriate.

(3) Where an employer collects workplace data as to the employee's productivity levels, that data must be assigned a 50% weighting in the overall assessment, regardless of the degree of disparity with the result of the SWS assessor's assessment.

(4) There will be an absolute minimum payment of $3.50 per hour. This amount will also serve as the minimum rate payable to a disabled employee during an initial assessment period in their employment.

[375] Finally, we consider that no existing ADE employee should suffer a reduction in remuneration as a result of the introduction of the new wages structure which we propose."

[7] The Full Bench considered that modifying the SWS in this way at the same time as introducing a new classification structure would utilise the benefits of the SWS and resolve its weaknesses. It was also noted that Commonwealth support and funding would be required in order to give effect to the December 2019 decision.[17] A draft determination giving effect to this position was published at Attachment A to the December 2019 decision.[18]

[17] Ibid at [376]

[18] Ibid at [377]

[8] The Full Bench noted in the December 2019 decision that it would be necessary to undertake a number of steps before any determination could take effect, and that the parties should be given an opportunity to make further submissions about the draft determination published with the December 2019 decision addressing the proposed rates of pay and classification descriptors as well as any other relevant issues, and in the case of the Commonwealth, whether it could provide financial support.[19] The following indicative timetable was set out in the December 2019 decision:

> "[380] … 17 December 2019 - receipt of further submissions concerning the new wages structure and advice from the Commonwealth Government concerning funding support.
>
> 20 December 2019 - conference of interested parties concerning the new wages structure.
>
> 31 January 2020 - Commission determines the final wages structure for the purpose of the trial.
>
> 1 March - 31 May 2020 - conduct of the trial of the new wages structure.
>
> 26 June 2020 - public release of information concerning the outcome of the trial.
>
> 17 July 2020 - receipt of any further evidence and submissions concerning the outcome of the trial and any consequential further modifications that might be required to the new wages structure.
>
> 10-14 August [2020] - further hearing if necessary.
>
> 30 October 2020 - final determination varying the SES to delete the existing wage assessment tools and add the new wages structure issued.
>
> 1 January 2022 – operative date of final determination, upon which existing wage assessment tools cease to operate and the new wages structure comes into operation."

Events following the December 2019 decision

[9] On 21 January 2020 the Full Bench issued a statement[20] (January 2020 statement) setting out a revised timetable for implementing the December 2019 decision and identifying some issues which had been raised by parties concerning the proposed new classification structure. The January 2020 statement also identified an issue concerning Commonwealth funding of the trial of the proposed new classification structure as follows:

> "[8] The effective implementation of the December decision will require Commonwealth financial support in at least the two following areas:

[19] Ibid at [378]

[20] [2020] FWCFB 343

(1) the conduct of the envisaged trial (including preparation of a report concerning the trial's outcomes); and

(2) the engagement of greater numbers of SWS inspectors when the entire supported employment sector ultimately moves to the use of the new SWS methodology.

[9] The Commonwealth Government was not in a position at the conference to make any commitments in respect of funding beyond noting that it had previously announced (well before the December decision) that funding of $67 million would be put towards the transition to the new wages structure. The Commonwealth Government indicated that it may be able to provide further advice as to its position in February 2020."

[10] After the receipt of further written submissions and the conduct of further hearings on 10 February and 2 March 2020, on 30 March 2020 the Full Bench issued a decision[21] (March 2020 decision) which finalised the form of the classifications in the proposed new classification structure for the purpose of the trial that was to be conducted. The classification structure that was to be the subject of the trial was set out in an attachment to the March 2020 decision, and is reproduced in Attachment A to this decision. The Full Bench said in relation to this:

"[2]…We make it clear that in doing so, we are not stating any final view about the new wages structure which will ultimately be placed into the SES Award, nor are we varying the SES Award at this time."

[11] The Full Bench also dealt with a submission filed by the AEDLC on 17 March 2020 as follows:

"[3] In a submission filed on 17 March 2020, the AED Legal Centre filed a lengthy submission expressing its opposition (on both jurisdictional and merit grounds) to the SES Award being varied to include any wages structure the same as or similar to that proposed in the principal decision. The premise of that submission is that the SES Award is to be varied to give effect to the new classification structure prior to the commencement of the trial. In that respect, at least, the submission is entirely misconceived. The purpose of the trial is to assist the Commission in determining whether the SES Award should be varied to include the wages structure we indicated we preferred in the principal decision. Participation in the trial is voluntary, and it is not necessary that the SES Award be varied in order to conduct it. As the timetable set out in paragraph [380] of the principal decision, as modified in paragraph [3] of the statement, was intended to make clear, we do not anticipate making any final variation to the wages structure in the SES Award until after the results of the trial are known and interested parties have been afforded a further opportunity to adduce further evidence and make further submissions. The current plan is that the final determination will not be made until 27 November 2020 and will not take effect until 1 January 2022. Accordingly, the matters raised in the AED Legal Centre's submission do not require consideration at this time."

[21] [2020] FWCFB 1704

[12] On 22 May 2020, the Association for Employees with a Disability, which we understand to be the controlling body of the AEDLC, made an application to the Federal Court of Australia for judicial review of the December 2019 decision and the March 2020 decision. At the completion of the hearing of this application before a Full Court on 18 February 2021, the application was dismissed. The Full Court published its reasons for this decision on 15 March 2021.[22]

[13] On 3 June 2021 the Full Bench (by then reconstituted) issued a statement[23] setting out a new timetable for the trial of the wages structure proposed in the December 2019 decision (ARTD Trial). This was necessary because the trial as timetabled in the January 2020 statement did not proceed due a large proportion of ADEs being closed or winding back their operations because of the COVID-19 pandemic. It had by then been confirmed that the trial would be conducted by ARTD Consultants. The matter was set down for final hearing in December 2021 on the basis that the final report on the ARTD Trial (Report) was expected in October 2021.[24]

[14] The current Full Bench was constituted on 17 October 2021. The December 2021 hearing dates were vacated because the Report had not yet been completed by October 2021, as anticipated. Ultimately, the Report was provided to the Commission on 31 January 2022. The Commission published the Report on its website the same day, together with a statement we issued[25] which confirmed that the provision of the Report made it appropriate to program the matter for further evidence and submissions and make a final determination as to the new wages structure to be inserted into the SES Award.[26] In the statement, we said that the following issues were likely to be significant in light of the outcomes in the Report:[27]

> "(1) The clarity and workability of the drafting of the new wages structure set out in the attachment to the 30 March 2020 decision.
>
> (2) The provisional quantum of the minimum wage rates for the proposed new Grade A and Grade B classifications set out in paragraph [372] of the 3 December 2019 decision.
>
> (3) The operative date for the new wages structure."

[15] We also noted that it would be necessary for us to consider the jurisdictional issues that had previously been raised by the AEDLC in the event that they were still pressed.[28] The matter was listed for directions on 14 February 2022. Following this, directions were issued for the filing of position documents ahead of a further directions hearing on 22 March 2022.[29] The following parties filed position documents:

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[22] *Association for Employees with a Disability v Commonwealth of Australia* [2021] FCAFC 36, 305 IR 203

[23] [2021] FWCFB 3139

[24] Ibid at [6]-[7]

[25] [2022] FWCFB 6

[26] Ibid at [8]

[27] Ibid at [9]

[28] Ibid at [10]

[29] Directions, 15 February 2022

- Our Voice Australia (Our Voice);[30]
- ABI;[31] and
- the AEDLC, the Health Services Union (HSU), the United Workers' Union (UWU) and the Australian Council of Trade Unions (ACTU) jointly.[32]

[16] Following the directions hearing on 22 March 2022, further directions were made for the filing of evidence and submissions and the matter was timetabled for final hearing.

[17] The final hearing occurred from 15 to 18 August 2022. Following the hearing, the presiding member issued directions for the filing of further submissions, and further submissions were received pursuant to these directions.

THE ARTD TRIAL AND REPORT

[18] The ARTD Trial consisted of the administration and evaluation of a trial of the proposed new wages structure over a period of three months. The scope of the ARTD Trial was summarised in the Report as:

> "… to understand what:
>
> - is needed to ensure consistent application of the new wage assessment structure
> - impact the new wage assessment structure will have on the financial viability of ADEs
> - impact the new wage assessment structure will have on worker earnings and hours and
> - the interaction with the Disability Support Pension (DSP)."[33]

[19] The ARTD Trial was conducted across a randomly selected group of 379 supported (disabled) employees across 28 ADEs and 35 ADE-associated enterprises designed to be representative of ADEs in terms of industry, size, location and the wage tool currently used. Balmoral Group Australia (BGA) conducted an independent financial analysis as part of the ARTD Trial.

[20] A number of key findings from the ARTD Trial were identified in the Report. First, as to the effect of the proposed new classification structure and the application of the modified SWS on wages, the report found that, across the trial sample:[34]

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[30] Our Voice position document, 21 February 2022

[31] ABI and NSWBC position document, 15 March 2022

[32] AEDLC and unions position document, 16 March 2022

[33] Report page 7

[34] Ibid page 9

- the average hourly wage outcome (excluding superannuation) was $9.77, and half of the sampled supported employees had an hourly wage outcome between $5.10 and $13.53;

- the average hourly wage increase (excluding superannuation) was $3.26 per hour, and for half of the sampled supported employees, the increase would have been in the range of $0.05 and $5.09;

- without the minimum wage floor, 16% of supported employees would have received less than $3.59 per hour;[35] and

- without the commitment not to reduce current wages (as was specified in the December 2019 decision), 25% of the sampled supported employees would have received a wage lower than their current wage.

[21] In respect of the grading of employees, the Report found that employees in the sample would be graded as follows under the proposed new classification structure:[36]

Grade A:	35%
Grade B:	28%
Grade 1:	2%
Grade 2:	27%
Grade 3:	5%
Grade 4:	2%
Grade 5 and above:	0%

[22] However, the Report noted that there was generally difficulty in understanding the changes to Grades 1-7 and new Grades A and B as outlined in the *Wage Grade Assessment Guidance* document that was provided to participants in the ARTD Trial. ADEs mentioned being unsure how to interpret the gateway requirements for Grades A and B, thinking that some supported employees fitted into more than one grade or met the conditions of a grade some but not all of the time, or met the conditions of various grades where their duties varied.[37]

[23] The Report found that the application of the modified SWS produced an average overall productivity outcome of 61%, with half of supported employees having a productivity outcome of between 44% and 78%.[38] As to the implementation of the modified SWS, the Report found:

- the extent to which the modified SWS was understood by ADE staff varied, with staff from the five ADEs already using the SWS finding the process clearer than others;[39]

[35] This figure is the result of applying the outcome of the Commission's 2020-21 annual wage review to the absolute minimum wage of $3.50 per hour prescribed at paragraph [374] of the December 2019 decision.

[36] Report page 54

[37] Ibid page 13

[38] Ibid pages 9, 53

[39] Ibid page 11

- the majority (more than 85%) of ADE staff, CEO/management representatives and independent assessors agreed or mostly agreed that both the ADE staff and the independent assessor were consistent in the way they applied the modified SWS across supported employees, but were less positive that the modified SWS was equally applicable to all of the major duties and associated tasks of the supported employees in the trial sample; [40]

- the trial data and interviews indicated that not all elements of the modified SWS were implemented consistently by ADEs and assessors; [41]

- independent assessors were more likely than ADE CEO/management representatives and staff to believe the modified SWS produced a reasonably accurate assessment of supported employees' productivity, but two-thirds of ADE CEO/management representatives and staff agreed or mostly agreed that assessments were reasonably accurate; [42]

- the challenges with consistency and accuracy identified in the trial are also encountered in the current application of the SWS; [43] and

- for nearly half the supported employees in the trial, there were minimal differences between internal and external productivity scores, with no more than a 5% difference between the two, and for 91% of the supported employees, the internal and external productivity assessments were within 20% of each other, meaning under the SWS guidelines that timings do not need to be excluded or new timings taken to try to resolve the differences.[44]

[24] As to the potential effect on the viability and profitability of ADEs of the proposed new classification structure and the modified SWS, the Report stated the following:[45]

- those ADEs participating generally had low levels of profits (based on their recent financial reports);

- most of the turnover of the participating ADEs was used to pay wages, suggesting a limited scope to absorb wage increases, although the wages of supported employees comprised a smaller proportion of turnover than non-supported employee wages;

- the BGA financial analysis estimated that wage increases for the participating ADEs, employing 6,335 supported employees, would be about $35.7 million per year;

[40] Ibid

[41] Ibid

[42] Ibid page 12

[43] Ibid page 12

[44] Ibid page 12

[45] Ibid page 10

- extrapolating this to the 161 ADEs assumed to be operating under the SES Award and their 16,355 supported employees, the wage increases would be $76.1 million annually;

- 10 ADEs were estimated to be at highest financial risk because they had a wage/ turnover ratio higher than 86% and 25 were estimated to be at high risk because they had a wage/ turnover ratio higher than 78%);

- however, these figures had to be considered with caution because assumptions had to be made in relation to the financial data for ADEs not participating in the ARTD Trial, and the outcome might differ for ADEs using different wage assessment tools; and

- the majority of CEO and management representatives involved in the ARTD Trial (more than 90%) expressed concern that a modified SWS would impact their viability, and some foreshadowed they may need to consider steps such as reducing or adjusting supported employee positions, adjusting working hours or closing the ADE, but a few noted they would explore changes to the business such as changes to business streams or contracts, and/or changes to pricing structure.

[25] In relation to the effect of the proposed new classification structure and the SWS on supported employees and their families/carers, the Report stated the following findings:

- most supported employees in the sample said during interviews that they did not understand or appeared not to understand the new wage assessment structure, and others had a limited understanding, but most supported employees likewise did not understand or appeared not to understand how their wages were currently worked out;[46]
- some supported employees and their families were concerned about the possible impact of wage increases on the DSP;[47]

- the proportion of supported employees whose wage would cause their DSP to begin to be tapered would increase from 63% to 76% under the new structure; [48]

- over half of all supported employees who spoke of the impact of a change in wages on their working hours indicated that if the new wage assessment structure impacted their DSP, they would not change their working arrangements, with one-third being unsure; [49] and

- supported employees most commonly felt "*ok*" or even positive about being timed by both internal and independent assessors, but a smaller number felt nervous or anxious. [50]

[46] Ibid page 9

[47] Ibid page 9

[48] Ibid page 9

[49] Ibid page 9

[50] Ibid page 12

[26] The Report made a number of recommendations concerning "*adjustments to support a successful transition*" by ADEs and employees to the proposed new wages structure. In summary, these were:

(1) Develop a change management plan and accompanying communications plan which provide for clear, consistent and repeated communications to support the transition by providing information about the new structure, its rationale, the transition process, the available supports and how it will operate.[51]

(2) (a) Determine a feasible timeframe for transition having regard to the time required to agree on supports to be provided to ADEs and employees, communicate with ADEs and employees via a centralised communication plan, provide training on the modified SWS in the ADE context and arrange for independent assessors to assess all supported employees.

(b) Consider setting a starting point for new wage changes to come into effect across the sector to ensure equitable application of the new wage assessment structure for supported employees across different ADEs.

(c) It is suggested that a few years would be required for the transition after the Commission's final determination, if the time required for agreement on supports to be provided and allowance of a buffer for delays (which the trial suggests should be expected) are factored into the timeframe.[52]

(3) In respect of the modified SWS, clarify the benchmarking process including how to proceed where there is not a comparator who regularly performs the same task at 100% productivity, consider developing a benchmark index of common tasks which can be used as a reference point when benchmarking, clarify what constitutes "*all major duties and tasks*" in an ADE context, consider whether internal assessments should be required and clarify that internal and external assessments must be conducted separately, build in time to assessments so employees can meet assessors in advance, identify circumstances where fewer than three timings of a task are acceptable, clarify that supported employees should receive support during an assessment and when an assessment should be paused or stopped, provide guidance as to virtual assessments being used and provide a FAQ sheet addressing the issues identified in the ARTD Trial.[53]

(4) (a) Consider providing further guidance on the new Grades A and B and the changes to Grades 1-7, including clarifying the gateway requirements and case studies or examples of particular industries.

(b) If possible, consider amending the definitions so that ADEs do not reach a result where a supported employee can fall within multiple categories.

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[51] Ibid page 13

[52] Ibid page 13

[53] Ibid pages 13-14

(c) Consider providing guidance on situations where some of a supported employee's work could fit in one Grade and some in another.[54]

(5) Provide training on conducting SWS assessments in the ADE context and consider providing training on the wage grades under the SES Award; and other proposals concerning.[55]

(6) Improve support by providing a centralised help desk during the transition concerning the modified SWS and the proposed new wage grades to ensure consistent application of the wage grades and explore the potential for ongoing supports.[56]

(7) Consider the development of a user-friendly assessment data collection tool for the proposed new wages structure.[57]

(8) (a) Provide funding for ADEs to absorb wage increases.

(b) Fund independent assessments.

(c) Consider whether funding would also be provided to support ADEs with the implementation process with consideration to the need for attendance at training to support quality implementation, the responsibilities of employers for conducting wage assessments, the reported additional time taken for SWS assessments compared to existing wage assessment tools, and the potential for implementation to become more efficient over time.[58]

(9) Implement a change management approach and associated communications plan, including starting to communicate information about the new wage assessment structure to supported employees and their support networks months in advance to prepare them for the transition, providing ongoing communication from the Commission or the Commonwealth Department of Social Services (DSS) to support understanding, and providing communications that include the rationale for the changes and how to make informed decisions about the interaction between wages, working hours and the DSP.[59]

(10) Engage support networks by communicating with families about the new wage assessment structure where this is required and desired by the supported employee.[60]

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[54] Ibid page 14

[55] Ibid pages 14-15

[56] Ibid page 15

[57] Ibid

[58] Ibid

[59] Ibid page 16

[60] Ibid page 16

(11) Provide communications material in a range of formats for supported employees and their families/support networks to understand the transition and the new wage assessment structure.[61]

(12) Hold information sessions for supported employees and their support networks; provide a centralised help desk during the transition to help supported employees and their support networks to understand the new wage assessment structure; provide supported employees with information and support to make informed decisions about their working hours if their wage increases will affect their DSP; provide supported employees with information and support to understand their responsibilities around tax returns if they need to provide these for the first time.[62]

(13) Provide support for assessments by giving adequate notice to supported employees for their assessments; building in time to the assessment process to enable supported employees to meet assessors ahead of their timings so they are comfortable; clearly explaining the task and when to start and stop; aligning with supported employees' normal schedules (where possible); keeping the environment as close to the normal work environment as possible and remaining unobtrusive but focused to minimise supported employees' potential anxiety.[63]

[27] The Report also made a number of recommendations concerning transition considerations for independent SWS assessors.[64]

OUTLINE OF THE PARTIES' POSITIONS

ABI and NDS

[28] The fundamental position of ABI and National Disability Services (NDS) is that we should proceed to vary the SES Award to establish Grades A and B with the rates of pay proposed in the December 2019 decision. However, with respect to the use of the modified SWS as part of the "preferred approach" in the December 2019 decision, they expressed concern as to the capacity and willingness of the DSS to source and fund the expansion in the number of SWS assessors necessary to apply the modified SWS to the whole of the ADE sector and its approximately 16,000 employees within a limited time period. As an alternative, ABI and NDS propose that the use of the SWS be abandoned and that, instead, new subclassifications for Grades A and B be introduced. This proposal (as amended), incorporating a further, separate proposal to clarify the "gateway" requirements for Grades A and B, is as follows (ABI Structure):

"**B.1 Explanation of Classification Structure**

[61] Ibid page 16

[62] Ibid page 16

[63] Ibid page 16

[64] See, e.g, ibid page 15

B.1.1 Grades A and B of the classification structure in this Schedule apply to any employee with a disability for whom an employer has created or tailored a job in such a way that they are capable of being performed by a particular person with a particular disability or by persons with a class of disability that does not fall into Grades 1-7 above.

For example, a set of work functions which is capable of being performed as a single job by a single person not relevantly affected by disability is broken up into a number of discrete tasks, each of which will be made into a separate job that aligns with the work capacities of a particular person with a disability or by persons with a class of disability.

This is not the normal case of the employer requiring the employee to perform only a very confined task because the employer considers this to be the most efficient way to conduct its business; rather it is a case of the restricted work capacity of the employee with a disability effectively dictating the nature of the job in which the employer may employ them. The person with a disability does not therefore perform the "whole job" which the relevantly non-disabled person is capable of performing, notwithstanding that the tasks performed by the person with a disability may constitute part of those that might be performed by the relevantly non-disabled person.

B.1.2 Grades 1-7 apply to employees with or without a disability who undertake the duties and exercise the level of skill and responsibility specified in the classification descriptors and they are (subject to any necessary training) capable of performing the full range of duties in the classification descriptors

B.2 Grade A

B.2.1 Grade A1

Employees at this grade will perform a simple task or tasks consisting of up to three sequential steps or subtasks, any of which may involve the use of jigs or equipment or tools with basic functionality, under direct supervision and constant monitoring and who also require regular assistance to keep on task.

B.2.2 Grade A2

Employees at this grade will perform a simple task or tasks consisting of up to three sequential steps or subtasks, any of which may involve the use of jigs or equipment or tools with basic functionality, under direct supervision and constant monitoring.

B.3 Grade B

B.3.1 Grade B1

> Employees at this grade will perform a simple task or tasks consisting of more than three sequential steps or sub-steps, each of which may involve the use of mechanical or electric equipment or tools, under direct supervision with regular monitoring.
>
> **B.3.2 Grade B2**
>
> Employees at this grade will perform a simple task or tasks consisting of more than three sequential steps or sub-steps, each of which may involve the use of mechanical or electric equipment or tools, under direct supervision with regular monitoring and who self-advocates their own and/or others task progress, issues or errors to a supervisor.

[29] In respect of the operative date and phasing-in period for the proposed new wages structure, ABI and NDS contend that it is uncontroversial that any new wages structure will lead to significant wage increases for a great many employees, and that an appropriate transitional period is necessary to ensure that implementation of the structure occurs in a way that ensures the financial sustainability of the supported employment sector. In that respect, ABI and NDS contend that there should be "*a phasing-in period of 8 years*". However, beyond that proposition, they did not advance any actual phasing-in proposal.

Our Voice

[30] Our Voice's position is that Grades A and B require re-consideration with "*perhaps*" more grades and/or different levels within grades. It proposes that there should be a transitional period of about five years, overseen by the Commission. However, Our Voice's position was subject to clarification of the financial support, both as to the cost of implementation of the modified SWS across the sector and the cost of wage increases, by the DSS.

AEDLC, ACTU and UWU

[31] The AEDLC contends that the Commission lacks jurisdiction under the FW Act to implement the preferred approach in the December 2019 decision.

[32] The AEDLC together with the ACTU and the UWU contend, independent of any issue of jurisdiction, that the classification structure in the SES Award should be confined to Grades 1-7, and that Grades A and B (and proposed provisions associated with them) should not be introduced. They also contend that the SWS, in the form contained in the SES Award, should be available to measure productive capacity for employees with a disability, subject to any textual alterations to the award that might be required to implement the recommendations of the Report. In addition, they contend that no existing ADE employee should suffer a reduction in remuneration as a result of any changes arising out of these proceedings.

EVIDENCE

[33] A summary of the witness evidence and the facts agreed between the AEDLC, the union parties, ABI and NDS is set out below.

ABI and NDS

Chris Christodoulou

[34] Chris Christodoulou[65] made one witness statement in this part of the matter (having previously made a number of witness statements and given oral evidence) and was subject to cross-examination. Mr Christodoulou has been the Chief Executive Officer of Greenacres Disability Services (Greenacres) since 2014. Mr Christodoulou said Greenacres did not participate in the ARTD Trial. Mr Christodoulou noted that in mid-June 2022, ABI requested that he undertake a trial (ABI Trial) in which he would apply the proposed new classification structure set out in the December 2019 decision to a sample of Greenacres' workforce and grade the employees in that sample in accordance with that structure. Mr Christodoulou said he undertook the following steps in the trial:

- Reviewed Greenacres' workforce and selected a sample of 10 employees who because of the type of work they perform and level of ability and support needs Mr Christodoulou considered constituted a "*fair sample*"[66];

- With Peter Williams, a Senior Supervisor who has been employed at Greenacres for 13 years, took the following steps in relation to the sample selected:

(a) Identified the typical duties usually performed by each person;

(b) Identified whether or not they met the criteria for receiving the DSP;

(c) Identified whether Greenacres had created a position for the employee that consisted of duties/tasks and supervision tailored for their circumstances;

(d) Where the circumstances in (c) applied, considered the classification descriptors in Grades A and B and decided which one the employee would fall into; and

(e) Where the position duties/tasks and level of supervision had not been tailored to the circumstances of the employee, they considered which of Grades 1-7 the employee would fall into.

[35] Mr Christodoulou noted that a difficulty he faced in undertaking the trial was that there is currently a lower level of production at Greenacres due to lack of sales, meaning that some employees were not performing their usual work. The assessment was therefore based on what work the employee usually performs and/or is capable of performing, rather than what they were actually performing at the time of the trial. Mr Christodoulou considered the assessment process was largely straightforward, and that the proposed new wages structure could be applied without any significant difficulty. He suggested that an appropriate higher duties clause may be necessary when a supported employee in (for example) Level B is being trained to gain further skills.

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[65] Witness Statement – filed 8 July 2022, Exhibit J; Transcript, 15 August 2022 at PNs 45-306

[66] Witness Statement – filed 8 July 2022, Exhibit J at [12]

[36] As to the implementation of the modified SWS component of the proposed new wages structure, Mr Christodoulou said it was not clear based on the DSS's submission dated 22 April 2022 whether it would be prepared to pay for all SWS-type assessments. Mr Christodoulou also said that the size of the current assessor workforce indicated that there would not be enough assessors to assess over 10,000 employees per year. In this context, Mr Christodoulou said he had concerns around how modified SWS assessments would take place within the constraints of the existing workforce, what this would mean for the quality and consistency of the assessments and how these assessments would be funded.

[37] Mr Christodoulou also described applying the ABI Structure to a sample of the Greenacres workforce at ABI's request. Mr Christodoulou said that based on his experience applying this structure it was easy to apply and would provide for an increase in rates of pay for supported employees. Mr Christodoulou said that based on his experience, he supported the adoption of the ABI Structure because it would do away with the administration, cost and disruption of productivity associated with having to conduct individual SWS-type assessments each year or when an employee changes roles.

[38] Mr Christodoulou responded to the statement in paragraph [28] of Mr Grzentic's witness statement that Greenacres is an example of a profitable ADE. Mr Christodoulou said that this statement was "*misleading and indeed completely wrong*"[67] for a number of reasons, including:

- The financial information to which Mr Grzentic referred included more than just its ADE operations. Mr Christodoulou said that when the financial results are broken down Greenacres' ADE has a deficit in excess of $300,000 for financial year 2019/20 and was not a profitable part of the business.

- The 2019/20 financial year was not a typical year for the purposes of assessing business financial performance because of the impact of the COVID-19 pandemic. Mr Christodoulou noted that the JobKeeper payment, introduced from March 2020 had a positive impact on Greenacres' position in this financial year, but that ultimately caution should be exercised when considering one year of financial results.

- Mr Grzentic did not refer to Greenacres' operational losses in the two previous financial years.

- Although Greenacres' annual report for financial year 2021/22 was yet to be finalised at the time of Mr Christodoulou's statement, he indicated that it would reflect a deficit of well over $1 million, mostly derived from the ADE component of its business.

[39] In cross-examination Mr Christodoulou said that Greenacres sought out work opportunities but did not always take the work on because the amounts of money that commercial clients offered Greenacres to perform the work were not sustainable. He agreed that his evidence about how the proposed new wages structure would apply is based only on how it would apply at Greenacres, not ADEs generally. Mr Christodoulou agreed that he was involved in developing the ABI Structure along with other ADE operators.

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[67] Ibid at [43].

[40] Mr Christodoulou said that since the COVID-19 pandemic began, less work had been coming in to Greenacres, which he put down to much of the work coming from overseas before the pandemic and also the fact that hand packaging work could be completed more cheaply by non-ADE organisations "*through technology*".[68] Mr Christodoulou was also cross-examined about Greenacres' financial report for the year ending 30 June 2021[69] and agreed that the wages of non-disabled workers comprised a larger proportion of Greenacres' costs than did the wages of disabled workers. Mr Christodoulou also acknowledged that the JobKeeper payment made a "*considerable difference*" to Greenacres' profit and loss.[70]

Kristian Dauncey

[41] Kristian Dauncey[71] is the Group Chief Executive Officer of Knoxbrooke Incorporated (Knoxbrooke), which operates an ADE in Victoria through a subsidiary, Knoxbrooke Enterprises Limited. The ADE employs 109 supported employees. Mr Dauncey gave evidence in this matter in February 2018 and attached his previous witness statement[72] to his most recent one, along with transcript[73] of his oral evidence from the previous substantive hearing.

[42] Mr Dauncey's evidence was that the Yarra View & Bushland Flora Nursery (Nursery) is the "*flagship business*"[74] of the ADE. He said that the ADE made a significant financial loss in the 2016-17 financial year and indicated that "*the financial sustainability of Knoxbrooke's social enterprises has deteriorated*"[75] since then, in part because wage supplementation funding from the federal government ceased after 30 June 2021. Mr Dauncey said that the Nursery in particular was "*operating at a material loss*",[76] and that Knoxbrooke would not be able to keep running it as is unless it received more financial support.

[43] Mr Dauncey said that Knoxbrooke did not participate in the ARTD Trial, but did participate in the ABI Trial and a separate trial of the ABI Structure. His evidence was that he and his colleagues largely undertook the same steps in both trials, being:

- reviewing the guidance material ABI had provided;
- selecting a representative sample of the ADE's employees (the same 11 were classified in both trials); and
- classifying each employee using the following process:

(a) identifying the type of duties usually performed by each employee;

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[68] Transcript, 15 August 2022 PNs 186-187

[69] Greenacres General Purpose Financial Report for Year Ended 20 June 2021, Exhibit L.

[70] Transcript, 15 August 2022 PN 253

[71] Witness Statement – 8 July 2022, Exhibit R; Transcript 16 August 2022, PN 712

[72] Witness Statement – 8 July 2022, Exhibit R at attachment A

[73] Ibid at attachment B

[74] Ibid at [7](b)

[75] Ibid at [13]

[76] Ibid at [15]

(b) identifying whether or not the employee meets the impairment criteria for receiving the DSP;

(c) identifying whether or not Knoxbrooke had created a position for the employee which consists of duties and a level of supervision that are tailored for the circumstances of the employee's disability;

(d) where the above was true, considering and discussing the classification descriptors at Grade A and Grade B to reach a consensus on the most suitable grade for the employee;

(e) where the position had not been created for the employee consisting of duties and a level of supervision tailored for the circumstances of the employee's disability, considering and discussing Grades 1-7 to reach a decision on the appropriate grade for the employee; and

(f) in relation to point (e), where Mr Dauncey and his colleague(s) considered that the employee was performing duties above levels A and B and could fit into Grades 1 to 7, classifying the employee accordingly.

[44] In trialling the ABI Structure, Mr Dauncey noted there was the additional step of considering the expanded classification descriptors (Grades A1, A2, B1 and B2) in that structure if an employee had been classified into Grade A or B previously, and selecting the most appropriate of those grades.

[45] Mr Dauncey described the classification process required by both trials as "*fairly straightforward*",[77] though in the ABI Trial it was "*slightly more difficult*"[78] to classify the one employee in the sample group whose role had not been modified on account of their disability because their duties appeared to fall between two grades in the classification structure. Mr Dauncey also noted that in the trial of the ABI Structure, there were a few employees who fell between Grades A1 and A2, or B1 and B2, and they were accordingly more difficult to classify. In those cases, he sought input from colleagues closely involved in the day-to-day oversight of the employees to assist in classification. Overall, Mr Dauncey's view was that the Commission's proposed new wages structure and the ABI Structure were both "*capable of being applied without significant difficulty.*"[79]

[46] In cross-examination, Mr Dauncey clarified that he was not involved in the "*crafting*"[80] of the ABI Structure, but merely its application to Knoxbrooke ADE employees in the relevant trial. He disagreed that Knoxbrooke's ADE is a purely commercial operation, preferring to describe it as a "*social enterprise*"[81] and emphasising that Knoxbrooke's primary purpose was "*to support people with disabilities through employment support and education*".[82] Mr Dauncey

[77] Ibid at [32] and [41]

[78] Ibid at [32]

[79] Ibid at [33] and [44]

[80] Transcript, 16 August 2022 at PN 728

[81] Ibid at PN 736 ff

[82] Ibid at PN 739

agreed that the Nursery had won contracts to supply plants to a number of substantial infrastructure projects in Victoria, and said he was hopeful that the Nursery's recent "*self-promotion model*"[83] would mean that after years of running at a financial loss, it would break even this year.

[47] Mr Dauncey also confirmed under cross-examination that Knoxbrooke has continued to use the SWS since adopting it in 2016, that he and his colleagues had taken into account the individual support needs of employees in the sample group when classifying them as part of the two trials described above, and that his understanding was that in trialling the ABI Structure, employees could only be classified into Grade A or B if their respective jobs had been "*tailored or adjusted*".[84] Finally, he explained that all supported employees of Knoxbrooke's social enterprises must be eligible to receive the DSP, and on that basis he had satisfied himself that the supported employees in the sample group for the two trials met the impairment criteria for the DSP.

Eric Teed

[48] Eric Teed made one witness statement and was subject to cross-examination.[85] Mr Teed is the Executive General Manager - Work of Endeavour Foundation. He has worked for Endeavour Foundation since August 2017 in a variety of roles. His current role involves developing meaningful employment opportunities for people with a disability.

[49] Mr Teed provided evidence in response to Kate Last's witness statement (see paragraph [63] below and following). He said that Ms Last's employment was transferred to the Endeavour Foundation when it took over operation of SCOPE Australia's Australian Disability Enterprises site at Maribyrnong in 2015. In 2017, Endeavour Foundation decided to close the Maribyrnong site because its size and building constraints made it unviable for packaging operations. Mr Teed said organisational records reveal that after making this decision, Endeavour Foundation worked with each employee affected by the closure of the Maribyrnong site to determine how they would transition, including transferring to other Endeavour Foundation sites or transferring to a different employer. Mr Teed said he understands that Ms Last transferred to another Endeavour Foundation site at Keon Park where she works in a production role. Mr Teed understands that Ms Last has been absent from work since approximately 21 August 2019 and has been receiving workers' compensation payments for some of that time. It was Mr Teed's evidence that Ms Last's comments in her statement about her experiences at work and the duties she performs relate to prior to August 2019, but noted that the services performed at Keon Park have not changed significantly from August 2019 to the time his statement was filed. Mr Teed also said he was unaware that Ms Last had ever worked as a Team Leader with Endeavour Foundation and has not been able to find any documentary evidence to that effect.

[50] Mr Teed said that the work performed at Endeavour Foundation's Keon Park site was similar to that required to be performed at any other packaging facility. Mr Teed identified three

[83] Ibid at PN 754

[84] Ibid at PN 827

[85] Witness statement – 8 July 2022, Exhibit M; Transcript, 15 August 2022 at PNs 326-492

key differences between employment in production roles within ADEs and in facilities outside the supported employment sector:

1. Production facilities outside the supported employment sector utilise automation whereas ADE production facilities do not or if they do, this use is limited. Mr Teed said that this is because the mission of ADEs is to create employment opportunities rather than eliminating tasks through automation.

2. ADEs such as Endeavour Foundation can only seek out and undertake work that is appropriate for its workforce's capabilities. Mr Teed said that this is different from production facilities outside the supported employment sector which would not usually be subject to the same limitations on the type of work that could be performed.

3. ADE production facilities design workflows and tasks based on the skills of employees as opposed to designing it purely to achieve maximum efficiency and productivity.

[51] Mr Teed noted that most of Endeavour Foundation's employees were limited in the types of work they are able to perform. He said Endeavour Foundation's supervisors work with each employee to develop a set of tasks they can perform, and provide appropriate supervision in line with this. Mr Teed explained that sometimes tasks will be broken down into sub-tasks. Mr Teed did not agree with Ms Last's evidence that she and other employees were unable to determine what tasks they would perform and that allocation did not cater to their needs, saying that tasks were designed for Ms Last (and all employees) based on safety requirements and the skills and capabilities of each employee. Allocation of these tasks depended *inter alia* on the other employees available, their skills and the specific production requirements. Mr Teed further noted that the role of Production Team Leaders is to work with employees to encourage them to undertake tasks which would develop their skills. He also said that supervisors are responsive if employees identify a preference not to perform a particular task, and where business requirements permit, they facilitate employee preferences. Mr Teed said that in his experience Endeavour Foundation tries to avoid allocating tasks to employees who would be unable to perform them, and also to avoid allocating simple tasks to employee who are capable of performing more complex tasks. Mr Teed acknowledged that sometimes employees are required to perform work which they may feel is too easy or not challenging enough, but said this is a sometimes-unavoidable feature of almost all working environments.

[52] In cross-examination Mr Teed agreed that he had not met or supervised Ms Last, and that his evidence about her employment contained in his witness statement about her employment was based on her employment records and what others had told him about her work. He agreed that Endeavour Foundation used "*little or no automation*",[86] and uses the Greenacres wage assessment tool. Mr Teed agreed that due to the way the NDIS operates, Endeavour Foundation is competing with other ADEs as well as open employment for workers who have NDIS plans that include employment supports. Mr Teed was taken to the Endeavour Foundation Financial Report for the year ending 30 June 2021[87] and agreed that the greater

[86] Transcript 15 August 2022, PN 366

[87] Exhibit O

component of Endeavour Foundation's wages costs during this period were for non-disabled workers.

Andrew Wallace

[53] Andrew Wallace made one witness statement and was subject to cross-examination.[88] Mr Wallace is Executive Director at SA Group Enterprises Incorporated (SAGE), which is part of the Minda Group. Mr Wallace has been employed by SAGE since about 2011 and has held a range of roles over this time. He has held his current role since 2019. His role involves operational and managerial responsibilities in relation to SAGE and its business units in packaging, manufacturing, recycling, design and facilities services. Mr Wallace provided evidence in response to witness statements filed by two SAGE employees: Mr Greer and Ms Smith.

[54] Minda Group operates a range of services for people with a disability. SAGE operates Minda Group's supported employment services and currently has about 600 employees, approximately 350 of whom have a disability. Mr Wallace said that SAGE operates 11 supported employment businesses including a packaging business, a wood manufacturing operation, a creative design and web development business, two recycling businesses, a wine re-labelling and packaging business, a wine storage and logistics business, a facility services business, a catering business, a grounds maintenance business and a café.

[55] Mr Wallace said that Mr Greer and Ms Smith both work in SAGE's packaging business known as Reynella Packaging. Reynella Packaging has the capacity to operate eight to nine different production lines at the same time. Currently Reynella Packaging has 151 employees, of which 123 are supported employees and 28 do not have a disability. Of the supported employees, 121 work in the production team and two work in administration.

[56] Mr Wallace disputed a number of assertions made in Mr Greer's witness statement (discussed at [66] below). Mr Wallace said that the staff numbers Mr Greer provided were incorrect and the correct numbers do not demonstrate that the supervision ratio at Reynella Packaging is in fact higher. Mr Wallace said that the support SAGE provides to employees with a disability depends on several factors, including their job roles, individual needs, individual NDIS plans and expectations and the tasks being undertaken. Mr Wallace noted that there is backup supervision and support available if needed.

[57] Mr Wallace provided evidence about job tailoring at SAGE. He said SAGE customises and tailors jobs, or parts of jobs, to suit both employees' capabilities and support requirements. Mr Wallace provided a number of examples where this had occurred, including:

> "30. For example, the organisation recently created an administration role and moved an employee from packaging operations into an administration role to expand and further develop her skillsets, and to facilitate her career aspirations. She currently fulfils that administration role 2 days per week and her substantive role for another 2 days per week. This opportunity has worked so well that the same opportunities have also been enabled at alternative sites across the organisation.

[88] Witness Statement – 7 July 2022, Exhibit P; Transcript, 15 August 2022 at PNs 507-683

> …
> 33. A further example was in our manufacturing business, the business recognised there was an opportunity for 3 of our employees to undergo forklift training. We were able to provide very specific training on site through a qualified staff member to fulfil a new job opportunity. An external body has been organised by SAGE to provide formal qualification for a High-Risk licence (forklift). Initially the supported forklift drivers were unable to complete the required manifests, paperwork or calculations associated with difficult loads, but have been trained to complete the main task of moving goods using a vehicle."

[58] Mr Wallace said that in addition to tailoring specific jobs, Reynella Packaging has a separate Training and Development team to meet employee needs in this area. Mr Wallace disagreed with paragraph [21] of Mr Greer's statement and said that the nature of an individual's disability is always considered.

[59] Mr Wallace also gave evidence in relation to SAGE's financial position. He said that its financial accounts are consolidated into the Minda Group's financial accounts. Mr Wallace said that the 2020-21 financial year was challenging because it required the business to adapt to changes in funding and the NDIS process. Mr Wallace attached a copy of the 2020-21 Minda Annual Report to his statement and noted that, while the Minda Incorporated balance sheet was strong, there was a total operating loss of $1.8 million for the Minda Group. Mr Wallace said that NDIS funding alone is insufficient to cover the wages of support workers and noted that SAGE was not eligible to receive any supplementary funding from the government because it has not transitioned to the SWS. It currently uses the FWS Assessment Tool.

[60] In cross-examination, Mr Wallace agreed that he did not participate in the recruitment of new staff or the day-to-day supervision of work. Mr Wallace agreed he did not participate in the process of allocating supported employees to work but said he did approve what supports were required for individual employees. Mr Wallace agreed that because NDIS funding alone did not cover SAGE's wages, it required commercial revenue to address any shortfall. Mr Wallace agreed that supported employees at SAGE might receive NDIS funding for a range of outcomes including building essential foundational skills for work through on-the-job training, direct supervision or group-based support. Mr Wallace agreed that SAGE might also provide physical assistance with supported employees' personal care in the workplace but that this was "*very minimal*".[89] Mr Wallace agreed that commercial considerations factored into how SAGE operates but said further: "*the key factor… first and foremost is creating meaningful employment*."[90]

Our Voice

[61] Our Voice tendered 14 anonymised witness statements[91] (the unredacted versions having been provided only to the Commission) from current supported employees of the ADE operated by Activ Foundation (Activ) in Western Australia. Activ is expected to cease its ADE

[89] Transcript, 15 August 2022 at PN 573

[90] Ibid at PN 592

[91] Exhibit H

activities at the end of 2023.[92] We directed that the 14 employees were not to be the subject of cross-examination. Their witness statements were demonstrative of the following broad propositions:

- they are unhappy about the expected impending end to their employment with Activ, and fear that they will not find alternative employment afterwards;
- some of the employees have worked for the same ADE for a long time, with the longest-serving of the 14 having worked for Activ for over 50 years;
- approximately half of them have tried open employment, but all who had done so had negative experiences and returned to work in ADEs; and
- the employees greatly enjoy the dignity, sense of purpose and social interaction that working at an ADE has provided them, and worry that they will become sad, bored and lonely if they cannot work there any longer.

AEDLC

Kairstien Wilson

[62] Kairstien Wilson is the Supervising Legal Practitioner at AEDLC.[93] She made one witness statement (Wilson statement) after the December 2019 decision in relation to the jurisdictional objection advanced by AEDLC, dated 13 May 2022, and was not required to attend for cross-examination. Ms Wilson attached a number of prior submissions made by AEDLC in this matter to her statement. In response to the DSS's submission that the Report was produced in consultation with a steering committee that included AEDLC, Ms Wilson confirmed she represented AEDLC on the committee, but its membership was suspended between October 2020 and 25 March 2021. Following this, Ms Wilson was permitted to resume her involvement on the steering committee but was not involved in discussions concerning the design of the evaluation.

AEDLC, UWU and ACTU

Kate Last

[63] Kate Last[94] is a supported employee who works part-time for the Endeavour Foundation on a production line. She commenced this role on 2 May 2011. She made one witness statement and was not required for cross-examination. In her witness statement, Ms Last explained that supervisors oversee work on the production line and Team Leaders maintain the workflow on the production line by assisting workers who may have fallen behind. Team Leaders are also supported employees, and Ms Last said she has held a Team Leader role in the past. Ms Last

[92] Exhibit AC, which includes ABC News article Activ's disability industrial worksites to stay open for another 18 months, but families want more certainty (19 June 2022).

[93] Witness Statement – 13 May 2022, Exhibit B.

[94] Witness Statement – 20 May 2022, Exhibit C

said she thinks there are 20 employees on each belt and that these employees have a range of disabilities and as a result require different levels of assistance to complete their tasks.

[64] At the commencement of each shift, Ms Last's supervisor tells her what job she will be doing for that shift, and she cannot choose or change her job once it has been allocated. Ms Last said that this allocation does not cater for any of the employees' needs. Ms Last said that sometimes on the production line her role is to pack sugar sticks into boxes and then to pack 12 of these boxes into a larger box to be loaded onto pallets, which are then sent to supermarkets to be sold. Ms Last said that when she was a Team Leader she would help other workers on the production line with their duties if they were having difficulty. This included helping with stacking and ordering boxes, providing more sugar packets and getting more boxes for workers in wheelchairs.

[65] When Ms Last first started working at the factory she was paid $2.00 per hour and is now paid about $8.00 per hour. Although Ms Last accepts that she and some co-workers may have difficulty in a non-supported (open) employment role, she believes she is not paid the amount she deserves for her work and believes this is not fair.

Donald Greer

[66] Donald Greer made two witness statements in this matter and gave evidence before us.[95] Mr Greer works full-time for Minda Incorporated as a vocational services officer (VSO), sometimes also known as a team leader. Mr Greer described his role as providing support and supervision to supported employees and meeting production requirements within packaging services. This involves the packaging of commercial products and components according to the particular instructions for the job which can vary depending on the company it is for. Mr Greer identified an example of work performed for a major national electrical appliance company. Mr Greer explained that the company first provides a purchase order, and Minda then puts together a work order which the VSOs use to instruct supported employees on the work they will be required to perform. This might include things like packaging light switch components into small plastic bags and "*there might be anywhere between (for example) 1000 or 10,000 sets of [components] that need to be packaged, with 4 of each component in each package*."[96] During a job like this Mr Greer said he would often work with up to 20 supported employees at a time, even though he should work with no more than 10. Mr Greer said that the assistance he would be required to provide in these circumstances could involve giving visual cues of what is required or providing assistance in performing the work. Mr Greer said that he would also work alongside supported employees to contribute to production deadlines. Different employees require different levels of support. If a supported employee is unable to perform the particular task at all, they will usually be reassigned to a different job at their VSO's discretion.

[67] Minda also employs line leaders who are non-disabled workers who perform the same work as supported employees so that deadlines can be met. Mr Greer said that he does not believe line leaders are required to hold qualifications in disability support and they do not perform support functions like VSOs do.

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[95] Witness Statement – 20 May 2022, Exhibit T; Further Witness Statement – 22 July 2022, Exhibit U; Transcript, 16 August 2022 at PNs 862-1041

[96] Witness Statement – 20 May 2022, Exhibit T at [13]

[68] Mr Greer said that in his experience supported employees are not assigned work based on the nature of their disability, which in his experience included a range of different physical and intellectual disabilities. Instead, these employees are assigned tasks based on what needs to be completed, and VSOs will work with the employee as needed to ensure the work is completed. Sometimes this approach to assigning work leads to disappointment on the part of supported employees because they may not be assigned a particular job they would prefer to do.

[69] Mr Greer's further witness statement was made in response to Andrew Wallace's witness statement. Mr Greer said that he has never seen Mr Wallace on the shop floor where he works. In response to Mr Wallace's evidence about job tailoring, Mr Greer gave evidence consistent with his initial witness statement and said that employees are engaged and placed in pre-existing roles based on commercial needs and, if they cannot perform these roles, they are usually assigned to other duties. Mr Greer explained that when new employees start they are usually trialled in a number of different roles to work out what their skills and capabilities are to ensure that appropriate roles are assigned to them going forward. Mr Greer provided an example where a supported employee was unable to perform a more complicated role. Instead of making adjustments to the role, this employee was assigned back to Mr Greer's area where simpler tasks could be performed for commercial reasons.

[70] During cross-examination, Mr Greer said that while he knew that new supported employees were assessed before being assigned to a particular team, he had "*never actually seen it happen and [he had] never been involved*".[97] He was not familiar with the "*Initial Skills Assessment*" document that he was shown during the hearing.

[71] Mr Greer went on to explain that training of supported employees in the particular tasks that are required for the contract Minda was fulfilling at any given time was largely delivered "*on the job*".[98] He said that if he felt a particular supported employee was not up to performing a particular task, he would either tell the trainer who presented that employee to him and his team initially, or his area supervisor. In re-examination on this issue, he clarified that when he said a supported employee might be assigned to another job if a VSO deemed them unable to perform their original job at all, he meant that they might be assigned to another "*pre-existing*"[99] job.

[72] Mr Greer also explained under cross-examination how he might use visual cues and/or jigs[100] to help supported employees perform tasks accurately, using the specific example of packing a set number of caps (for light switch screws) into a plastic bag. He said that his reference to any "*difficulty*"[101] that a supported employee might encounter could encompass both difficulties performing the task accurately (for example, counting out the right number of caps) and behavioural difficulties like becoming anxious after having made a mistake with the

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[97] Transcript, 16 August 2022 at PN 909

[98] Ibid at PN 934

[99] Ibid at PN 1038

[100] As reflected in Exhibit V

[101] Witness Statement – 20 May 2022, Exhibit T at [16]

task at hand. He also agreed that he endeavoured to make the supported employees' work "*fulfilling*" by providing "*as much variety as they want*".[102]

[73] Mr Greer also expanded on the impact that certain disabilities had on supported employees' ability to perform the job as required. He gave the examples of some employees with autism being overly focused on one part of the job rather than the whole and becoming anxious or frustrated, and employees with Down Syndrome insisting on performing a task "*their way*",[103] which is inconsequential if the result is as required, but problematic if not.

Robyn Smith

[74] Robyn Smith made two witness statements and was subject to cross-examination.[104] Ms Smith works as a VSO for Minda Incorporated within packaging services. Ms Smith has held this role since approximately 2015. Before this, Ms Smith worked for Minda as a disability support worker from 2009.

[75] Ms Smith described her role as including performing jobs for commercial clients involving packing or unpacking and repacking items to specific requirements. Ms Smith provided an example of this work for a company that makes pet treats. The company client would provide Minda with the requirements for the job, which the VSOs would then use to provide instructions to the supported employees tasked with completing the job. Ms Smith said she normally works in small groups with three supported employees, but sometimes works one-on-one with a supported employee who requires more support from her. Ms Smith said her role in practice mostly involves performing the same work that the supported employees are performing, as well as supervising and supporting them. Ms Smith said Minda also employs line leaders who are non-disabled employees who perform the same work as supported employees to ensure production targets are met, but are not required to provide support to supported employees.

[76] Ms Smith said that the supported employees she works with have a range of physical and intellectual disabilities. Ms Smith noted that the main difference between supported employees was the speed with which they can accurately perform the job they are assigned. In her experience, work is not assigned based on individual employees' abilities, but rather on what needs to be done to meet client needs. Where a supported employee is unable to perform a particular job, the VSO will usually notify the area supervisor, and the employee will usually be given a different job depending on what is available.

[77] Ms Smith's further witness statement was made in response to the witness statement of Andrew Wallace. Ms Smith said that she could not recall seeing Mr Wallace on the shop floor observing or participating, only travelling along a walkway. Ms Smith said that Mr Wallace's evidence about job tailoring did not cause her to depart from the evidence she gave in her first statement that supported employees are placed in pre-existing jobs rather than having jobs created or tailored for them. Ms Smith also disagreed with Mr Wallace's evidence about the

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[102] Transcript, 16 August 2022 at PN 998

[103] Ibid at PN 1021

[104] Witness Statement – 20 May 2022, Exhibit W; Further Witness Statement – 22 July 2022, Exhibit X; Transcript, 16 August 2022 at PNs 1054-1145

number of supervisors that are usually in place. Ms Smith said that the ratios and supervision frameworks that Mr Wallace referred to as being generally in place at Minda did not always occur in practice.

[78] In cross-examination Ms Smith said that in her work as a VSO she would work one-on-one, one-to-two or sometimes as part of a larger team of 10 to 12 people and may perform different tasks. Ms Smith said she was aware that when supported employees first start working at Minda they undertake an assessment, but did not know what was involved in that assessment. If Ms Smith was working with an employee who she believed did not have capacity to do the job, she would tell someone and may recommend that the person do a different job. Ms Smith explained that it is the area supervisor who decides which employees will be on which teams for different jobs and determines the ratio of supported employees that will work with Ms Smith by allocating her to a particular team.

[79] Ms Smith described the example of packing pigs' ears. She said supported employees would pack six pigs' ears into a bag with the majority of the group undertaking the same job of packing the bags around a table. There might be two further supported employees at the end of the table sealing the bags or putting the sealed bags on a pallet. Ms Smith said it was usually another staff member's job to do the quality checking (making sure each bag has the right number of ears). Ms Smith said that in her role as a VSO she would like to always ensure that an individual's capacity is used so they can have the most fulfilling job, but that "*usually it's a matter of quickly getting the job done*".[105]

Walter Grzentic

[80] Walter Grzentic made two witness statements and was subject to cross-examination.[106] Mr Grzentic is the Director of Disability Expertise Australasia (DEA), which is a disability consultancy providing consultancy services and conducting employment-related assessments for people with disability. These assessments included SWS assessments, ongoing support assessments and workplace modifications assessments. Mr Grzentic said that he has worked in the disability sector, including with ADEs, since the early 1980s and provided an overview of the different roles he held during this time.

[81] Mr Grzentic said he has conducted over 2000 SWS assessments in various industries and roles as well as over 200 under the SES Award. He said assessments would include assessing the supported employees working alone, as part of a team and in indoor and outdoor roles. Mr Grzentic also trains other SWS assessors as part of his role at DEA.

[82] Mr Grzentic said that the business model of ADEs has changed significantly in the time he has been working in the sector. In particular, Mr Grzentic identified that the commercial practices adopted by ADEs had become more sophisticated, including through developing partnerships with commercial entities and pitching for value-added contracts such as gardening, cleaning and catering. Mr Grzentic did not consider that ADEs operate in a different paradigm. Although they are required to provide employment for people with disability, ADEs are

[105] Transcript, 16 August 2022 at PN 1120

[106] Witness Statement – 20 May 2022, Exhibit Y; Further Witness Statement – 21 July 2022; Transcript, 16 August 2022 at PNs 1157-1444

commercial and operate in a manner similar to the general market in mainstream employment, usually for profit. Mr Grzentic used Greenacres as an example of a profitable ADE.

[83] Mr Grzentic said that most ADEs have changed their recruitment practices to focus on recruiting supported employees who are more capable of meeting higher expectations about work output. Mr Grzentic said a common method of doing this for an ADE, once a contract has been secured, is for non-disabled staff to deliver the service so that the skills required to perform particular tasks can be determined. Workers will then be assigned to specific components of the service based on the skills that they have. Mr Grzentic provided an example of a work team assembling a shaving kit to illustrate this:[107]

> "A skills analysis is undertaken that results in 10 supported employees working on a production line at a long table. The shaving kit has a number of components that need to be assembled. At one end of the table, the first couple of supported employees compile the flat pack into a box. This box is then passed onto the next work station, where another supported employee correctly places the first item into the kit, to the required quality specifications. The kit is then passed onto the next station, where the next process occurs. At the end of the table, the kit is checked for quality accuracy. Other employees then complete the kit display packaging. At the end of the table, staff double check the required quality specifications. If there any errors, they can easily identify as to which employee has made a mistake, and the ADE Team Leader/Supervisor, will give the relevant employee feedback and re-train them, as to what is required, or they move the employee to another process."

[84] Addressing the definitions of grades A and B in the proposed new wages structure, Mr Grzentic said that employees with a disability in mainstream employment also perform a simple task or tasks consisting of up to or more than three sequential steps or sub-tasks, which may involve the use of jigs, equipment or tools under direct supervision and varying levels of monitoring.

[85] Mr Grzentic said he had observed the following practices with respect to wage setting and conditions in the time he had worked with ADEs:

(a) Some ADEs set wages and conditions according to the SES Award while others do so under enterprise agreements;

(b) Some ADEs may use a combination of methods to set wages, such as using the SES Award to set wages for supported employees and using an enterprise agreement for workers without a disability;

(c) A number of ADEs continue to use wage assessment tools which are similar to that found to be discriminatory in *Nojin v Commonwealth of Australia*[108] (*Nojin*) while others have phased these out; and

[107] Witness Statement – 20 May 2022, Exhibit Y at [34]

[108] [2012] FCAFC 192, 208 FCR 1

(d) The ADE business model includes payment of significantly higher wages for senior management, professional and administrative staff who are non-disabled.

[86] In his further statement, Mr Grzentic responded to evidence provided by ABI and NDS' witnesses. Mr Grzentic did not agree with the proposition that ADEs employ workers with disabilities in a way that is different from other employment relationships. In support of this, Mr Grzentic said he had observed over the time he had worked in the sector that ADEs provide employment for people with disabilities and in doing so satisfy various funding requirements, their operational objectives are to secure profitable contracts and use their workforces to fulfil it. In relation to Mr Wallace's evidence regarding job tailoring, Mr Grzentic said this practice is widespread in open employment too, and provided examples based on his observations of non-ADE employers adjusting particular duties to facilitate supported employees' participation. His view is that in contrast, supported employees in ADEs are allocated to a pre-existing role determined by commercial considerations, and job tailoring is not used in the same way.

[87] In cross-examination Mr Grzentic said he holds a Bachelor of Arts with a major in disability studies and a Certificate IV in small business management. He said he does not hold any formal economics, commerce or accounting qualifications. Mr Grzentic explained that DEA assessors conduct SWS assessments, ongoing support assessments and workplace modification assessments. He estimated that of his own workload, 15% of assessments would be SWS assessments and 85% would be ongoing support assessments. Mr Grzentic estimated he would have completed a higher proportion of SWS assessments prior to the COVID-19 pandemic. He said most of the SWS assessments DEA performed were in open employment, and of the 2000 assessments he had performed personally, about 10% were in ADEs. If the SWS assessment tool were extended across the entire ADE sector, Mr Grzentic said he expected that businesses like DEA could respond to any increase in demand for assessments.

[88] Mr Grzentic accepted that a purpose of ADEs is to provide employment for people with a disability, and that ADEs will "*be on the lookout*" for work that their employees are able to perform.[109] Mr Grzentic accepted that an ADE will determine how work is structured within its business and may break work down into small tasks, but he stated that this also happened in open employment in businesses that employ people with a disability. Mr Grzentic gave examples of this occurring in open employment in his further witness statement, but refused to provide the names of the relevant businesses. Mr Grzentic did not identify any example of open employment where the majority of employees in the business had a disability.

Sharon Dulac

[89] Sharon Dulac made two witness statements and gave evidence before us.[110] Ms Dulac has worked in the field of employment for people with disabilities since 1992 in both open employment and ADEs. Ms Dulac is currently self-employed and employs approximately 12 people in her business, Enable Solutions Australia, which assesses people with disabilities in employment.[111] Ms Dulac said she had experience in ADE business operations in a range of

[109] Ibid at PN 1335

[110] Witness Statement – 20 May 2022, Exhibit AA; Witness Statement – 22 July 2022, Exhibit AB; Transcript, 17 August 2022 at PNs 1486-1670.

[111] Transcript, 17 August 2022 at PNs 1502-1518

areas including packaging, garden maintenance, administration, firewood cutting, catering, printing, food preparation and packaging, timber manufacturing, steel fabrication, sewing, cleaning and recycling services. Ms Dulac said she is familiar with several wage assessment tools and has conducted a "*considerable number*" of wage assessments in ADEs and open employment.[112]

[90] Ms Dulac said that in her experience most ADEs are viable businesses that tender for commercial contracts suited to their particular workforce. Over time, Ms Dulac has observed ADEs evolving in accordance with the contracts that are available. Some employees are able to more easily transfer skills to a wider variety of tasks than others. Ms Dulac said all ADE employees with a disability are required to have existing NDIS funding for any support they may need in the workplace, meaning that these costs are not borne by the workplace.

[91] Ms Dulac said that many supported employees in open employment and ADEs undertake work which involves simple or sequential tasks. Ms Dulac described a process of placing employees with a disability into pre-existing roles rather than roles being specifically created for workers. In this regard, Ms Dulac gave the example of employees engaged by supermarkets whose role is to pick up discarded boxes after other employees have re-stocked shelves. Ms Dulac said that, in her experience, the number of employees of ADEs who require role modification is small, between 10 and 20% of the overall workforce and would generally reflect employees with low productivity. Ms Dulac also noted that some ADEs have transitioned to paying employees based on the NMW.

[92] Ms Dulac's further statement was in response to the ABI Structure. She agreed that ADEs often make adjustments to work required to be completed to ensure these tasks can be undertaken by employees with a disability. Ms Dulac made a number of observations about the classification structure proposed by the employer parties. She also provided some examples of how employers (both ADEs and in open employment) can arrange work in order to assist employees with disability to be able to do it.

[93] In cross-examination Ms Dulac said Enable Solutions Australia undertakes supported wage assessments, ongoing support assessments for people with a disability in open employment and workplace modification assessments predominantly in open employment. She said the supported wage assessments were undertaken using the SWS tool. Ms Dulac estimated that she had undertaken approximately 1000 SWS assessments during her career, with between 100 to 150 of these being undertaken in ADEs. Ms Dulac said her evidence regarding ADEs is predominantly based on undertaking SWS assessments in that environment, although earlier in her career she also worked in an ADE. Ms Dulac said that her direct knowledge of contracts fulfilled by ADEs came from her work in an ADE in the 1990s and accepted that she had not since then been involved in drafting or tendering for contracts for ADEs.

[94] Paragraph [248] of the December 2019 decision, which contains the finding that ADEs operate in a different paradigm from employers in the general labour market (see point (2) in paragraph [2] above) was put to Ms Dulac in cross-examination and she accepted the propositions it sets out. She accepted that breaking up a work activity into a range of smaller tasks that could be performed by employees with a disability was commonplace in ADEs. Ms

[112] Witness Statement – 20 May 2022, Exhibit AA at [6]

Dulac said two ADEs she had worked with recently, Help Enterprises and NQ Green Solutions, have been paying wages based on the NMW and remained viable in the sense that they could continue to operate, but accepted that she had not seen the organisations' balance sheets and that her view was based on what people had told her while she was working with them. Ms Dulac accepted that a distinction between employment in ADEs and open employment was that in the latter an "*overwhelming majority*" of employees do not have a disability.[113]

[95] In re-examination Ms Dulac gave evidence about an ADE she had worked with called NQ Green Solutions which operates at locations in Queensland. Ms Dulac said that NQ Green Solutions pays all its employees the applicable NMW for their level. Ms Dulac said that the NQ Green Solutions workforce was predominantly made up of employees with disabilities. Ms Dulac said that in her experience only a small proportion of the workforce in ADEs, approximately 10 or 15%, had the capacity to only perform simple tasks such as putting a shaving brush in a box. Ms Dulac said that in the SWS assessments she undertakes and typically employees with this productivity level would have their wage rounded up to the agreed minimum rate in the SWS tool.

Ron McCallum

[96] Professor Ron McCallum made one statement in these proceedings and was not cross-examined.[114] Professor McCallum is an Emeritus Professor of Law and was asked by the AEDLC to provide responses to two questions, which he answered in a report annexed to his witness statement. The questions were:

> "Having regard to the *Convention on the Rights of Persons with Disabilities*, the *Vocational Rehabilitation and Employment Convention 1983* (No 159) and the *Vocational Rehabilitation and Employment (Disabled Persons) Recommendation 1983* (No 168):
>
> 1. To what extent, if any, do the above instruments give effect to the principle of substantive equality in connection with minimum rates of pay for employees with a disability, whatever their level of disability.
>
> 2. In circumstances where section 153(3)(b) of the FW Act confers an immunity from the prohibition in section 153(1) in respect of discriminatory modern award terms:
>
>   (i) How should the FWC give effect, if at all, to Article 27(1)(b) that entitles any disabled worker to "just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value."
>
>   (ii) How should the FWC give effect, if at all, to the reasonable accommodation human right recognised by Art. 27(1)(b)(i).

[113] Transcript, 17 August 2022 at PNs 1624-1626

[114] Witness Statement – 21 July 2022, Exhibit F.

(iii) To what extent, if at all, do Articles 9 and 10 of the *Vocational, Rehabilitation and Employment Recommendation* assist in fixing minimum wages for employees with a disability in circumstances where discriminatory minimum wages are excused by section 153(3)(b)."

[97] In response to the first question, Professor McCallum said that while the *Disability Discrimination Act 1992* (Cth) (DD Act) contains some aspects of substantive equality, such as a duty to make reasonable adjustments, it does not fully embrace substantive equality. Professor McCallum said that the *Vocational Rehabilitation and Employment (Disabled Persons) Convention* clearly focused upon formal equality which is promoted by its prohibitions on discrimination. As for the *Convention on the Rights of Persons with Disabilities* (CRPD), which Professor McCallum considered "*the most important human rights instrument*" in this area, he said that elements of the concept of reasonable accommodation as defined in the CRPD are important to substantive equality but is limited by its definition which exempts accommodations that impose a disproportionate or undue burden — that is, where accommodations would impose a disproportionate or undue burden, the employer does not have to make them. Despite this, Professor McCallum concluded that the CRPD "*comes close to requiring a standard of substantive equality*".

[98] In response to the second question, Professor McCallum noted that there are statutory exemptions in both the DD Act and the FW Act in relation to the payment of wages to persons with a disability who are eligible to receive the DSP. Professor McCallum suggested that the exemption contained in s 153(3)(b) in relation to setting minimum wages for employees with a disability should be read with the definition of employee with a disability in s 12 of the FW Act and s 47(1) of the DD Act to "*confine its operation to cover only persons with disability who are qualified to receive the Disability Support Pension, and whose minimum wage is determined by reference to the capacity of that person*." Further, because Australia has ratified the CRPD, Professor McCallum suggested that s 153(3)(b) of the FW Act should be exercised consistently with article 27(1)(b), and only where reasonable accommodations and specific measures have been exhausted.

Brendan Ford

[99] Brendan Ford made one witness statement and was not cross-examined.[115] He is a Site Operations Manager for NQ Employment, an employment services provider based in North Queensland. Mr Ford said NQ Employment has a subsidiary called NQ Green Solutions which operates two social enterprises: Containers for Change (a container recycling program) and Burdekin Lawn Care (a lawn and gardening service). Mr Ford said that both enterprises primarily engage workers with disabilities to perform work, these individuals are paid "*full award wages*" (that is, their wages are not discounted) and the enterprises do not receive government assistance in their own right.

[100] Mr Ford said that Burdekin Lawn Care engages about two to three employees at any one time and pays them pursuant to the *Gardening and Landscaping Services Award 2020*. Containers for Change engages about 10 to 15 employees at any one time. Mr Ford said that

[115] Supplementary Witness Statement – 22 July 2022, Exhibit E

some employees transition to open employment and new employees are only engaged according to business needs.

Rodney Davis

[101] Rodney Davis made one witness statement and was not cross-examined.[116] He has been employed part-time at a Bunnings store since about 2019. Prior to this, Mr Davis worked at Marriot Industries in its factory in Melbourne. Mr Davis said he has been told he has an intellectual disability. He receives the DSP. In his witness statement, Mr Davis described the kind of work he performs at Bunnings. He said he does a range of tasks now including restocking shelves, collecting trolleys and other tasks as directed by his manager. When he first started, Mr Davis said he only watered the plants in the store and was supervised when he did this. At the time he made his statement, Mr Davis said he was in the process of obtaining an electric pallet jack licence and a forklift licence with the support of Bunnings to further expand the tasks he could perform at work. Mr Davis said he receives a full wage and thinks he gets paid the same amount as other Bunnings workers who perform the same job as him.

[102] Mr Davis also described his previous role at Marriot Industries. He said he was a supported employee there. Mr Davis did a two-day trial at the factory before he started to determine whether he could perform the tasks required. During the trial, Mr Davis worked at his own workstation packing and sorting whichever items the factory was dealing with at the time, such as planter boxes. Mr Davis stayed in this packing role following the trial. Mr Davis said that he did not have a supervisor checking his work at the workstation. When Marriott Industries stopped doing packing work, Mr Davis said he began to do other work there which involved assembling eco-bins, packing them away and other tasks. Mr Davis worked at Marriott Industries for two to three years and was paid approximately $9.00 per hour for the work he performed. He said this would be adjusted sometimes depending on a number of factors including behaviour, performance and whether he was supervised. Mr Davis said that he is paid significantly more at Bunnings than what he was paid at Marriot Industries and this has improved his quality of life.

Sunil Kemppi

[103] Sunil Kemppi[117] is a Senior Legal and Industrial Officer at the ACTU and made one witness statement in this matter, to which he attached a number of documents from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) which he had accessed from the document library on the Disability Royal Commission's public webpage. These were:

- A scenarios document prepared by the DSS and provided to the Disability Royal Commission on 12 May 2022. Mr Kemppi said this document contains hypothetical scenarios showing overall employee income from hypothesised wage rates, taking into account the effect of those rates on the DSP an eligible supported employee receives;

[116] Witness Statement – 21 July 2022, Exhibit D

[117] Witness Statement – 4 August 2022, Exhibit G

- An extract of a transcript of evidence provided to the Disability Royal Commission by Gerrie Mitra, General Manager, Provider and Markets Division at the National Disability Insurance Agency;

- A copy of Ms Mitra's witness statement dated 1 April 2022;

- A copy of Ms Mitra's supplementary witness statement dated 6 April 2022; and

- A copy of Ms Mitra's responses to questions on notice dated 13 May 2022.

[104] Mr Kemppi was not cross-examined.

Agreed facts

[105] The statement of agreed facts filed on 4 August 2022 states that Ms Kerrie Langford, Head of Employment with National Disability Services, gave evidence at the Disability Royal Commission on 13 April 2022 on the subject of "*the experience of people with disability working in Australian Disability Enterprises*". An extract of Ms Langford's evidence is attached to the statement of agreed facts as Annexure 1.

SUBMISSIONS

Jurisdictional submissions

[106] The AEDLC contends that we cannot, under the FW Act, lawfully vary the SES Award to implement the "preferred approach" identified in the December 2019 decision and the March 2020 decision by which we would include the proposed Grade A and Grade B terms in the award. The process by which these submissions were advanced, and responded to by other parties, was as follows:

- on 16 March 2022, the AEDLC (as directed) filed an outline of its "jurisdictional objections" (AEDLC March outline);

- on 13 May 2022, the AEDLC (as directed) filed a detailed submission explicating its "jurisdictional objections" (AEDLC May submissions), and this was accompanied by the Wilson statement;

- ABI and NDS filed a submission specifically in reply to the AEDLC May submissions on 8 July 2022 (ABI response submissions);

- the AEDLC filed submissions in reply to the ABI response submissions on 20 July 2022 (AEDLC July reply submissions);

- the AEDLC and ABI/NDS made oral submissions concerning the jurisdictional issues raised during the last day of the hearing on 18 August 2022;

- the DSS filed submissions on 9 September 2022 which, *inter alia*, responded to the AEDLC May submissions (DSS response submissions); and

- the AEDLC filed submissions in reply to the DSS response submissions on 29 September 2022 (AEDLC September reply submissions).

AEDLC March outline and AEDLC May submissions

[107] In the AEDLC March outline, the AEDLC states two propositions which were said to be of a jurisdictional nature. The first proposition is that Grades A and B terms are prohibited by s 153(1) of the FW Act because:

(a) those terms would discriminate against employees because of mental or physical disability, and

(b) the Grades A and B terms are not terms which fall within the exception to the s 153(1) prohibition in s 153(3)(b) because they would not "*merely*" provide for minimum wages for all or a class of "*employees with a disability*" (as defined in s 12 of the FW Act).

[108] The second proposition is that variation of the SES Award to include the Grades A and B terms would exceed the authority conferred by (former) s 156(2)(b)(i) of the FW Act unless the Commission responds to the AEDLC arguments that:

(a) those terms should not be included in the SES Award for employees to whom clause B.1.1 of Annexure A would apply because:

(i) they would not establish minimum wages for those employees;

(ii) would not ensure or establish a fair or relevant safety net of minimum wages for those employees, having regard to the safety net that has been established for the same employees, or class thereof, covered by other modern awards and Special national minimum wage 2;

(b) it would be futile to include those terms in the Award because they would be liable to removal pursuant to s 161 of the FW Act.

[109] The AEDLC May submissions expanded upon these two propositions, although it must be said, with respect, that it is difficult to disentangle the submissions made concerning the first proposition from those made about the second. It may also be noted that although the second proposition was articulated as a procedural fairness point in the AEDLC March outline (that is, it was necessary for the Commission to consider arguments said to have previously been advanced by the AEDLC), the AEDLC May submissions dealt with the substance of these arguments.

[110] In respect of the first proposition, the AEDLC began by making submissions about the proper construction of s 153(3) of the FW Act. In relation to the phrase "*employee with a disability*" used in s 153(3), the AEDLC submitted that the definition of this phrase in s 12 of

the FW Act refers to the criteria for receipt of the DSP under ss 94 and 95 of the *Social Security Act 1991* (Cth) (SS Act) and that, having regard to the terms of s 94 of the SS Act, the definition therefore hinges upon an individual's participation in the SWS or the existence of a "*continuing inability to work*" as defined in s 94(2) of the SS Act. In respect of the latter criterion, the AEDLC submitted that this is highly individualised, and (by virtue of ss 94(2), (3) and (5) and 7(1) and (5) of the SS Act) requires a period of assessment to determine whether a person is prevented from working at least 15 hours a week on wages that are at or above the relevant minimum wage independently of an ADE due to the effect of the impairment on their capacity. By contrast, it was submitted, it was sufficient to satisfy the former criterion of participation in the SWS that the employee be unable to perform the range of duties contemplated by a class of work covered by an award (as distinct from being prevented from performing work independently of, relevantly, the ADE by the impairment itself). The AEDLC submitted that both criteria "*focus on what the worker can deliver by way of work as the work indicia of the effects of disability*."

[111] The AEDLC submitted that this position was altered by subjecting access to the award minimum wage to a hypothetical assessment of the work contribution the employer considers the employee can make given the circumstances of that person's disability, which would be likely to have distorting effects on DSP eligibility. This was the case, it was submitted, because a person employed in a position that is tailored and adjusted for the circumstances of their disability is a person who is able to perform the range of duties to the competence level required within the class of work for which the employee is engaged under the award, whereas eligibility for the SWS is predicated on an inability to do those duties. Likewise, the AEDLC submitted, such a person would be unlikely to satisfy the DSP "*continuing inability to work*" criterion in s 94(2) of the SS Act because the outcome of the evaluation contemplated by the proposed clause B.1.1 is work at the relevant minimum wages for Grades A and B.

[112] In relation to the use of the word "*merely*" in s 153(3) of the FW Act, the AEDLC submitted that this is used as a word of strict limitation which confines the application of the exception in s 153(3)(b) to an award provision "*for minimum wages in respect of the work output that an individual employee with a disability has the capacity to deliver*". This, it was submitted, is made apparent in the following ways:

(1) Section 153(3)(b) ambulates s 94(1) of the SS Act by enabling a wage standard to be developed which intersects with the work criterion for receipt of the DSP. Section 94(1) "*takes award regulated work as it finds it*" by presuming the existence of an award-based wage standard that has valued work. A harmonious construction of the provisions of the SS Act and s 153(3)(b) of the FW Act requires the latter to be construed beneficially as a provision that permits adjustment to the award wage standard to enable an impaired person's productive work capacity to be ascertained and remunerated, according to that capacity, for work that has been valued on the same basis as other employees - that is, without regard to impairment, which is not a work value reason prescribed by section 156(4)). The residual incapacity is addressed by the DSP.

(2) Section 150 of the FW Act prohibits the inclusion in an award of an "*objectionable term*", which is one that permits or has the effect of permitting a contravention of Pt 3-1 of the FW Act. The proposed clause 14.2 would authorise a minimum rate

of pay for Grades A and B that is lower than other employees of an ADE by reason of the circumstances of employees' disability, which would be adverse action. The proposed clause would allow "*the opportunity for abstract assessment of a disability and its perceived effects (not necessarily based on actual work performance over a period of time) to intrude into how work is classified*". Further, the possibility that this would authorise the infliction of injury in employment because of disability, which would also be adverse action, cannot be excluded. This would contravene s 351(1), with the exception in s 351(2)(a) in respect of action that is not unlawful under any anti-discrimination law in force in the place where the action is taken not being applicable because (relevantly) the proposed Grades A and B would not determine minimum wages by reference to the capacity of the person and thus would not be saved by s 47(1)(c) and (d) of the DD Act. It would not be a harmonious construction of ss 150 and 153(3)(b) of the FW Act to read the latter as permitting the inclusion of an objectionable term about minimum wages as if it were a broad-based exemption for disability-based discrimination, since this would enable the Commission "*to include forms of wage adversity in an award that go further than the carefully calibrated adversities excused by section 47(1)(c) and (d) of the DD Act on the same subject*".

(3) Section 161 of the FW Act requires the Commission to review an award referred by the Australian Human Rights Commission and to vary the award to the extent that it requires a person to do an act which would be unlawful under (relevantly) the DD Act. It is unlikely that s 153(3)(b) was intended to sanction discriminatory minimum wage terms liable to be removed under s 161(3) of the FW Act.

(4) The beneficial character of s 153(1) read together with s 153(3)(b) and of minimum wage award terms support a construction of s 153(3)(b) that authorises the inclusion in an award of terms that permit differential minimum wage treatment in respect of employees with a disability only insofar as this is necessary to take account of the effects of disability on a person's "*capacity*", which denotes "*productive capacity*." This is how "*merely*" is to be understood.

[113] The AEDLC submitted that its construction of "*merely*" aligns s 153(3)(b) of the FW Act with the DD Act, the SS Act and the Federal Court Full Court decision in *Nojin* in which Buchanan J said (at [148]) that pay should be fixed at a rate that was reasonable "having regard to the output of the disabled worker compared with the output of the non-disabled worker." In addition, it was submitted that the AEDLC's construction:

- aligns with other awards of the Commission;
- gives effect to the methodology used to design the National Minimum Wage Order, in that productive capacity is the basis for the distinction made by the Commission between Special national minimum wage 1 and Special national minimum wage 2;
- gives effect to the human rights embodied in the CRPD and the International Labour Organisation's *Vocational Rehabilitation and Employment Convention 1983*; and

- does not alter the work value of the work the worker has been engaged to perform, but rather keeps work and the worker separate and ensures that the work is not devalued by association with disability.

[114] It follows, it was submitted, that s 153(3)(b) is not engaged by the Grades A and B terms, since these terms would not "*merely*" make provision for the authorised subject matter.

[115] The AEDLC May submissions next involved submissions made under the heading of "*The consequences of including the Grade[s] A and B terms in the Award*", which appear to be directed both to the first and second propositions. It was submitted that:

- the inclusion of the Grades A and B terms would result in "*legally sanctioned double discrimination against ADE employees with a disability for the same disability*";

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

- the criterion of "*circumstances of the employee's disability*" is broader than "*capacity*" and, for the purpose of assessment, may or may not require actual work performance and is divorced from the value the employer obtains from its labour need, and proceeds on a frame of reference that is work only employees with a disability would perform as the basis for fixing an upper limit on the amount of minimum wage the individual worker could earn from the employment, regardless of their productive output;

- the preferred approach would, through clause 14.4, then test the employee's productive output in relation to the very work that proposed clause B.1.1 assumes has been adjusted, which might be thought unnecessary if the duties have been tailored for the employee;

- the effect is to produce differing wage outcomes for the same work for employees with the same disability, which strays beyond mere differential minimum wage treatment and would be unlikely to be necessary to meet the minimum awards objective;

- no other employee covered by the SES Award would be subject to two evaluative methods applicable to wage determination, and those classified in Grades 1 to 6 would have the benefit of alignments with the *Food, Beverage and Tobacco Manufacturing Award 2020* and other relevant awards, with such alignments corresponding with the statutory concept of minimum rates based on uniformity and consistency of employee treatment within and between awards;

- the Grades A and B terms would destroy consistency across awards and create a "uniquely *disadvantageous*" classification for employees of a particular kind (i.e. employees with a disability) employed by a particular form of enterprise (i.e. ADEs),

which would not constitute the setting of a "*minimum wage*" within the settled meaning of that phrase;

- the effect of the preferred approach would result in wage rates less beneficial than both the NMW and even Special national minimum wage 2, and this exposes discrimination partly based on disability and partly on the irrelevant consideration of employer identity, and also "*exposes adversity*"; and

- on these grounds alone, the inclusion of the Grades A and B terms would not engage s 153(3)(b) because they do not set a "*minimum wage*".

[116] The AEDLC also submitted that the rates of pay proposed for Grades A and B, which would lower the minimum wage currently prescribed by clause 14.2[118] of (the 2010 version of) the SES Award, do not (at least expressly) invoke the work value reasons referred to in s 156(4). The December 2019 decision, it submitted, disclosed that the effect of wages on the viability of ADEs and ADE employment was the foremost consideration, and regard was also had to the nature of commercial opportunities pursued by ADEs and whether ADEs were for-profit or not-for-profit enterprises, but these are not reasons relevant to the satisfaction referred to in s 156(3). It was further submitted that an association between personal capability and work of a particular kind or considerations of personal capacities and characteristics into an evaluative alignment exercise that for other workers is irrelevant, were not relevant to the satisfaction referred to in s 156(3).

[117] Finally, the AEDLC submitted, even if the Grades A and B terms do set a minimum wage, the grades would not establish a minimum wage for "*all employees with a disability*" within the meaning of s 153(3)(b), but would only apply to those employees with a disability in "*tailored or adjusted*" positions and who perform "*a simple task or tasks*" involving a number of "*sequential actions*" under "*direct supervision and constant monitoring*". This does not constitute a "*class of employees with a disability*" within the meaning of s 153(3)(b) since such a class must be constituted by a defined group differentiated in a manner that engaged the defined phrase. It was submitted that, having regard to ss 94(1) and 95(2) of the SS Act, the basis of identifying a class is by reference to the nature of the disabled employees' qualifying impairment (i.e. psychiatric disability, intellectual disability or physical disability) rather than the kind of work a person is employed to do or the identity of their employer.

ABI response submissions

[118] In response to the AEDLC's submissions, ABI and NDS submitted that the following propositions applied to the Commission's task in the 4 yearly review:

(1) There is nothing in the statutory context of s 156 to give the word "*review*" a more confined meaning than its natural and ordinary meaning, being to "*survey, inspect, re-examine or look back upon*".

(2) The statutory task is a review at large to ensure that the modern awards objective is being met. The Commission is required to review the award and, by reference

[118] Now clause 15.2 of the SES Award

to the matters in s 134(1) and any other consideration consistent with the purpose of the modern awards objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.

(3) The powers in s 156(2)(b) are not conditional on the Commission having reached any state of satisfaction.

(4) The modern awards objective in s 134(1) applies to any such exercise of power. It imposes a function on the Commission to ensure that modern awards satisfy the requirements of that provision (that is, together with National Employment Standards, to provide a fair and relevant minimum safety net of terms and conditions taking into account paragraphs (a)-(h)).

[119] In relation to the SES Award specifically, ABI and NDS submitted that it should be uncontroversial that:

- the Commission must review the award and in doing so can make variations to it subject to certain statutory constraints;
- the Commission must ensure that the SES Award includes terms only to the extent necessary to achieve the modern awards objective and, to the extent applicable, the minimum wages objective;
- in accordance with s 139 of the FW Act, the Commission's power to make variations to the SES Award extends to the introduction of new skill-based classifications and the identification of wage rates (including, as specifically noted at s 139(1)(a), wage rates for employees with a disability);
- in accordance with s 153(3)(b), the Commission can include a term in the SES Award providing for minimum wages for all employees with a disability, or a class of employees with a disability; and
- in accordance with s 156(3) of the FW Act, the Commission can make a determination *varying* modern award minimum wages only if it is satisfied that the variation is justified by work value reasons.

[120] Having regard to the above propositions, ABI and NDS submitted that the "preferred approach" as outlined in the December 2019 decision, including the Grades A and B terms, is plainly available as a matter of jurisdiction, and that the proposed Grades A and B constitute skill-based classifications and establish minimum wages as contemplated by s 139(1)(a). In relation to s 153(3)(b), ABI and NDS submitted that a plain reading of the provision suggests the power of the Commission to provide for minimum wages for employees with a disability is not conditioned or limited to providing for specific minimum wages only insofar as this is necessary to take account of the effects of disability on a person's capacity. Rather, it was submitted, s 153(3)(b) allows the Commission to set minimum wages for employees with a disability and goes no further than that. The legislative power which arises from s 153(3)(b) is not conditioned by a requirement to set rates in accordance with and having regard to the

specific "*productivity consequences*" of a person's disability, but simply identifies that the Commission is able to set minimum rates for persons with a disability, without falling foul of the prohibition on discriminatory terms as identified in s 153(1). A term setting such rates will not offend s 153(1), it was submitted, unless it does something other than to include minimum rates for person with a disability – for example, by setting rates on the basis of sex as well as disability. ABI and NDS submitted that the breadth of s 153(3)(b) is illustrated by the junior rates exemption in s 153(3)(a), which is not limited to providing junior wages insofar as this is necessary to take account of the effects of age on those employees' capacity.

[121] In relation to the proposed establishment of Grades A and B, ABI and NDS submitted that the better view would be that this involves *setting* minimum wage rates within the meaning of s 284 rather than *varying* existing wage rates such as to make s 156(3) applicable. This would make the AEDLC's submissions concerning s 156(3) fall away, although it would not render work value irrelevant to the Commission's consideration.

[122] By contrast to the proposed Grades A and B, which plainly would involve the setting of minimum wages, ABI made the "*observation*" that it is not obvious that a requirement to apply the SWS likewise involves the setting of minimum wages given that the SWS requires an external assessment to determine a relevant pay rate. ABI and NDS said that it raised this only to suggest that "*if there is any jurisdictional difficulty with the preferred approach of the Commission, it may lie in the incorporation and/or implementation of the SWS, and not in the introduction of Grades A and B*".

[123] In specific response to the AEDLC's submissions that the Grades A and B terms would be objectionable because they are discriminatory, ABI and NDS submitted that:

(1) The AEDLC's submissions did not identify with precision the relevant differential effect or whether the differential treatment arises from direct or indirect discrimination. If direct discrimination is asserted, the AEDLC had not identified any relevant comparator. To the extent that the relevant comparator is said to be another person who is performing tasks or functions within the existing classification structure in the SES Award, the argument falls apart because the proposed new classifications will not apply where the relevant disabled person is employed within Grades 1 to 7. The two new classifications apply where an ADE has tailored a whole new position specific to the circumstances of the disability of the employee. This is not the same or similar position. Nor is it an instance where the "productive capacity" of the particular employee is simply ignored. The productive capacity of the employee informs the tailoring of the job (which is also made plain by the fact that the relevant employee must meet the eligibility criteria to receive the DSP). If the AEDLC intends to assert indirect discrimination, it has failed to identify with precision the relevant condition or requirement.

(2) The AEDLC's contention that a term which permits an employer to pay an employee with a disability a rate of pay that is lower than anyone else due to the circumstances of disability authorises adverse action for a prohibited reason, fails to take into account the matters set out in (1) above, including that it would only apply to employees who are eligible to receive the DSP. The proposed new classifications do not, as the AEDLC asserts, require the employer to classify

employees merely according to its assessment of the "circumstances of the disability"; rather, the classifications would only apply where the employer has created a position consisting of tasks and a level of supervision that has been tailored or adjusted "*to meet the circumstances of the employee's disability*" and which does not fall into Grades 1-7 of the classification structure.

(3) Grades A and B, like Grades 1-7, do not turn upon the disability of any employee but depend on whether a class of persons with a disability perform the prescribed tasks, functions and jobs. There is no warrant to read down the words "*class of employees with a disability*", and such a class may be characterised as the whole class of employees with a disability, and/or the class of employees with a disability who work in a job that falls within any classification in the SES Award. The AEDLC's contention that the proposed Grades A and B would fall foul of the exception in s 153(3)(b) because they are not tied to "productive capacity" based on work value is based on a construction of s 153(3)(b) which is not supported by the words used, and the AEDLC's proposed construction of the single word "*merely*" stretches it well beyond its ordinary meaning of "*simply*" or "*just*". In any event, and notwithstanding that the text of s 153(3)(b) does not appear to specifically require it, if implemented, Grades A and B would be intrinsically tied to the productive capacity of the class of employees engaged by ADEs for whom specific jobs have been tailored.

DSS response submissions

[124] The DSS's submissions restated the submissions advanced on behalf of the Commonwealth in *Association for Employees with a Disability v Commonwealth of Australia.*[119] In relation to the proper construction of s 153(3) of the FW Act, the DSS submitted that the applicable principles are:

- the Commission must consider the ordinary and grammatical meaning of the words, while at the same time taking into account context and purpose;
- remedial or beneficial provisions are to be given a generous, fair, liberal and large interpretation;
- exceptions do not require such an interpretation and may be read narrowly; and
- so far as possible, statutes are to be construed consistently with international legal obligations, relevantly including article 27 of CRPD, which amongst other things confers a right to just and favourable conditions of work on an equal basis with others and equal remuneration for work of equal value.

[125] The DSS also noted that s 15AA of the *Acts Interpretation Act 1901* (Cth) provides that when interpreting a provision of an Act, the construction which best promotes the purpose of the Act is to be preferred.

[119] [2021] FCAFC 36; 283 FCR 561; 305 IR 203

[126] Applying these principles, the DSS submitted, the meaning of s 153(3) is clear: a term of a modern award providing for minimum wages for the categories of employees described in (a) to (c) "*does not discriminate against an employee*" and the inclusion of such a term in a modern award is therefore not prohibited by s 153(1). It submitted that there is nothing in the language of s 153(3) as a whole, or in s 153(3)(b) itself, which supported either reading the provision down or reading in additional words to limit its scope. The use of "*merely*" in s 153(3) indicates an intention that the award term will not be prohibited by s 153(1) unless it does something more than provide for minimum wages for one of the categories of employees referred to in ss 153(3)(a) to (c). As used in s 153(3), merely can be read as a synonym for just. The DSS submitted that minimum wages must be set according to the statutory requirements in the FW Act, and an award term which provides for minimum wages for one the categories of employees described in sub-ss (a) to (c) and has been set in accordance with the statutory requirements in the FW Act, will fall within the scope of s 153(3). Conversely, an award term which provides for minimum wages for one of the categories of employees described in (a) to (c) but which has not been set in accordance with the statutory requirements in the FW Act, will be invalid and will not be saved by s 153(3).

[127] As to the context and purpose of s 153(3), the DSS submitted that the provision reflects the longstanding position in Australian industrial relations legislation that different rates of pay can be used to create and protect employment opportunities for certain categories of employees. It submitted that there is nothing in the context of s 153(3)(b) which supports a contention that it only operates to authorise minimum wage terms for all employees with a disability, or a class of employees with a disability, in so far as that term takes account of the effect of disability on the employee's "*productive capacity*". In the performance and exercise of its powers and functions in relation to making, varying and revoking modern awards and setting, varying or revoking award minimum wages, the Commission is obliged to have regard to the modern awards objective and the minimum wages objective and, when conducting reviews of modern awards required in accordance with s 156, the Commission must be satisfied that any variation of award minimum wages is justified for work value reasons. Award wage fixation by reference to the value of work performed, the DSS submitted, has long been a feature of the Australian industrial relations system. The DSS identified paragraphs [351]-[354] and [357]-[359] of the December 2019 decision as illustrating the relevance of the work value reasons consideration in the context of employment covered by the SES Award.

[128] The DSS submitted that the policy underpinning of s 153(3) is clear: it is a carve out from the general prohibition on discrimination contained in s 153(1) in recognition that, in respect of the categories of employees identified at paragraphs (a) to (c), special minimum wages 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. It was submitted that a narrow construction of s 153(3)(b) may limit the Commission's ability to discharge its obligation to be satisfied that award minimum wages are justified on work value reasons, and the nature of the work, the level of skill or responsibility in doing the work and the conditions under which the work is done are separate considerations to the employee's productive capacity. A plain reading of s 153(3) best promotes the objects of the FW Act.

[129] The DSS also submitted that s 153(3)(b) does not need to be given a narrow construction in order to be read harmoniously with ss 150 and 351. In relation to s 150, it was submitted that

this provision must be read as subject to the specific authority granted by s 153(3) to include in a modern award a term that, but for s 153(3), would be discriminatory. In response to the AEDLC's submissions, the DSS submitted that s 47(1)(c) of the DD Act provides no real assistance in determining the proper construction of s 153(3) of the FW Act and, in the absence of any authority on the subject, there is no warrant to read the reference to "*capacity*" in 47(1)(c) as meaning "*productive capacity*" and then using that reading to require a narrow construction of s 153(3). Similarly, the DSS submitted, s 161 of the FW Act, and s 46PW of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), do not support a narrow construction of s 153(3), since the regime established by these provisions establishes a further protective mechanism for review where a modern award requires an act to be done that would be unlawful (but for the fact it is done in direct compliance with the award), notwithstanding the term of the award complies with s 153. In respect of the phrase "*class of employees with a disability*", the DSS submitted that this should be given its ordinary meaning, and that there is nothing in the text or the context that supports the contention that a "*class*" must be differentiated in any particular way.

[130] In the context of this matter, the DSS made the following submissions regarding the operation of s 153(3):

- the Commission's ability to provide for minimum wages for employees with a disability pursuant to s 153(3)(b) is limited to circumstances where this is necessary to achieve the modern awards objective and the minimum wages objective;

- the consideration of promoting social inclusion through increased workforce participation would be particularly relevant to any exercise of power under s 153(3);

- where the Commission decides that it is necessary to provide for minimum wages for employees with a disability which (but for the operation of s 153(3)) would be discriminatory, the requirements to establish a fair and relevant minimum safety net of terms and conditions, and a safety net of fair minimum wages, mean that the Commission should be careful to ensure that the proposed differential treatment is fair, and differential treatment that is unreasonable, disproportionate, or unnecessary to achieve a legitimate goal is likely to be unfair;

- the requirement of fairness is particularly evident in the minimum wages objective, which requires (in s 284(1)(e)) the Commission to take into account the need to provide a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability – which categories align in substance with the categories in s 153(3);

- it is a legitimate objective to ensure that ADEs continue to provide the benefits of supported employment described in the factual findings in paragraph [245] of the December 2019 decision; and

- whether a determination that comes within the terms of s 153(3) is consistent with the requirement of fairness is generally a question of fact that the Commission should assess based on the relevant circumstances, which should include whether the proposed special minimum wage will in fact lead to the achievement of its objectives,

whether a less discriminatory alternative is available that would also achieve these objectives, and whether sufficient regard has been paid to the rights and interests of those employees who would be affected.

[131] The DSS also, at our invitation, made submissions concerning whether the implementation of the variations proposed in the December 2019 decision and the March 2020 decision would affect the entitlement of any supported employee working in an ADE to the DSP. These submissions were sought in relation to the AEDLC's submissions that the proposed Grades A and B terms would adversely affect employees' eligibility for the DSP. The DSS rejected the AEDLC's contention. It submitted that the proposed new wages structure would not prevent employees from participating in the SWS, nor would it negate those employees' "*continuing inability to work*".[120] The proposed new wages structure, it submitted, would still permit a SWS assessment to be conducted for employees in Grades A or B, and it anticipated that most, if not all, employees with a disability under the SES Award would undergo a SWS assessment (noting that all employees the subject of the ARTD Trial were subject to SWS assessments). The DSS further submitted that even if employees captured by Grades A or B were not subject to a SWS assessment, they would nonetheless be qualified for the DSP. This is because, it was submitted, any employee with a disability working in supported employment in an ADE could not be considered as working "*independently of a program of support*", and work performed in an ADE is not "*work*" as defined in s 94(5) of the SS Act for the purpose of the DSP criteria in that section. The consequence of this is that employees falling within the proposed Grades A or B would still have a continuing inability to work for the purpose the DSP criteria in s 94 of the SS Act.

AEDLC July reply submissions and September reply submissions

[132] In the AEDLC July reply submissions, it submitted in reply to the ABI response submissions that:

- ABI's submissions invite an acontextual construction of s 153(3)(b);
- junior wages authorised by s 153(3)(a) are expressed as a percentage of the properly-fixed minimum wages set for adults and thus preserve wage relativities for young people in a manner that accords with principle, and it is not correct that junior wages can be set by reference to matters other than age; thus the analogy in the ABI response submissions with junior wages does not assist in the construction of s 153(3)(b);
- in a statutory setting that tightly regulates award content, singles out attribute discrimination for specific prohibitions and expresses "*fairness*" as one of the overarching values of the award safety net, ABI and NDS's view of s 153(3)(b) as an unencumbered, freestanding grant of statutory authority to discriminate against employees with a disability in relation to wages in favour of one category of Australian employer, ADEs, is unlikely and without substance;

[120] *Social Security Act 1991* s 94(1)(c)(i)

- there is no statutory support for the for the hypothesised ability of the Commission to engage in wage discrimination without regard to the specific disability that enlivens the definitional phrase "*employee with a disability*" — a concept which lies at the centre of s 153(3)(b);

- the preferred approach in the December 2019 decision foreshadows a revaluing of existing work which would reduce the existing entitlements for "*employees with a disability*" who meet the gateway requirements of proposed clause B.1.1, and this would constitute a variation to modern award minimum wages which would need to satisfy the requirement in s 156(3);

- ABI and NDS's "*jurisdictional attack*" on the SWS is not correct because the SWS is an aspect of the eligibility requirement of the defined phrase "*employees with a disability*" upon which s 153(3)(b) turns;

- the "*discrimination*" referred to in ss 153(1) and (3) is not limited to meanings derived from other statutes; the FW Act uses the phrase "*discrimination against*", which connotes the making of distinctions which engenders adversity;

- it is unquestionably the case that the Grades A and B terms would establish a lower base level of award entitlement than other award-covered employees or indeed award-free employees with a disability employed by a non-ADE employer, and this undeniably engenders adversity;

- the word "*merely*" in s 153(3) limits each of the three forms of "*discrimination against*" addressed by paragraphs (a), (b) and (c), but in doing so takes its colour from its subject matter, namely age, disability, and training arrangements;

- the notion that all the award classifications (Grades A, B and 1-7) would apply in an undifferentiated way (apart perhaps from the work of each) is false since, unlike Grades 1 to 7, Grades A and B are only available once an ADE employer has created work for the employee due to its view of their disability;

- it is antithetical to traditional notions of work value to associate classification with the personal characteristics of a worker, as the Grades A and B terms do;

- ABI and NDS's submissions miss the protective context of the word "*merely*" in s 153(3) and do not explain how beneficial legislation prohibiting discrimination against those with disability should simply be put to one side in construing the provision;

- AEDLC's preferred construction of "*merely*" is consistent with and would promote Australia's compliance with its obligations under the CRPD; and

- the SES Award is not a true industry award because, when regard is had to the classification descriptors, ADE employment affords work that is the same or similar as work regulated by other awards, and what makes the award distinctive is the ability

ADE employers have enjoyed, by reason of clause 14.4 of the award, to engage in disability-based wage discrimination.

[133] The AEDLC's September reply submissions, which replied to the DSS submissions, largely recapitulated propositions advanced in its earlier submissions. Its submissions include the following in relation to the issue of jurisdiction:

- section 153(3)(b) constitutes an exception, not an independent, freestanding, source of inclusionary power or a "carve out";
- because it is an exception, the canons of construction as well as the text of the provision should confine and limit the discrimination it excuses;
- because the subject matter of s 153(3)(b) is expressed in general, abstract language, it must be construed contextually in a way which harmonises the Commission'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;
- the DSS's use of the phrase "*special minimum wages*" has no basis in s 153(3)(b) itself (unlike s 294(1)(b) in relation to the setting of "*special minimum wages*"), and is a synonym for discrimination that conceives of different wages as a special measure to maintain employment through low wages in order to effect the objective of social inclusion;
- rates for junior employees and employees to whom training arrangements apply (trainees) have been based on factors other than the promotion of workforce participation, including work value and the income needs of workers;
- disabled ADE employees are the lowest-paid in the modern award system, and the "preferred approach" in the December 2019 decision would perpetuate this and adjust the level of minimum wages downward; the disparity caused would impair social inclusion by impairing the dignity and human rights of these employees, and lead to an inferior form of workforce participation;
- the DSS's plain meaning does not explain how it could sustain, as between the SES Award and other awards, two safety net minimum wage standards for the same class of employee that produce wildly different wages outcomes;
- the SWS is owned by the Commonwealth and constitutes part of the work criteria for qualification for the SWS under s 94(1) of the SS Act, and the DSS does not contend that adopting the SWS as the sole proportional methodology sanctioned by the SES Award would fail to engage s 153(3)(b) or fail to produce a rate of pay derived from properly-fixed minima;
- there is no contextual support in the legislative history for the degree of discriminatory latitude which the DSS proposes in relation to s 153(3)(b) and, in

particular, the FW Act broke ranks with its predecessor, the *Workplace Relations Act 1996* (Cth), in relation to special rates of pay for disability-specific classifications;

- the obligation in s 135(2) to take into account the national minimum wage orders in setting modern award minimum wages, including their methodology, applies in respect of s 153(3)(b);

- the explanatory memorandum for the *Disability Discrimination and Other Human* Rights *Legislation Amendment Bill* made it clear that the amendments it made to the DD Act implemented recommendations contained in the Productivity Commission's 2004 report titled *Review of the Disability Discrimination Act 1992*, which report referred to s 47(1)(c) of the DD Act as rendering it 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*";

- 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;

- 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 established rules of international law, and s 153(3)(b) does not exclude the AEDLC's conforming construction;

- the DSS's submission that a narrow construction may limit the Commission's ability to be satisfied that minimum wages are justified on work value grounds is wrong, since s 153(3)(b) allows the Commission 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 DSS's contention that s 150 must be read as subject to s 153(3)(b) results in an odd and disharmonious constructional outcome, and should be rejected;

- the DSS's submissions concerning s 161 miss the point that the exercise of the removal power contained in s 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 Commission performs in relation to these instruments, and 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 s 44 [sic; presumably s 45] of the FW Act unless removed;

- it is neither necessary or attractive to construe s 153(3) as if it would permit the Commission to include a term that does, or might, result in unlawful conduct;

- in relation to s 153(3), it does not make sense to attribute to the legislature an intention to authorise 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 Commission may desist from doing so if it thought those terms unfair by reference to idiosyncratic views of what constitutes "*unreasonable, disproportionate or unnecessary*"; and

- such a construction is not consonant with the general approach of the FW Act or the specific provisions relevant to modern award content, and the DSS'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 s 136(1), with the considerations that apply to whether particular content must be excluded, which is governed by s 136(2).

Submissions on the merits

ABI and NDS

[134] ABI filed a position paper on 15 March 2022 in which it identified issues in relation to clarity and workability, quantum and operative date based upon consultation it had conducted following the January 2022 statement.

[135] As to clarity, ABI submitted that greater education would be needed when it comes to classifying an individual employee in an award structure as opposed to assessing them, confusion had arisen on the part of employers in interpreting the gateway criteria and, related to these issues, some employers may have mis-classified employees as Level 2 without considering whether they are ready, willing and able to do all things at that level.

[136] As to workability, ABI noted that the ARTD Trial may have exposed a potential issue with DSS providing funding for facilitating SWS assessments going forward, and foreshadowed that an alternative expanded classification structure may help remove the necessity of applying the modified SWS and may save the DSS "*tens of millions of dollars*" which could then be used to fund actual wage increases under the new structure.

[137] As to quantum, ABI submitted that nothing in the Report suggested an error in the quantum of wage rates proposed for Grades A and B, and suggested that an alternative classification structure which builds upon Grades A and B could be considered as an alternative to using the proposed new wages structure at all.

[138] As to operative date, ABI submitted that because the Report foreshadowed an average wage increase of over 50% (not including on-costs), it sought a prospective operative date of 1 July 2023 unless DSS was required to assess every employee transitioning to the new structure, in which case it would seek a longer period before the proposed new wages structure was to commence.

[139] In their submissions of 8 July 2022, ABI and NDS described the outcome of the ARTD Trial as set out in the Report as "*in most respects… entirely to be expected*".[121] They suggested that the Report reflects that the requirement in the December 2019 decision that "no existing

[121] ABI and NDS submission, 8 July 2022 at [33]

ADE employee should suffer a reduction in remuneration as a result of the introduction of the proposed new wages structure"[122] played "*a material role in protecting employees*".[123]

[140] In relation to the "*points of confusion*" set out on page 86 of the Report, ABI and NDS downplayed the extent to which the trial implementation of the proposed new wages structure in fact generated confusion, submitting that:

- those points were stated to be about the wage grade assessment guidance that ARTD Consultants had prepared and not new Grades A and B themselves;
- some of the confusion described was commonplace when employers are looking at any modern award classification structure, rather than being specific to the proposed new wages structure;
- the only "interesting"[124] and relevant points for the Commission's purposes were that staff assessing supported employees in the ARTD Trial:
    - were uncertain about when to use the lettered versus the numbered grades in the proposed new wages structure; and
    - may incorrectly have used the indicative tasks for Grades 1-7 in the current SES Award to guide their assessment; and
- in any case, those relevant points were addressed in the Report's recommendations.

[141] ABI and NDS submitted that section 6 of the Report, "*Ensuring a successful transition to the new wage assessment structure*", was "*the most important for the purposes of the FWC finalising this matter*".[125] They suggested the following in addition to endorsing the recommendations in that section:

- include a note drawing upon the wording in paragraphs [248] and [348] of the December 2019 decision to clarify the "*gateway*"[126] requirements for supported employees to be classified into grades A or B; and
- consider inserting a "higher duties" clause to account for situations in which an employee temporarily performs tasks that belong to a higher classification.

[142] ABI and NDS expressed concern about the lack of clarity around the DSS's ability to resource the expected significant increase in demand for SWS assessments and higher wage costs for ADEs should the proposed new wages structure be implemented across the supported employment sector. They further submitted that the SWS assessment process also increases the

[122] [2019] FWCFB 8179 at [375]

[123] Ibid at [43]-[44]

[124] Ibid at [60]

[125] Ibid at [63]

[126] Ibid at [65]

administrative burden for ADEs and can cause supported employees to feel stressed and/or anxious.

[143] ABI and NDS suggested an alternative to the proposed new wages structure that they said built upon it, comprising grades A1, A2, B1 and B2 and eliminating the requirement for SWS assessments. It described its alternative proposal as "*founded on work value considerations*"[127] and preferable to "*grade[s] A and B being supplemented by an underfunded and underresourced modified SWS*".[128]

[144] Finally, ABI and NDS submitted that the proper operative date of the proposed new wages structure should depend on how long it will take the DSS to assess all ADE employees; they did not suggest an alternate date to that in their March 2022 position paper (1 July 2023). They also submitted that the proposed new wages structure, which as previously stated is expected to significantly increase the wage costs for ADEs, should be phased in over eight years in consideration of their "*financial sustainability*".[129]

Centacare

[145] Centacare is a disability service provider located in NSW that employs a number of supported employees at different sites across the state. It lodged a submission on 8 July 2022. Centacare transferred from the Business Services Wage Assessment Tool (BSWAT) to the SWS in 2015 to conduct wage assessments for its supported employees. Centacare submitted that it has to pay higher wages under the SWS. It is concerned that if a modified SWS is inserted into the SES Award as a result of these proceedings which has a prohibition on reducing supported employee wages, Centacare will be "*locked in*" to paying the higher wage rates it currently pays under the current version of the SWS. Centacare submitted that such a result would have a negative impact on it financially as well as reducing its competitiveness in the market.

[146] Centacare submitted that further education and guidance would be vital should the proposed new wages structure be incorporated into the SES Award. In Centacare's submission, the proposed new wages structure could not be implemented without "*clear commitments*" from DSS as to the funding arrangements. Centacare submitted that alternative options to the proposed new wages structure should be considered, and indicated its support of the alternative proposed by ABI in its position paper of 15 March 2022 because it would provide greater simplicity and clarity during the transitional period. Centacare submitted that it was vital that the sector be provided with sufficient time to transition before the proposed new wages structure becomes operative, but did not commit to a position on what interval it considers would be appropriate.

Greenacres

[127] Ibid at [81]

[128] Ibid at [80]

[129] Ibid at [87]

[147] At the hearing, Greenacres submitted that, extrapolating from the Report, it appeared likely that the "*major increase*"[130] in wage costs would come from employees being classified as Grade 2, in which case any transitional arrangements would not make a difference as Grade 2 wages could not be "phased in".

[148] Greenacres submitted that it did not consider that anything in the evidence or submissions should persuade us that any aspect of the proposed new wages structure should be altered, including the provisional wage rates for new Grades A and B. It stated therefore that it did not support ABI and NDS's submissions, though it acknowledged that the ABI Structure was an attempt to overcome the difficulty that would arise if the proposed new wages structure applied across the supported employment sector, being that there would not be enough SWS assessors to enable its timely implementation. It supported a long transitional period, and specifically put that ADEs should be given at least 12 months to benchmark supported employees.

[149] Greenacres also submitted that the evidence demonstrates that ADEs are "*not just any commercial enterprise*",[131] but are also places that generate positive social outcomes and provide an environment of great non-financial benefit to supported employees. Accordingly, the Commission should "*try to find the balance between higher remuneration on the one hand and on the other hand the right of people with disabilities to be able to work in our community*".[132]

[150] Greenacres lastly endorsed Our Voice's proposed amendments to the Rights at Work clause.[133]

Our Voice

[151] In its position paper filed on 21 February 2022, Our Voice submitted that it did not appear that the proposed new wages structure would be successful without funding support from the DSS. Our Voice proposed an alternative national concept for restructuring the supported employment sector. This would comprise re-introduction of the Disability Sector National Consultative Council to monitor the transition, introduction of a stepping stone from supported employment to open employment based on the social enterprise model of employment and resourcing a peak body for Our Voice's members to provide advocacy where required. Our Voice submitted that the introduction of Grades A and B has created confusion, as has the grading gateway and lack of a consistent comparator. Our Voice questioned whether there was enough flexibility in the ceilings for the minimum wages for Grades A and B and may require adjustment. Ultimately, Our Voice submitted, the categorising of wage entitlements must meet the commercial and social needs of "*a vulnerable cohort whose safety net is their DSP*". Our Voice agreed that the transition to a new wages structure would take a number of years. It estimated that approximately five years would be realistic and submitted that any transition should be staged.

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[130] Transcript, 18 August 2022 at PN 2324

[131] Ibid at PN 2354

[132] Ibid at PN 2385

[133] *Supported Employment Services Award 2020* clause 32

[152] Our Voice filed submissions on 22 July 2022. Our Voice submitted that the proposed new wages structure "*will not solve the problems for ADEs*", and cited closures of Western Australian sites of Activ, an ADE, in support of this. Our Voice supported the position advanced in ABI's position paper that further differentiation in Grades A and B may be helpful, that education in relation to any new wages structure is vital, and in relation to transition timing, that eight years is "*probably necessary*", and that any transition could be assisted by re-constituting a Disability Sector National Consultative Council (formerly known as the Industry Consultative Council) to oversee this. Our Voice also supported the alternative structure proposed by ABI and NDS in their submissions.

[153] Our Voice did not accept the AEDLC, UWU and ACTU's submission that disproportionate weight had been assigned to the impact on ADE employers of increases in employee wages in the December 2019 decision. Our Voice submitted that "*there can be no argument about the amount of wages paid by the employer if the alternative is NO wage at all*" (bolding omitted), particularly in circumstances where job losses in ADEs were already occurring. Our Voice indicated it supported ABI's position in relation to the jurisdictional issues raised by the AEDLC.

[154] Our Voice submitted that clause 32 of the SES Award which is titled "Rights at work for supported employees" should be varied to insert the words "*in a timely manner*".

[155] Our Voice tendered further reference material[134] during the hearing on 17 August 2022, but did not speak to it at hearing beyond agreeing that it would be useful to mark it as an exhibit.

Activ Action Team

[156] On 20 July 2022 the Activ Action Team filed submissions and evidence. The Activ Action Team is the Western Australia-based representative of Our Voice and states that its purpose is to advocate "*for and with those affected by the proposed closure of Activ worksites*." The Activ Action Team submitted that increases in wages under the SES Award would challenge the financial viability of ADEs. It was submitted that ADEs play a key role in providing employment opportunities for people with disabilities because some would be unable to work in open employment environments. The Activ Action Team's submissions expressed concern that open employment may become the only option for supported employees should the financial viability of ADEs be threatened by increases in wages under the SES Award.

[157] The Activ Action Team also provided a number of attachments to its submissions including a report it prepared in June 2022 titled "*Hear Us, See Us*" and 15 statements prepared by supported employees, their parents and carers in relation to their experiences in supported employment. It is clear that the closure of the Activ ADE in Western Australia had a significant impact, however assessing this in detail is beyond the scope of this decision.

AEDLC, UWU and ACTU

[158] In a joint position paper filed on 16 March 2022 AEDLC, UWU and ACTU submitted that the SES Award should not be varied, insofar as the proposed new wages structure includes

[134] Our Voice reference material, lodged 15 August 2022, Exhibit AC

wage classifications A and B. It was submitted that the classification structure in the SES Award should instead include seven grades, that Grades A and B should not be introduced, the SWS should be used to measure the productive capacity for employees with a disability covered by the SES Award and no existing ADE employee should experience a reduction in remuneration as a result of any changes to the SES Award arising out of these proceedings.

[159] In support of this position the AEDLC, UWU and ACTU submitted that the Report did not allow the Full Bench to be satisfied that including Grades A and B in the SES Award met the modern awards objective in s 134(1) of the FW Act and the minimum wages objective in s 284(1). They submitted that the Full Bench assigned disproportionate weight to the impact an increase in supported employees' minimum wages would have on ADE employers, and that in any event the limitations on the financial modelling in the Report meant the Commission could not make a definitive finding on the impact that would result for ADE employers. The AEDLC, UWU and ACTU submitted that there would be no further utility in considering the quantum for the dollar amounts payable for Grades A and B and that any sub-NMW components of the proposed new wages structure should be abandoned. The AEDLC, UWU and ACTU noted that it was "*an undesirable state of affairs*" that ADE employers have continued to be able to apply wage tools under the SES Award that were found by the Commission not to comply with the FW Act.

[160] In their joint submissions of 20 May 2022 the AEDLC, UWU and ACTU addressed the three topics identified in the December 2019 decision in turn. As to the clarity and workability of the proposed new wages structure generally, it was submitted that the Report demonstrates there is uncertainty on the part of ADE staff who would be responsible for classifying employees in Grades A and B. The AEDLC, UWU and ACTU submitted that we should reconsider the conclusion that ADEs operate in a different paradigm and tailor roles such that they are capable of being performed by particular members of their workforce, because this conclusion was not supported by the Report. It was submitted that the evidence of Walter Grzentic, Donald Greer, Robyn Smith, Sharon Dulac and Kate Last supported the contention that ADEs operated on a commercial basis in that they complete whatever work is required to be done without tailoring roles for individual workers.

[161] As to workability the AEDLC, UWU and ACTU submitted that the ADE industry is characterised by a considerable diversity of work as demonstrated by the range of indicia currently contained in Schedule B to the SES Award. In light of this, for a classification scheme in the SES Award to be workable, it was submitted that it would have to be "*one that establishes a safety net that produces consistent classification (and wage) outcomes across the range of employers and employments to which those classifications will apply*".[135] Where an employee fell within multiple classifications because of task variation, it was submitted that the proposed Grades A and B classifications could not meet the modern awards objective in s 134 of the FW Act. It was further submitted that the risk of inconsistency was elevated by the proposed intrusion of individual evaluations of disability through the gateway requirements of the proposed new wages structure and for subjective factors such as competency skills to bear upon the classification of work. The AEDLC, UWU and ACTU described such competency factors as "*irrelevant*" and urged caution in embracing any classification rules that contain requirements for evaluation of work value of another person by reason of disability.

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[135] AEDLC and unions submission, 20 May 2022 at [12]

[162] The AEDLC, UWU and ACTU submitted that award wage classifications should not be concerned with the purpose for which an employer employs its workers. Instead, it is a matter for objective evaluation having regard to the work actually performed. It was submitted that the paradigm adopted by us in this regard appears to attribute probative weight to the employer's purpose, but this was not a pathway which was available. Even if Grades A and B could be included in the SES Award, it was submitted that we could not be satisfied that this would ensure a fair and relevant safety net or minimum wage because the risk of inconsistency in applying the classifications is too great.

[163] As to clarity, the AEDLC, UWU and ACTU submitted that neither Grade A nor B distinguishes the classifications on the basis of skill or as an aspect of the work value reasons set out in section 156(4) of the FW Act. Instead, the distinction is based on the number of required tasks or sub-tasks, which are left to the employer to determine despite the potential consequences this might have for an employee's pay. It was submitted that this creates a potential for wage injustice to be perpetuated at the expense of supported employees. It was further submitted that in an industry where there is significant diversity in work, there is no clear justification for insisting on having three sequential steps or sub-tasks as the dividing line between Grades A and B. The AEDLC, UWUW and ACTU submitted that the Commission has insufficient information about the nature of work across the ADE industry in Australia to devise new work classifications, and that we should not authorise individual assessments to "*intrude*" into this space.

[164] As to quantum, the AEDLC, UWU and ACTU submitted that Grades A and B as framed would not achieve the object of minimum wages instruments to lift the floor of wages. Similarly, it was submitted that Grades A and B terms were unfair for two reasons. First, workers with a disability working in ADEs who fall within Grades A or B classifications would not have a wage which is fixed relative to other award rates and would be subject to a wage classification that takes into account individual capacity and output and, second, Grades A and B authorise lower minimum wages in all circumstances for supported employees, including where a non-disabled employee performs the same work as the supported employee. It was submitted that unless properly fixed, the absence of a uniform relativity linkage with other award rates may damage the Commission's ability to apply the benefit of annual wage reviews to supported employees within Grades A and B classifications.

[165] The AEDLC, UWU and ACTU proposed an alternative Grade 1 approach whereby the Full Bench concludes that:

- The gateway requirements proposed in clause B.1.1 of the proposed new wages structure are unstable and do not have a sufficient factual basis in the work required and performed in ADEs to be sustained.

- The work descriptors for Grades A and B are too narrow and do not distinguish between different types of work in a way that would lead to uniformity across the ADE industry as a whole.

- The proposed removal of indicia from Grades 1 to 7 would render the classification exercise more opaque but the AEDLC, UWU and ACTU support the alignments for each of the Grades where they are proposed.

- The approach contained in the December 2019 decision would not result in a minimum wage for employees with a disability according to the settled meaning of that term.

[166] The AEDLC, UWU and ACTU submitted that there is no need for new classifications at all and referred to a 2010 decision in support of this.[136] It was submitted that "*minimal*" changes would be required to Grade 1 and that our approach to Grade 1 is to be preferred for a number of reasons including that it carries a lower risk of under-classification, it does not depart from the present wage setting scheme which involves classification of work, classification at Grade 1 for more than three months still requires the worker to be trained to help them to progress through the classification structure, classification responds to the skills the employee can demonstrate, it would fix a minimum wage for employees with a disability in a manner consistent with the settlement meaning of "minimum wages", and it is simple and stable. It was noted that the Report did not identify any "*fundamental flaw*" with the SWS and that 85% of ADE staff and independent assessors considered the SWS was consistently used.

[167] In relation to operative date, the AEDLC, UWU and ACTU submitted that we should set a short operative date for any variation to the SES Award because there is "*no justification*" to continue to allow ADE employers to use the wage tools that have been found not to meet FW Act standards. A specific date was not proposed in the submissions.

[168] In joint reply submissions filed on 22 July 2022 the AEDLC, UWU and ACTU rejected the contention that the December 2019 decision expresses a concluded view as to the merits of the proposed new wages structure. It was submitted that we should revisit a number of the conclusions in the December 2019 decision, in particular:

- As to paragraph [246], there was no basis to distinguish between employment in ADEs and open employment on the basis that ADE employment caters for more severely disabled persons. In their submission, it is not clear what the phrase "*more severely*" means in this context because a person will either meet the eligibility criteria for the DSP or they will not. If they do then they will be an "employee with a disability" for all purposes, regardless of the setting in which they are employed. It was submitted that there was "*not a safe basis*" for us to conclude that such a distinction exists or that it characterises ADE employment throughout Australia.

- We should revisit the observations contrasting the general labour market with ADE employment contained in paragraphs [247]-[248] of the December 2019 decision because they are at odds with the evidence already before the Commission, evidence of the AEDLC, UWU and ACTU witnesses and the Report. It was submitted that even if there were a basis to conclude that all ADEs are motivated to employ in the manner suggested in [247] of the December 2019 decision, it would not deny the need

[136] [2010] FWAFB 1980 at [18]-[19]

for minimum rates of pay in the SES Award to meet the modern awards objective and minimum wages objective.

- The proposition in paragraph [249] of the December 2019 decision that the low productivity nature of ADEs cannot be sustained financially by commercial revenue alone should be revisited because there was evidence that some ADEs pay full award wages and were financially successful.

- The conclusion expressed in the opening sentence of [252] of the December 2019 decision should be revisited because evidence that some ADEs are using the SWS renders the conclusion unstable.

- The finding in paragraph [253] of the December 2019 decision that "consideration of the appropriate minimum wage setting mechanism for employees with disability in ADEs must necessarily take into account the fact that such employees are invariably also in receipt of the DSP" was erroneous because it had regard to a welfare measure that has no bearing on the determination of wages for work performed.

[169] The AEDLC, UWU and ACTU further submitted that the notion of the "*so-called 'deconstructed job'*" continues to remain hypothetical. It was submitted that without "*concrete ADE examples*" to illustrate deconstruction from a whole job, the Full Bench cannot know what a tailored position looks like across the supported employment sector, to what extent such jobs are characteristic of ADE employment generally, or the features of such a job when compared with the idea of a whole job. Further, what constitutes a "job" for an ADE employee consists of work their employer wants completed to fulfil contracts it holds which, it was submitted, is significant because we are required to establish a general safety net standard for all SES Award-covered employment. Assuming a state of affairs exists across the supported employment sector in relation to this question was difficult, it was submitted, without established facts probative of the generality of that state of affairs.

[170] The AEDLC, UWU and ACTU also made submissions in relation to historical wage fixation, and submitted that the overview provided at [314] of the December 2019 decision should be viewed against contemporary developments. These developments included that hybrid forms of wage determination may no longer be valid (as was seen with the BSWAT in *Nojin*) and that applying a work value lens may have limitations when it comes to the lower end of the value range.

[171] It was submitted that the Full Bench's observation that the SWS was not designed for use in ADEs should be understood in light of the proposal to modify the SWS, which is demonstrated by the Report has the potential to be applied appropriately and consistently across the sector. Further, the SS Act has "*intervened*" by recognising the SWS as a conditional element of eligibility without assuming it is only employed in non-ADE employment.

[172] In relation to paragraph [357] of the December 2019 decision, the AEDLC, UWU and ACTU again submitted that the Full Bench's observations — saliently, that the significant increase in wages costs when ADEs moved from other wage assessment tools to the SWS was not merely "the correction of a wage injustice" because the SWS' assessment "takes no account of the value of the work being assessed" and is therefore not an appropriate tool for the fixation

of ADE wages — should be reconsidered. They made the following points about the Full Bench's characterisation of the SWS as "inherently biased towards an inappropriate escalation of pay rates in respect of the performance of work of the lowest value":

- the classification structure the subject of the Report was a modified SWS, and the Report did not identify any such bias;

- it was incorrect for the Full Bench to say that the SWS does not take work value into account, because its purpose is to assess a given supported employee's output in respect of work the employer has already valued;

- the SWS is part of the scheme set out in Special national minimum wage 2 for determining the wages of award-free employees with a disability regardless of the value of the work they perform and even so, those wages are higher than those set for Grades A and B for the purpose of the ARTD Trial; and

- the Full Bench should not measure the increase in wages arising from application of the SWS starting from a base that it itself has found "*fall[s] below FW Act standards*", and in any case, any such increase is a "*desirable and appropriate correction to… wage injustice*".

[173] The AEDLC, UWU and ACTU submitted that the ABI and NDS' submissions about financial impact on ADEs should be viewed in context, particularly given that this was qualified by the authors of the Report. It was submitted that some ADEs involved in the ARTD Trial were already using "*substandard wages tools*" and should not be further excused from paying what the Commission considers a properly valued minimum amount for work. Further, for the five ADEs in the ARTD Trial that used the SWS already, the proposed new wages structure did not increase wage costs for those ADEs, which negates the position put forward by ABI and NDS. Finally, the AEDLC, UWU and ACTU submitted that it is not part of the Commission's role to protect ADE employers from paying a properly fixed minimum rate for work.

[174] In relation to Attachment A to the ABI and NDS submissions which proposed an alternative classification structure for Grades A and B, the AEDLC, UWU and ACTU submitted that it was another example of seeking "*special protection from the FWC*" for their clients, and was not supported by the AEDLC, UWU and ACTU. It was submitted that the ABI and NDS' proposed structure may be *ultra vires* if it did not engage with all criteria relevant to qualify for the DSP contained in s 94(1) of the SS Act, and therefore not align with the phrase "employee with a disability". The AEDLC, UWU and ACTU further submitted that by adding further categories within Grades A and B, ABI and NDS had further exacerbated the difficulty in distinguishing between when the relevant grades would apply that was identified in the Report.

[175] As to operative date, the AEDLC, UWU and ACTU rejected ABI and NDS' proposal for a transitional period of eight years on the basis that the ARTD Trial has already taken place, and the proposed new wages structure has been "*on the cards*" since December 2019. It was submitted that there should not be any further delay to correcting "*sub-standard minimum wages*".

DSS

[176] In submissions dated 22 April 2022, the DSS submitted that its policy responsibilities in respect of employment for people with disabilities and the SWS as well as its management role of the National Panel of Assessors (NPA), which conducts SWS assessments, meant it was in a position to inform the Commission about the potential implications arising from proposed changes to the SES Award. The DSS stated that the government had announced $67 million in funding to support a transition to a new wage assessment process, with further policy advice to be determined once the Commission's final decision is issued and industry consultation had occurred.

[177] The DSS submitted that it currently funds SWS assessments via the NPA, and estimated that currently around 20,000 assessments were undertaken each year, comprising approximately 16,000 for workers in ADEs and 4,000 for workers in open employment. It was submitted that NPA assessors undertake approximately 5,200 SWS assessments each year, with around 25% of these (approximately 1,250) taking place in ADE settings and the remaining 4,000 taking place in open employment settings at a cost of approximately $3 million per year. The DSS further submitted that about 14,750 workers in ADEs are currently assessed using one of the other wage assessment tools in the SES Award. These assessments are not funded by the DSS.

[178] The DSS submitted that if the approach proposed in the December 2019 decision were implemented and NPA assessors were required to complete approximately 20,000 assessments each year the cost to the DSS would increase to approximately $12 million per year. The DSS submitted that demand for external assessments would increase by 1,280% of current ADE levels per year. It was submitted that the NPA workforce is already strained, so changes would be required to be made to the program in order to deliver increased services pursuant to a changed approach.

[179] In response to the Report's recommendation that increased funding be provided to ADEs to absorb wage increases, the DSS submitted that it could not provide any indication of how transitioning may be supported because this would pre-empt a decision of government. The DSS accepted that a period of a number of years would likely be required in order to transition to any new process under the SES Award. As to the weight that we should place on the Report, the DSS submitted that:

> "a. The Trial was commissioned to understand what:
>
> i. is needed to ensure consistent application of the new wage assessment structure;
> ii. is needed to ensure a successful transition to the new wage assessment structure;
> iii. impact the new wage assessment structure will have on the financial viability of ADEs; and
> iv. impact the new wage assessment structure will have on worker earnings and hours and the interaction with the Disability Support Pension (DSP).

b. It was not anticipated the Trial Report would address matters beyond the scope for which it was commissioned.

c. The Trial design was produced in consultation with a steering committee which contained representatives from all the employee groups (specifically the ACTU, UWU, AED, HSU and Our Voice), employer groups (Australian Business Industrial, NSW Business Chamber, Greenacres Disability Services and National Disability Services), the FWC and the Department;

d. The Trial Report sets out, in detail at page 8, the limitations of its evaluation; and

e. Ultimately trials (of any nature) are necessarily, constrained by their scope, and cannot anticipate, address or assess all possible variables and eventualities."[137]

[180] In further submissions dated 3 August 2022 in response to directions issued on 27 July 2022, the DSS submitted that it did not assume an ongoing annual requirement to conduct SWS assessments, however noted that should the approach proposed in the December 2019 decision be implemented, it would lead to increased assessments in the first two years of operation. This assumption was made on the basis that all employees employed under the SES Award would need new assessments if the wage assessment tools were changed, even if they had previously been assessed using the SWS. Specifically, DSS submitted that 16,000 supported employees would be required to undertake initial assessments under the proposed new wages structure followed by a review 12 months later. These assessments would be in addition to the average of 4,000 assessments undertaken in open employment, reaching a total of approximately 20,000. The DSS estimated that this figure would be likely to decrease after the first two years.

CONSIDERATION

Jurisdictional issues raised by the AEDLC

[181] The AEDLC's jurisdictional submissions have an elusive and Escher-like quality which makes it difficult to deal with them as a coherent whole. They also blend issues of jurisdiction, power and the appropriate exercise of the discretion in a way which is difficult to disentangle. We consider the best way to approach these submissions is to identify what we consider to be the proper construction of the contested provisions of the FW Act and then to respond to what we perceive to be the main propositions advanced by the AEDLC.

[182] The setting of minimum award rates of pay for "*employees with a disability*" is dealt with in a parallel way by ss 139(1)(a), 153(3)(b) and 284(1) of the FW Act. First, s 139(1) prescribes, by reference to subject matter, the terms which may be included in modern awards. In relation to the subject matter of minimum wages, s 139(1) provides:

139 Terms that may be included in modern awards — general

(1) A modern award may include terms about any of the following matters:

[137] DSS submission, 22 April 2022 at [17]

> (a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:
>
> (i) skill-based classifications and career structures; and
>
> (ii) incentive-based payments, piece rates and bonuses;

[183] Section 139(1)(a), which received little attention in the AEDLC's submissions, plainly empowers the Commission to set minimum wages generally in respect of employees covered by modern awards, and also to set specific wage rates for three categories of employees: junior employees, employees with a disability, and trainees. That the Commission is empowered to include in modern awards terms which prescribe specific minimum wage rates for employees with a disability is, we consider, the premise upon which the constructional analysis must proceed. Paragraphs (b)-(j) of s 139(1) prescribe a range of subject matters other than minimum wages which may be the subject of award terms, but none of these paragraphs authorises or refers to special provisions for junior employees, employees with a disability or trainees in respect of the specified subject matters.

[184] The exercise of the power in s 139(1)(a) is constrained by s 138, which provides:

> **138 Achieving the modern awards objective**
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

[185] The modern awards objective is found in s 134(1) of the FW Act, and requires the Commission to ensure that modern awards, together with the National Employment Standards (prescribed in Pt 2-2 of the FW Act) provide "*a fair and relevant minimum safety net of terms and conditions*" taking into account the matters specified in paragraphs (a)-(h) of the subsection. In giving effect to the modern awards objective, the Commission is required to perform an evaluative function taking into account the matters in paragraphs (a)-(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.[138]

[186] The minimum wages objective in s 284(1) of the FW Act is, for the purpose of s 138, "*applicable*" to any exercise of power under s 139(1). This is made clear by s 284(2)(b), which renders the minimum wages objective applicable to the Commission's functions or powers under Pt 2-3 (in which s 139(1) is located) "*so far as they relate to setting, varying or revoking modern award minimum wages*". For the purpose of this provision, s 284(3) then defines "*modern award minimum wages*" as "*the rates of minimum wages in modern awards*" and specifies that this includes "*wage rates for junior employees, employees to whom training arrangements apply and employees with a disability*" as well as casual loadings and piece rates. This confirms that the establishment of specific wage rates for employees with a disability is part and parcel of the FW Act's conception of minimum wages in modern awards.

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[138] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [49]

[187] Section 284(1) provides:

> **284 The minimum wages objective**
>
> *What is the minimum wages objective?*
>
> (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
>
> (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
>
> (b) promoting social inclusion through increased workforce participation; and
>
> (c) relative living standards and the needs of the low paid; and
>
> (d) the principle of equal remuneration for work of equal or comparable value; and
>
> (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.
>
> This is the ***minimum wages objective***.

[188] Relevant to this matter, it is of significance that, in respect of the obligation imposed by s 284(1) on the Commission to establish and maintain a safety net of fair minimum wages, the Commission is required by paragraph (e) of the subsection to take into account the provision of a "*comprehensive range of fair minimum wages*" to junior employees, trainees and employees with a disability. Thus, in respect of employees with a disability, the Commission is both *empowered* by s 139(1)(a) of the FW Act to set minimum wages which specifically apply to them and *obliged* by s 284(1)(e) to consider the provision of fair minimum wages specifically for them in establishing and maintaining the minimum wage safety net.

[189] In summary therefore, s 139(1)(a) empowers the Commission to, among other things, make modern award terms setting minimum wage rates specifically for employees with a disability, and ss 138, 134(1) and 284(1) identify the constraints and obligations which apply, and the matters which must be considered, in exercising that power. It is important to note at this point that the AEDLC does not attempt to locate the constraint which it contends exists upon the Commission's power to set minimum award wages for employees with a disability in the provisions of the FW Act which prescribe that power; instead it seeks to locate the constraint in s 153, to which we will return shortly.

[190] It is apposite to make some observations about the application of national minimum wage orders to employees with a disability in the scheme for minimum wages established by the FW Act. The Commission is obliged by s 285(2)(c) to make a national minimum wage order arising from the annual wage review it is required to conduct under s 285(1). However, the

significance of national minimum wage orders in the statutory scheme is limited, since under s 294 the provisions of such orders only apply to award/agreement free employees, and for that reason such orders have no application or direct relevance to this matter concerning employees covered by the SES Award. However, the provisions governing the making of national minimum wage orders have some indirect contextual relevance. In particular, s 294(1) provides:

> **294 Content of national minimum wage order — main provisions**
>
> *Setting minimum wages and the casual loading*
>
> (1) A national minimum wage order:
>
> (a) must set the national minimum wage; and
>
> (b) must set special national minimum wages for all award/agreement free employees in the following classes:
>
> (i) junior employees;
>
> (ii) employees to whom training arrangements apply;
>
> (iii) employees with a disability; and
>
> (c) must set the casual loading for award/agreement free employees.

[191] Section 294(1)(b) thus *requires* the Commission to set, in a national minimum wage order, "*special*" NMWs for junior employees, trainees and employees with a disability who are award/agreement-free. These are, of course, categories of employees parallel to those referred to in ss 139(1)(a), 284(1)(e) and 284(3) of the FW Act, and confirm the statutory intention that employees in these categories are to be treated as distinct and separate for the purpose of setting minimum wages. The minimum wages objective in s 284(1) applies to the setting of special minimum wages pursuant to s 294(1)(b), but there is otherwise no constraint upon the Commission's discretion to set the amount of special national minimum wages in discharging its duty under s 294(1)(b). The AEDLC did not contend that any such constraint exists.

[192] We now turn to s 153 of the FW Act. This section is located in Subdiv D, *Terms that must not be included in modern awards*, of Div 3 of Pt 2-3. Section 153(1) provides:

> **153 Terms that are discriminatory**
>
> *Discriminatory terms must not be included*
>
> (1) A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

[193] Although, for reasons stated below, s 153(1) is not determinative of the outcome of this matter, the text and context of s 153(1) and the authorities concerning or relevant to the provision indicate that it should be construed as follows. First, s 153(1) is concerned with *award terms* which discriminate against an employee on proscribed grounds, and its function is to *prohibit* the Commission from including such terms in a modern award. This indicates that the provision is concerned with potential award terms which textually or as a matter of legal effect discriminate in the proscribed way. It is not concerned with the conduct of any person nor the practical effects of facially or legally-neutral terms in their operation (since such terms are not permitted to take operation). It is also not subject to any reasonableness exception. Therefore, s 153(1) does not appear to encompass the concept of indirect discrimination to which anti-discrimination statutes in other contexts have given effect.[139] Second, the expression "*discriminate against*" connotes differential treatment between employees with adverse consequences.[140] Thus, in summary, s 153(1) prohibits the inclusion in a modern award of any term which, according to its text or legal effect, treats one employee differently from another with adverse consequences on the basis of any proscribed characteristic of the employee, including (relevantly) physical or mental disability.

[194] Subsections 153(2) and (3) exclude specified types of award terms from the operation of the prohibition in s 153(1). As such, they must be construed on the basis that they "save" or "carve out" certain award provisions which are otherwise discriminatory in the way prohibited by s 153(1). The relevant question which arises here in respect of s 153(3)(b) is the extent or scope of the "saving" or "carve out".

[195] As earlier observed, the three categories of excepted award terms in s 153(3) closely parallel the three categories of employees for whom specific minimum wage award terms may be established under s 139(1)(a) in accordance with the minimum wages objective in s 284(1). That is plainly a matter of contextual significance which is indicative of the purpose of s 153(3), namely to ensure that the prohibition in s 153(1) does not operate to prevent what s 139(1)(a) and s 284(1) empower to be done.

[196] The text of s 153(3) confirms this approach. On the ordinary meaning of the words used, the chapeau provides that a modern award term does not discriminate against an employee (and thus does not offend the prohibition in s 153(1)) if it "*merely*" provides for minimum wages for any of the three categories of employees specified in paragraphs (a) to (c). As submitted by ABI, NDS and the DSS, "*merely*" should be given its ordinary meaning, namely "*only as specified, and nothing more*".[141] Thus, an award term which does no more than provide for minimum wages for employees in any of the three specified categories is not discriminatory and does not offend s 153(3), but the exception will not apply if the term provides for something else in addition to minimum wages – for example, if (relevantly) it provides for differentiated

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[139] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480, 205 FCR 227, 219 IR 382 at [52]-[57]; *Attorney General and Minister for Industrial Relations v Metropolitan Fire and Emergency Services Board; United Firefighters' Union of Australia* [2019] FWCFB 6255, 291 IR 1 at [68]-[72]; *Australian Building and Construction Commissioner v McConnell Dowell Constructors (Aust) Pty Ltd* [2012] FCAFC 93, 203 FCR 345, 222 IR 211 at [109].

[140] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480, 205 FCR 227, 219 IR 382 at [52]-[53]; *Australian Building and Construction Commissioner v McConnell Dowell Constructors (Aust) Pty Ltd* [2012] FCAFC 93, 203 FCR 345. at [25]-[27], [69], [111].

[141] Macquarie Online Dictionary

allowances as well as minimum wages for employees with a disability. It would also appear to us that the exception would not protect a term which provides for minimum wages but does so on a basis which is not confined only to one of the three categories of employee in paragraphs (a) to (c) – for example an award term which sets differentiated minimum wages for employees with a disability of a specific sex.

[197] Paragraphs (a) to (c) of s 153(3) all permit the relevant award minimum wages term to be for "*all*" employees in the specified category, or "*a class*" of the specified category. We consider, again consistent with the submissions of ABI, NDS and the DSS, that "*class*" should be given its relevant ordinary meaning, namely "*a number of persons … regarded as forming one group through the possession of similar qualities; a kind; sort*" or "*any division of persons ... according to rank or grade*". Thus, in respect of employees with a disability, any category of employees with a disability who are of a common kind or quality or rank relating to their employment is covered by s 153(3)(b).

[198] The interpretation of s 153(3) which we prefer is consistent with the ordinary meaning of the terms used, and renders its operation consistent with the parallel terms of ss 139(1)(a) and 284(1) of the FW Act. For relevant purposes, the effect of s 153(3)(b) is that an award term which provides for minimum wages for employees with a disability, or a class of them, and does no more than that, is not prohibited by s 153(1). This straightforward interpretation is, we consider, confirmed by the Explanatory Memorandum for the *Fair Work Bill 2008* which, at paragraph [594], simply states:

> "Subclause 153(3) provides that a term of a modern award does not discriminate against an employee because the term provides a minimum wage for all (or a class of) junior employees, employees with a disability or employees to whom training arrangements apply."

[199] Such an award term must also, of course, be made in compliance with the other applicable requirements of the FW Act, including that it must be necessary to achieve the modern awards objective in s 134(1) and the minimum wages objective in s 284(1) and, to the extent that the term involves a variation to minimum wages as part of the conduct of the 4 yearly review, it must be justified by work value reasons in accordance with s 156(3).[142]

[200] The AEDLC's submission that s 153(3)(b) must be read in a way which confines its scope to minimum wages for employees with a disability based on their "*productive capacity*" finds no support in the text of the FW Act. Its submission, which seeks to give effect to its *idée fixe* that the SWS constitutes the only permissible way for the Commission to set minimum wages for employees with a disability, is founded upon the proposition that s 153(3)(b) must be interpreted by reference to, first, s 94 of the SS Act and, second, s 47 of the DD Act.

[201] The former proposition is founded upon the definition in s 12 of the FW Act of the expression "*employee with a disability*", which is as follows:

[142] Section 156 of the FW Act has been repealed; however, pursuant to Schedule 4 to the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth) it remains in force with respect to 4 yearly review matters which had not been finalised on 1 January 2018.

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

[202] The defined expression "*employee with a disability*" is used in all the provisions of the FW Act to which we have referred above (ss 139(1)(a), 153(3)(b), 284(1)(e) and (3)(a), and 294(1)(b)(iii), (3)(c) and (4)(c)). We see no logical reason to regard the construction of any of these provisions as being determined or guided by reference to the qualifying criteria for the DSP established by ss 94 and 95 of the SS Act merely because they proceed on the premise that the class of employees with which the provisions are concerned consists of persons who meet those qualifying criteria (or would do but for the criteria relating to Australian residency in ss 94(1)(e) or 95(1)(c)). The subject matters and purpose of the provisions are distinct: the relevant provisions of the FW Act are concerned with the establishment of minimum wages for all, or classes of, employees with a disability, whereas ss 94 and 95 of the SS Act are concerned with the circumstances in which individual persons (whether in any form of employment or not) may become entitled to a government social welfare benefit. It is inherently unlikely therefore that it was intended that ss 94 or 95 of the SS Act would bear upon the proper meaning of the relevant provisions of the FW Act apart from the scope of the definition of "*employee with a disability*" in s 12. Indeed, having regard to the fact that ss 94 and 95 of the SS Act long predate the enactment of the FW Act and have been frequently amended, including on a number of occasions since the FW Act came into effect, the effect of the AEDLC's approach would be to give the relevant provisions an ambulatory meaning. This cannot be accepted; the better understanding of the relevant provisions of the FW Act is that they take persons qualifying for the DSP as they find them.

[203] In any event, nothing in s 94 of the SS Act supports the AEDLC's approach. Other than in a case of permanent blindness to which s 95 applies, a person must satisfy the following requirements in s 94(1)(a) to (c) in order to qualify for the DSP:

(1) section 94(1)(a) requires that the person have a physical, intellectual or psychiatric impairment;

(2) section 94(1)(b) requires that the person's impairment be of 20 points or more under the Impairment Tables (as determined by an instrument made under s 26(1) of the SS Act); and

(3) section 94(1)(c) requires that one of the following applies:

  (a) the person has a "*continuing inability to work*" (s 94(1)(c)(i)); or

  (b) the Secretary of the DSS is satisfied that the person is participating in the SWS (s 94(1)(c)(ii)).

[204] The AEDLC submissions focus on the alternative criteria in s 94(1)(c) of the SS Act as demonstrative of the proposition that qualification for the DSP is founded on the notion of work capacity. That may be accepted only in a very qualified way. The criteria in ss 94(1)(a) and (b) are concerned with the existence of an impairment to the requisite degree and do not concern work capacity as such (although the application of the Impairment Tables may require the

assessment of a person's functionality in various respects). Section 94(1)(c) may broadly be characterised as related to work capacity, and the second alternative criterion concerning participation in the SWS infers that the person's productive capacity in respect of particular tasks has been or will be measured. However, the first alternative criterion (in s 94(1)(c)(i)) may be satisfied without any assessment of the person's work capacity in the way postulated by the AEDLC. Section 94(2) provides that a person will have a "*continuing inability to work*" because of an impairment if, in summary, the Secretary of the DSS is satisfied that the person, if not subject to a severe impairment, is actively participating in a Commonwealth-funded "*program of support*", and in any case, the impairment prevents the person from doing any work independently of a program of support within the next 2 years and either prevents the person from undertaking a training activity in the next 2 years or that undertaking a training activity would not be likely to enable the person to work independently of a program of support. As explained in the DSS's submissions, which we accept:

- working in an ADE constitutes active participation in a program of support;[143]

- any impaired person working in an ADE would generally satisfy the requirement that they be unable to work independently of a program of support;[144] and

- work in an ADE does not constitute "*work*" for the purpose of s 94 of the SS Act.[145]

[205] Thus the existence of the requisite impairment and employment in an ADE are likely to be sufficient for a person to qualify for the DSP, without any assessment of the work capacity being necessarily required. It is therefore not possible to say that the DSP qualification criteria in s 94 of the SS Act are premised on the relevant person's assessed "*productive capacity*", nor that the AEDLC's proposed construction of s 153(3)(b) of the FW Act whereby it is confined to minimum wages set on the basis of assessed "*productive capacity*" produces any "*alignment*" in meaning or harmony with s 94 of the SS Act.

[206] The AEDLC's second proposition involves, as we understand it, the following course of logic. Section 150 of the FW Act requires that a modern award not include an "*objectionable term*". "*Objectionable term*" is defined in s 12 to mean, relevantly, one that requires or permits (including in effect) a contravention of Pt 3-1 of the FW Act. Section 351(1) (which is located in Pt 3-1) provides that an employer must not take "*adverse action*" against an employee or prospective employee because of, relevantly, the person's physical or mental disability. Under s 342, "*adverse action*" includes injury in employment, prejudicial alteration of the employee's position and discrimination between the employee and other employees. Section 351(2)(a) provides that s 351(1) does not apply to any action that is not unlawful under any "*anti-discrimination law*" in force in the place where the action is taken. Section 351(3) specifies the laws which are "*anti-discrimination laws*" for the purpose of s 351(2)(a), and this relevantly includes the DD Act. Section 47(1)(c) of the DD Act provides, relevantly, that anything done

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[143] By reason of the *Social Security (Active Participation for Disability Support Pension) Determination 2014* made pursuant to ss 94(3C) and (3E) of the SS Act.

[144] See [1.1.I.95] of the *Social Security Guide* issued by the DSS to guide the administration of the SS Act.

[145] *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Harris* [2010] FCA 360, 218 FCR 274, 114 ALD 560

by a person is not unlawful under the DD Act if it is in direct compliance with a fair work instrument within the meaning of the FW Act (which includes a modern award) that has specific provisions relating to the payment of rates of salary or wages to persons, in circumstances where, if the persons were not in receipt of the salary or wages, they would be eligible for the DSP, and the salary or wages are determined by reference to the capacity of the person. The "*capacity*" of the person refers to their productive capacity. Any award term which sets minimum wages for employees with a disability based on other than their productive capacity (which may only be measured, in the AEDLC's view, by the SWS) permits adverse action against employees with a disability in breach of s 351(1) of the FW Act, and is therefore an objectionable term under s 150 of the FW Act. Such a provision is not saved under s 351(2)(a) because it is not in turn saved under s 47(1)(c) of the DD Act. Section 153(3)(b) of the FW Act must be construed harmoniously with s 150. Therefore s 153(3)(b) should be construed as "*merely*" excluding from the operation of s 153(1) such award minimum wages provisions for employees with a disability which set wages on the basis of the productive capacity (that is, by way of the SWS).

[207] We reject this second proposition. The chain of logic upon which the proposition relies has at least three fatal flaws. *First*, there is no available reading of the text of s 153(3)(b) of the FW Act which would allow it to be read as confined to minimum wage terms for employees with a disability which are based on an assessment of "*productive capacity*". If the legislature had intended that s 153(3)(b) be confined in such a specific way, it would have said so. It is inherently unlikely that the legislature intended s 153(3)(b) to be read down by reference to a provision of a different Act. *Second*, far from harmonising the relevant provisions of the FW Act, the proposed construction of s 153(3)(b) would create radical disharmony between that provision and the other provisions of the FW Act concerning setting minimum wages in modern award terms. The whole concept of wage setting based on the "*productive capacity*" of individual employees is the AEDLC's own construct; it is not an expression used anywhere in the FW Act to describe or limit the Commission's power to set minimum wages in modern award terms. As earlier discussed, award terms generally must constitute a "*fair and relevant*" safety net of terms and conditions taking into account the matters specified in s 134(1); minimum wage award terms specifically must constitute a safety net of "*fair*" minimum wages taking into account the matters in s 284(1); and award minimum wages may only be varied outside of annual wage reviews for "*work value reasons*" (former s 156(3) and current s 157(2)(a)), such reasons being the nature of the work, the level of skill and responsibility involved, and the conditions under which the work is done (former s 156(4) and current s 157(2A)). No reason is apparent why a different conception of minimum wage setting should be read into s 153(3)(b).

[208] *Third*, even assuming that an award term which set wages for employees with a disability other than on the basis of their "*productive capacity*" would require or permit a contravention of s 351(1) of the FW Act on the basis of disability – a matter to which we will return – we do not accept that the exception in s 351(2)(a) is not applicable. Section 47(1) of the DD Act, which is prescribed as an "*anti-discrimination law*" for the purpose of s 351(2)(a) of the FW Act, relevantly provides:

47 Acts done under statutory authority

(1) This Part does not render unlawful anything done by a person in direct compliance with:

. . .

(c) an instrument (an ***industrial instrument***) that is:

(i) a fair work instrument (within the meaning of the *Fair Work Act 2009*); or

. . . ;

to the extent to which the industrial instrument has specific provisions relating to the payment of rates of salary or wages to persons, in circumstances in which:

(iii) if the persons were not in receipt of the salary or wages, they would be eligible for a disability support pension; and

(iv) the salary or wages are determined by reference to the capacity of the person; or

(d) an order, award or determination of a court or tribunal having power to fix minimum wages, to the extent to which the order, award or determination has specific provisions relating to the payment of rates of salary or wages to persons, in circumstances in which:

(i) if the persons were not in receipt of the salary or wages, they would be eligible for a disability support pension; and

(ii) the salary or wages payable to each person are determined by reference to the capacity of that person.

[209] Paragraph (d) of s 47(1) appeared in almost identical terms as s 47(1)(c) of the DD Act as first enacted, and current paragraph (c) was included by the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* consequent upon the enactment of the FW Act. It may be seen that both sub-paragraphs (c)(iv) and (d)(ii) extracted above refer to salaries or wages (set by a specific provision of an award or other relevant instrument) that are determined by reference to the "*capacity*" of the person. There is no reason in our view why "*capacity*" should be read as confined to "*productive capacity*", and no persuasive reason is advanced for this proposition by the AEDLC, notwithstanding that its chain of reasoning depends upon it. There is no case authority which supports the AEDLC's position. On its ordinary meaning, "*capacity*" relevantly means "*power, ability, or possibility of doing something*".[146] Any award wage rate which has been set and applies to persons on the basis of the value of the work which they can and do perform would in our view be a wage rate determined by reference to "*capacity*".

[210] Further, the legislative history tells against the AEDLC's approach whereby "*capacity*" in ss 47(1)(c)(iv) and (d)(ii) of the DD Act compels the use of the SWS in setting award wages

[146] Macquarie Online Dictionary

for employees with a disability under the FW Act. As stated above, the reference to wages set by reference to "*capacity*" has been contained in s 47(1) of the DD Act since its first enactment in 1992. At that time, the SWS had not yet been developed or adopted,[147] so it cannot be regarded as informing the meaning of "*capacity*" in s 47(1)(c) of the DD Act as it then was. The reference to "*capacity*" in s 47(1)(c) is better explained by the provision which at the time of the DD Act's enactment empowered the setting of special award wage rates for employees with a disability (and perhaps other categories of employees) by the Australian Industrial Relations Commission (AIRC). Section 123 of the *Industrial Relations Act 1988* (Cth) then provided:

> 123. Where the Commission, by an award, prescribes a minimum rate of wages, the Commission may also provide:
>
> (a) for the payment of wages at a lower rate to employees who are unable to earn a wage at the minimum rate; and
>
> (b) that the lower rate shall not be paid to an employee unless a particular person or authority has certified that the employee is unable to earn a wage at the minimum rate.

[211] Section 123 empowered the AIRC to prescribe lower award wages for employees with an inability ("*unable*") to earn a wage at the minimum rate, and in this sense employees' capacity became the critical factor in the exercise of the power. We consider it is more likely than not that s 123 of the *Industrial Relations Act 1988* informed the drafting of s 47(1)(c) of the DD Act as enacted.

[212] For completeness, we deal with other contentions advanced by the AEDLC as follows:

(1) Section 161 of the FW Act and s 46PW of the AHRC Act do not inform the proper construction of s 153(3)(b) of the FW Act. Relevantly, s 161(3) of the FW Act requires the Commission, on review, to make a determination varying a modern award so that it does not require a person to do an act that would be unlawful under the DD Act. Having regard to our earlier construction of s 153(3)(b) of the FW Act and s 47(1) of the DD Act, a term of a modern award setting minimum wages for employees with a disability in accordance with ss 138 and 139(1)(a) and (to the extent applicable) former s 156(3) and current s 157(2) does not require any person to do anything unlawful under the DD Act.

(2) Paragraph [148] of the judgment of Buchanan J in *Nojin* is not concerned with, and does not bear upon, the proper construction of s 153(3)(b) of the FW Act or the setting of minimum award wages for employees with a disability under the FW Act.

(3) The expression "*minimum wages*" used in s 153(3)(b) and in other provisions of the FW Act concerning modern award terms simply refers to a rate of wages prescribed by an award which is the lowest wage rate legally permitted to be paid

[147] See the chronology in the December 2019 decision: [2019] FWCFB 8179 at [254]-[274]

by an employer to which the award applies to an employee to whom the relevant wage rate applies. Contentions advanced by the AEDLC concerning what constitutes a properly-set minimum award wage rate do not raise any issue of jurisdiction but are rather merits propositions concerning how we should exercise the power in s 139(1)(a) in respect of employees with a disability under the SES Award.

[213] Having regard to the conclusions stated above concerning the proper construction of s 153(3)(b), we now turn directly to whether s 153 of the FW Act constitutes any jurisdictional impediment to the implementation of the "preferred approach" set out in the December 2019 and March 2020 decisions. We note that the AEDLC's submissions rely in some respects on the specific wording of the draft determination attached to the December 2019 decision and the classification structure attached to the March 2020 decision, but we assume that the AEDLC's jurisdictional objection would apply equally to any variation of the SES Award to include the two main elements of the "preferred approach", namely:

(1) the addition of the two new Grades A and B classifications to apply to employees with a disability who perform a job which accommodates the circumstances of their disability and which does not fall into Grades 1-7, with wage rates set below that of the current Grade 1; and

(2) the capacity to apply the SWS (as modified) to Grades A and B. This is significant because, as discussed later in this decision, we propose to depart in some respects from the earlier drafting of the classification criteria for Grades A and B.

[214] As to the first element of the "preferred approach", we are not persuaded that the variation of the SES Award to include terms establishing Grades A and B would offend s 153(1) of the FW Act, even without regard to s 153(3)(b). As ABI and NDS have submitted, it is not clear on what basis the AEDLC contends that the establishment of Grades A and B would involve differential treatment as between disabled and non-disabled employees. Any employees with a disability who performs a job which falls into Grades 1-7 would be classified at those levels in the same as any non-disabled employee. Grades A and B are drafted to encompass jobs created in ADEs to accommodate the circumstances of employees whose disability does not permit them to perform the duties of positions falling within Grades 1-7, and the duties of positions falling within Grades A and B will patently involve a lower level of duties, skill and responsibility than for Grades 1-7. The proposition that positions with lower work value should *for that reason* have a lower minimum rate of pay has been a core element of the Australian industrial relations system for over a century and does not involve any element of discrimination. Grades A and B are expressed as applicable only to employees with a disability in ADEs because, as was found in the December 2019 decision, they are the only employees in ADEs who perform jobs which would meet the criteria for those grades. There is no evidence, nor any suggestion, that non-disabled employees (either in ADEs or elsewhere) perform jobs of this nature, and so no element of discrimination is involved for that reason. In any event (although we do not propose to do this), any reference to Grades A and B applying only to employees with a disability could be removed such as to render the terms facially neutral and applicable to any employee who performs duties of the requisite nature in ADEs. This would not, of course, alter the practical position that only employees with a disability actually perform positions of this nature.

[215] Alternatively, even if our conclusion concerning whether the first element of the "preferred approach" would offend s 153(1) of the FW Act is incorrect, it falls within the exception in s 153(3)(b), rendering s 153(1) inapplicable. Grades A and B do no more than to provide for minimum wages for those classes of employees with a disability who perform jobs which meet the classification criteria for those grades. No further analysis beyond this conclusion is necessary.

[216] In respect of the second element of the "preferred approach", namely the use of the SWS, it may readily be accepted that the SWS (both in the context of the proposed Grades A and B and its use in relation to award classification) would, but for s 153(3)(b), offend s 153(1) of the FW Act. As discussed in the December 2019 decision, the SWS is used to measure a disabled employee's productivity in respect of a task or tasks which the employee performs as part of their job, as compared to an agreed performance standard concerning what is required to earn the full amount of the relevant award minimum rate of pay. The employee with a disability may then be paid a percentage of the relevant award minimum wage based on a comparison of their measured productivity with the performance standard.

[217] The SWS is not, under the SES Award or any other modern award, applied to non-disabled employees. There is no reason to assume that all non-disabled employees will have the same level of productivity in the performance of a given task or tasks: individual productivity will differ due to differences in intellect, physical strength, dexterity, health, attitude and degree of effort even in the absence of disability. However, award minimum wage terms take no account of this (except in respect of the limited number of awards which provide for piece rates, which does not include the SES Award). The performance standards used in the SWS are not contained in any award of the Commission, and no non-disabled employee is required to demonstrate that they meet a particular performance standard in order to be entitled to the full amount of the relevant award minimum rate of pay. Paying non-disabled employees below an applicable award minimum rate of pay is simply not permitted. Thus, award terms which permit the SWS to be applied to employees with a disability, and allow such employees to be paid less than the applicable award minimum rate, discriminate against them by reason of the fact that they are disabled.

[218] However, we accept that the exception in s 153(3)(b) of the FW Act applies to the SWS, both in the context of the proposed Grades A and B and in relation to award classifications generally. No party positively contended otherwise (beyond ABI's "observations" about the topic). Application of the SWS to an employee results in the identification of a percentage of the relevant award classification minimum wage rate payable to the employee, and this becomes the employee's minimum wage rate under the award. The SWS is applied to an identified class of employees with a disability, namely "*…those who are unable to perform at the required productive capacity because of the effects of a disability…*". This satisfies the requisite elements of s 153(3)(b) as we have earlier construed it.

[219] Accordingly, we conclude that, subject to satisfaction of the requirements of s 138 and, to the extent applicable, ss 156(3) or 157(2) of the FW Act, the proposed Grades A and B terms are authorised by s 139(1)(a) and not prohibited by s 153. For completeness, we also do not consider, having regard to our earlier analysis of s 351 of the FW Act and s 47(1) of the DD

Act, that the proposed terms would constitute objectionable terms prohibited by s 150 of the FW Act. The AEDLC's jurisdictional objections are therefore rejected.

Substantive issues

Should we proceed with Grades A and B?

[220] As earlier outlined, the AEDLC, the ACTU and the UWU submitted that we should abandon the "preferred approach" we set out in the December 2019 decision in respect of Grades A and B, so that the SES Award would simply contain Grades 1-7 and the modified SWS could be applied to these to assess the productivity of employees with a disability. We note at the outset that, in substance, the AEDLC, the ACTU and the UWU have simply reverted to the position they advanced before the December 2019 decision (albeit coupled with a new proposal that employees could indefinitely be classified at Level 1, contrary to the text of the current classification descriptor for that level) in blithe disregard of the fact that this position was rejected in that decision on the basis of a finding that it would not achieve the modern awards objective or the minimum wages objective.[148] Further, they advance that position on the basis of propositions concerning the nature and characteristics of the supported employment sector which are at odds with the four fundamental findings about that sector, based on extensive evidence and not expressed in a way which was in any sense "provisional", contained in the December 2019 decision and summarised in paragraph [2] above. In this sense, the AEDLC, the ACTU and the UWU impermissibly treat this final stage of the proceedings as if it were a *tabula rasa* rather than an exercise involving the assessment of the "preferred approach" in light of the findings and recommendations in the Report and other relevant matters. We do not propose, in response to the submissions made by the AEDLC, the ACTU and the UWU, to engage in any detailed revisitation of matters the subject of findings in the December 2019 decision, but we will deal briefly with a number of the matters raised in their submissions.

[221] *First*, it is submitted that the criteria for the application of Grades A and B are "*informed by the view the Full Bench formed of what they described as the ADE 'paradigm'*" in respect of ADEs creating and tailoring jobs capable of being performed by employees with a disability, and we should re-consider this conclusion because there is no support for it in the Report and there is evidence that contradicts it. This submission is wholly rejected. It seeks to put at nought the extensive evidence referred to in the December 2019 decision which supported the Full Bench's second finding concerning the nature of the ADE sector. There is no purpose in reviewing the entirety of this evidence, which is set out at length in the December 2019 decision, but for illustrative purposes we refer to the Full Bench's discussion of the evidence of Michael Smith, an expert witness called by NDS with 30 years' experience in disability services including the management of an ADE. The Full Bench recorded that Mr Smith gave the following evidence, which explains the fundamentally different nature of ADEs:

> "[204] Mr Smith stated that in his opinion ADEs were functionally, operationally and economically different from typical commercial businesses. He said that where a business employed persons with a disability, that would represent a very small part of the workforce, and would be supported by a specialist external agency funded by the

[148] Ibid at [364]

> Commonwealth government such that it did not constitute an additional cost for the employer. The employee would be undertaking tasks that would otherwise be carried out by a non-disabled person at the full award rate. In contrast a typical ADE essentially functioned as a social justice program. ADEs provided supported employment for people with disabilities who aspired to work but are independently assessed as unlikely to succeed in the open labour market. Mr Smith stated that for over a decade, referrals to ADEs had come from Centrelink on the basis of a job capacity assessment. The workforce of ADEs were predominantly made up of supported employees with lower productivity and higher support needs."

[222] Specifically as to the "tailoring" of jobs, we also refer to the Full Bench's discussion of the evidence of Mr Heath Dickens, the Business Service Operations Manager of Disability Services Australia in the December 2019 decision. Mr Dickens gave this evidence in the context of detailing the potential effects of large wage rises for employees with disability in ADEs:

> "[163] Mr Dickens gave evidence that while DSA mostly matches employees with tasks that align with their productive capacity, this can be challenging. Most jobs that are easily broken down into simpler tasks are those with a smaller profit margin. DSA has had to keep jobs going that barely break even to ensure they can provide tasks for higher support individuals. If DSA were to sustain a large increase in wages costs, it would need to reduce lower margin jobs and seek more complex and higher profit work."

[223] The submissions of the AEDLC, the ACTU and the UWU do not identify any reason as to why the extensive evidence of the above nature, which was the subject of the second fundamental finding in the December 2019 decision, should now be disregarded. The submission that the Report does not support this second finding is misconceived; this was not a matter with which the ARTD Trial was concerned or examined. We reject the submission that any evidence before us contradicted the second finding in the December 2019 decision. The AEDLC, the ACTU and the UWU relied in respect of this on the evidence of Mr Grzentic, Ms Dulac, Ms Smith, Mr Greer, and Ms Last. Mr Grzentic's evidence consisted principally of the expression of broad opinions not supported by any relevant expertise, experience, or factual material, and he did not present as a credible witness. His opinion evidence is rejected. As earlier noted Ms Dulac agreed with paragraph [248] of the December 2019 decision (which details the finding that "ADEs operate in a different paradigm") and gave evidence that ADEs tender for commercial contracts that are suitable to their particular workforce.

[224] Ms Smith gave evidence that, in respect of the ADE operated by Minda at which she is employed, work is assigned to employees with disability based on what needs to be done to meet client needs rather than the individual abilities of the employees. However, at the same time, she gave detailed evidence concerning employees who proved incapable of performing particular jobs and then (sometimes on her recommendation) the employee would be reassigned to a job they were capable of doing. She also referred to a job which consisted simply of supported employees packing six pigs' ears into a bag (with another non-disabled staff member quality-checking this by making sure each bag contained the right number of ears). This is a paradigmatic example of a job created in an ADE to suit the work capacity of employees with disability which would simply not exist in the open labour market. Mr Wallace, the Executive Director of the company which operates Minda (SAGE), gave uncontradicted evidence that SAGE customises and tailors jobs, or parts of jobs, to suit the capability and support

requirements of employees with disability, and that employees are assigned work tasks based on their work capacities and support needs. Mr Greer, who also works at Minda, asserted that in his experience supported employees are not assigned work based on the nature of their disability but rather based on what needs to be done, but at the same time he conceded that new supported employees were skills-assessed before being assigned to a particular team (a process in which he had never been involved), and that (like Ms Smith) he was involved in the reassignment of employees who proved not to have the capacity to perform the task they were assigned. He also described a job involving employees with disability packing a set number of screw caps into a plastic bag, often with the assistance of visual cues and jigs. This is, we consider, yet another paradigmatic example of a job that could only be found in an ADE. Finally, in respect of Ms Last, who was some years ago working at an ADE operated by the Endeavour Foundation, we accept Mr Teed's evidence that the Endeavour Foundation works with each employee with disability to develop a set of tasks they can perform and a level of supervision appropriate for them, and that the tasks developed for Ms Last were (as for all employees) based on safety requirements and the skills and capabilities of the employee.

[225] *Second*, the AEDLC, the ACTU and the UWU contend that there "*was (and is) no evidence*" that ADE employment is to be distinguished from open employment on the basis that the former caters for persons with more severe disability and, in any event, the statutory definition is simply that a person meets the eligibility criteria for the DSP. This submission is rejected. The December 2019 decision is replete with references to evidence describing how ADEs provide employment for persons who, because of the circumstances of their disability and the nature of the support they require, will not be able to obtain open employment. The evidence of Mr Smith quoted in paragraph [221] above is but one example of this. In the current stage of the proceedings, a number of the witnesses employed by Activ gave evidence to the broad effect that they had tried but had been unable to sustain open employment and that only ADE employment was sustainable for them. The proposition that people with a disability are to be treated, for employment purposes, as a homogeneous class because they are the subject of a single statutory definition in s 12 of the FW Act is untenable: it fails to distinguish even at the most basic level between physical and intellectual disability, let alone the various gradations of disability within those two categories. The evidence makes it pellucidly clear that, while some employees are able to transition from supported employment to sustained open employment (as, for example, described in the witness statement of Mr Davis, summarised at paragraphs [101] and [102] above), for others, ADE employment will be the only employment opportunity they will ever have. This demonstrates the legitimacy of the concerns expressed by the Activ witnesses about the pending closure of their ADEs.

[226] *Third*, the AEDLC, the ACTU and the UWU endeavoured to advance a case that ADEs operate as normal commercial enterprises because they endeavour to win commercial contracts and to make profits, and they recruit and utilise their supported employees to meet the work demands arising from their contractual obligations. The implication of this submission is that the payment of below-award wages by ADEs to persons with disability is exploitative and is for the purpose of enhancing profit-making. This is rejected. As was clearly established in the December 2019 decision, ADEs exist for the purpose of providing supported employment to persons with disability. The definition of "*supported employment services*" in the *Disability Services Act 1986* (Cth) (DS Act), by reference to which the coverage of the SES Award operates, makes this clear:

> ***"supported employment services"*** means services to support the paid employment of persons with disabilities, being persons:
>
> (a) for whom competitive employment at or above the relevant award wage is unlikely; and
>
> (b) who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment.

[227] To the extent that ADEs act commercially (by seeking to win contracts and make profits, or at least operate in balance) they do so to further their social objective. As was found in the December 2019 decision, this social objective dictates that ADEs can only undertake certain types of business, and the performance of those contracts which they do obtain must usually be undertaken using a low productivity model due to the need to provide jobs to employees with disability which they are capable of doing. This necessarily has direct implications for the setting of fair and minimum wages for employees with disability in ADEs, having regard to the matters requiring consideration under ss 134(1) and 284(1) of the FW Act (discussed further below). To the extent that the evidence of Mr Grzentic, upon which reliance was placed, asserts otherwise, that evidence is rejected for the reasons earlier stated.

[228] *Fourth*, the AEDLC, the ACTU and the UWU seek to place some significance on the evidence indicating that tailoring of jobs also occurs for employees with disability in open employment. The logical corollary of this, it is submitted, is that there is no basis for a different system of minimum wages rates for employees with disability under the SES Award as compared to awards applying to open employment.

[229] It may be accepted that there is some evidence that job tailoring does occur in open employment. However, we do not consider this to be of any significance in our present task. Because we are only reviewing the wage provisions of the SES Award, the evidence concerning open employment of people with a disability is necessarily limited, and no general findings can be made about the nature of such tailored jobs, the skills required to be exercised or the level of responsibility and supervision. In particular, the evidence does not demonstrate that employees with a disability in open employment perform jobs that do not fall within existing classifications of applicable industry awards, taking into account reasonable adjustments. The position in ADEs is entirely different, as explained at length in the December 2019 decision and above. The jobs described in the evidence of Ms Smith and Mr Greer, referred to above, are clear examples of jobs which do not fit within Level 2 or any other classification in the SES Award.

[230] *Fifth*, it was submitted that Grades A and B incorporate elements of individual assessment of capability because of the "gateway" requirements contained in the proposed clause B.1.1 of Schedule B (see the March 2020 decision). This is incorrect (although, as discussed later, we propose to modify the drafting of those gateway requirements for different reasons). Those requirements are intended to identify a class of jobs to which, consistent with the findings in the December 2019 decision, Grades 1-7 do not apply and which are therefore the subject of separate classifications. The classification criteria for Grades A and B describe the nature of the work and the required skills and responsibilities for positions which fall within those grades, and thus operate by reference solely to work value criteria. They do not require

any assessment to be carried out as to the disability or work capacities of individual employees in order to be applied.

[231] *Sixth*, it was submitted that Grades A and B are discriminatory because the evidence of Ms Smith and Mr Greer disclosed examples of non-disabled persons performing jobs involving the same tasks as those done by persons with a disability, but such non-disabled persons could never be classified in Grades A or B because the grades are only expressed as applicable to employees with a disability. This submission is likewise rejected. It misrepresents the evidence of Ms Smith and Mr Greer, who were describing persons (such as themselves) who engaged in such work as an incident of their responsibility of providing supervision and support to employees with disability, or line leaders who performed such work as part of a production supervision role. Such non-disabled employees were simply not performing the same roles as the employees with disability and, having regard to their responsibilities, could never have been classified in Grades A or B even if they were not confined in their application to employees with a disability.

[232] More broadly, as we have earlier discussed in connection with the AEDLC's jurisdictional objections, we do not consider that the establishment of Grades A and B involves any element of discrimination against employees with a disability. It should be absolutely clear that, if an employee with a disability fills a role which fits within the classification criteria for any of Grades 1-7, they must be classified in one of those grades and cannot be classified in Grades A or B. Grades A or B only apply to positions which do not fall within any of Grades 1-7 because they involve a significantly lesser degree of skill and responsibility and more basic duties. There is no evidence that any non-disabled employee under the SES Award is incapable of performing a Grade 1-7 role, or that they perform or might be required to perform a job to which Grade A or B would, if implemented, apply. Consequently, no element of discrimination arises by reason of Grades A and B being confined to a specified class of employees with a disability.

[233] We turn now to the conclusions of the Report, which we have earlier summarised. The principal matters we draw from the Report are that:

- the Report did not recommend that Grades A and B not be implemented;
- it did not identify any fundamental or conceptual flaw in the design of Grades A and B arising from their implementation during the ARTD Trial;
- the participating employees were successfully able to be classified in Grades A or B, or Grades 1-4, and there is no indication that there was any insuperable difficulty in classifying any employee; and
- the proportion of employees classified in each grade broadly conforms with what might have been expected.

[234] As earlier noted, the Report identified some difficulties amongst the trial participants in understanding and applying the modified Grades 1-7 and the new Grades A and B. In its submissions, the AEDLC endeavoured to weaponise such difficulties in support of its position that Grades A and B should not be implemented at all, but we do not consider such difficulties

to be fundamental in nature or to exceed what one would expect in relation to the implementation of a new wages structure with which an industry has no previous familiarity. We are fortified in that conclusion by the evidence of Mr Christodoulou and Mr Dauncey concerning the ABI Trial. These witnesses characterised the trial implementation of Grades A and B for a representative sample of the supported employees at Greenacres and Knoxbrooke respectively as relatively straightforward without, again, identifying any fundamental difficulty. Neither the Report nor the evidence before us suggested that Grades A and B were inadequate to capture the range of jobs not falling within Grades 1-7 which are performed by employees with a disability.

[235] The difficulties which the Report identified in relation to Grades A and B concerned:

(1) the "gateway" requirements;

(2) circumstances whereby some supported employees appeared to fit within more than one grade or met the conditions some but not all of the time; or

(3) circumstances in which some employees meet the conditions of various grades when their duties varied.

In respect of the first matter, we will deal with this separately below. The second difficulty is not unique to the circumstances of supported employees and may arise from time to time in respect of any classification definitions which describe duties, skills and responsibilities in generic terms. Such difficulties are usually resolved by the application of the principal purpose test enunciated in decisions such as *Carpenter v Corona Manufacturing Pty Ltd*.[149] The principal purpose test goes beyond a mere quantitative assessment of the time spent in carrying out various duties and requires an examination to be made of the nature of the work and the circumstances in which the employee is employed to do the work, with a view to ascertaining the principal purpose for which the employee is employed. The dispute resolution provision in clause 31 of the SES Award may be utilised to resolve any difficulties which may arise in the implementation of the new classification structure and, in addition, supported employees have the protection of clause 32, *Rights at work for supported employees*. The third difficulty may also arise in respect of any classification structure. Short term changes in duties may be accommodated by the existing higher duties provision in clause 15.4 of the SES Award. None of these difficulties poses, in our view, any insuperable difficulty with the implementation of Grades A and B.

[236] We note the finding in the Report that many employees with disability who participated in the ARTD Trial had difficulty in understanding the proposed new wages structure. This is not a surprising finding and, as the Report also found, most such employees did not understand how their wages were currently set either. In the circumstances, we do not consider this to be a reason not to proceed with Grades A and B.

[237] Accordingly, for the above reasons, we propose to proceed with the implementation of Grades A and B. No party advanced any proposal that we should alter the classification descriptors for Grades A and B (as distinct from the ABI Structure, which was advanced and

[149] [2002] AIRC 1562, PR925731

which we deal with below in the context of the use of the SWS) and, therefore, they will remain as proposed in the March 2020 decision.

What rates of pay should be set for Grades A and B?

[238] The findings of the Report concerning the cost to ADEs of implementing the preferred approach, which we have earlier summarised, are troubling. At paragraphs [376] and [377] of the December 2019 decision, the Full Bench made it clear that it did not intend or envisage that the proposed new wages structure would result in a large increase in labour costs, although it recognised that "there will be some increase as a result of the fact that some employees will inevitably become entitled to a higher rate under the new system and no employee is permitted to have their wage rate reduced". The Report has demonstrated that implementation of the Full Bench's preferred approach will indeed cause a significant overall increase in the cost of employing employees with disability, contrary to the Full Bench's intention.

[239] It is not possible to identify what aspects of the Full Bench's preferred approach are the primary drivers of the Report's projected cost escalation, but clearly the proposed hourly rates of $7.00 and $14.00 for Grades A and B respectively must have a significant role. Had there been a consensus proposal advanced by employers for different rates to be set for Grades A and B that would ameliorate the cost impact, we would have given it serious consideration. We effectively invited such a proposal in our statement of 31 January 2022[150] when we identified, as one of the three principal issues arising from the Report requiring consideration, the quantum of the wage rates for Grades A and B.[151] However, no such proposal was forthcoming and, indeed, no serious submission was made that we should not proceed with the wage rates proposed in the December 2019 decision subject to an appropriate transition process. As earlier stated, ABI's alternative proposal for additional grades and wage rates to supplement Grades A and B was advanced only as an alternative to the use of the SWS, and we consider it in that context below. In those circumstances, we will not depart from the rates proposed in the December 2019 decision. However, in respect of those rates and the cost impact of the preferred approach generally, we note the following matters which are likely to have an ameliorative effect:

(1) The rates for Grades A and B of $7.00 and $14.00 per hour respectively, which were proposed almost three years ago, will not be the subject of any adjustment prior to the 2023 annual wage review. This means that the real cost of their implementation will have diminished since the December 2019 decision.

(2) The implementation of the rates will be subject to an extended transitional period, which we discuss below.

(3) We proposed a modification to the "gateway" requirement for Grades 1-7 to avoid any potential for an employee to be wrongly classified in those grades, as distinct from Grades A and B. This is discussed below.

[150] [2022] FWCFB 6

[151] Ibid at [9]

(4) There will be a modification to the proposed absolute minimum hourly rate payable once the SWS is applied, which we discuss in connection with the use of the SWS below.

(5) As adverted to in the December 2019 decision,[152] the establishment of fixed award rates, with productivity to be assessed by use of the SWS, together with the removal of all other assessment tools from the SES Award, will for many ADEs ultimately relieve them of the cost of administering their own assessment tools for the purpose of fixing wage rates.

[240] In addition, although it is likely that there will ultimately be (after the completion of the transition process) an increase in the cost of the disabled workforce of ADEs, there will be no increase to the cost of the non-disabled workforce as a result of the implementation of the preferred approach in the December 2019 decision (including Grades A and B). The Report and the evidence before us suggests that, for ADEs, the wages cost for employees with disability is only a relatively small proportion of total employee expenses and a smaller proportion of total costs. Having regard to the ameliorative matters referred to above, we do not consider that it is likely that the implementation of the preferred approach will, at least by itself, endanger the viability of any ADE. However, as we discuss later, we intend to carefully monitor the implementation of the new wages structure throughout the transitional period to ensure that the viability of ADEs, and the employment of supported employees, is not adversely affected.

Should the "gateway" requirements for Grades A and B be modified?

[241] As earlier indicated, the Report identified that participants in the ARTD Trial had difficulty in interpreting the "gateway" requirements for Grades A and B – that is, the initial criteria for persons to be placed in either classification as set out in the March 2020 decision in the proposed clause B.1.1. This has caused us to reconsider the way in which those provisions have been formulated. The currently proposed provision effectively establishes three criteria:

(1) the classifications only apply to any employee with a disability;

(2) such employees must meet the impairment criteria for receipt of the DSP; and

(3) the employer must have created a position consisting of duties and a level of supervision tailored or adjusted for the circumstances of the employee's disability that does not fall into Grades 1-7.

[242] The Report did not identify any difficulty with the first criterion. As to the second criterion, it is on reflection unnecessary because clause 2 of the SES Award, consistently with s 12 of the FW Act, already defines "*employees with a disability*" as meaning "*a national system employee who qualifies for a disability support pension as set out in sections 94 or 95 of the Social Security Act 1991 (Cth), or who would be so qualified but for paragraph 94(1)(e) or paragraph 95(1)(c) of that Act*". Accordingly, the second criterion may be removed.

[152] [2019] FWCFB 8179 at [377]

[243] The Report appears to have identified a problem concerning the third criterion, but unfortunately provided very little detail about the nature of the problem beyond saying that staff were confused as to its interpretation. Perhaps the only detail in the Report is provided in the following quote of feedback from a "*Trial Coordinator*":

> "Some of it was a little bit of a grey area. It was mainly in terms of 'have you created the job for the employee?' Because, technically, we create the job to fit the employee, not the other way around. So, one was especially hard. For the guy that only works for 50% of the time and the other 50% he does other things, we've sort of moulded that job to suit his requirements, so then it's kind of a B, but then his supervision level is not as high as what the B definition was saying. So, he ended up in Grade 2, because Grade 1's only for your first 3 months."[153]

[244] We can glean little that is useful from this comment. The circumstance described whereby "*we've sort of moulded that job to suit his requirements*" is exactly that captured by the third criterion, so it is not clear what the nature of the problem is. The import of the further comment that, because the relevant employee's supervision level is not as high as Grade B, he "*ended up in Grade 2*" is also unclear, noting that a Grade 2 employee must "*understand and undertake basic quality control/assurance procedures including the ability to recognise basic quality deviations/faults*".[154] The Report also stated that "*[t]here was also one criticism that the gateway requirements do not account for the quality of work and competency of a supported employee performing a task.*"[155] Again, in the way in which it is reported, the import of this criticism is unclear. The classifications are intended to describe the work tasks which the employee is assigned to perform. Presumably the employee will not be assigned those tasks unless they have a basic level of competency to perform them. The employee's level of productivity in performance of those tasks may be addressed by the application of the SWS. We are therefore left unsure as to how this criticism relates to the third criterion, or indeed any aspect, of the "gateway" requirements. In summary, although we do not question the Report's conclusion that there was a degree of confusion as to the third criterion, it is unclear to us what precisely caused relevant ARTD Trial participants to be confused or how the criterion might be altered to address this problem.

[245] The evidence before us has, however, exposed one particular difficulty. The third criterion, as currently drafted, may express the tailoring or adjustment of jobs in an over-individualised way. While, in some cases, jobs are specifically created or modified to suit the circumstances of an individual's disability, in other cases an employee with a disability may be placed in a pre-existing job which has been established to meet the needs of a class of employees with a disability with similar levels of capacity, albeit that individualised adjustments may be made as to the level of support and supervision provided for that job. For example, Mr Greer described a job (to which reference has already been made) at Minda which involved manually packaging components for light switches into small plastic bags. That work has plainly been obtained consistent with Minda's social objective, as Mr Wallace described it, of providing meaningful work for persons with disability, but it is not necessarily a job which is specifically created, tailored or adjusted for any particular individual employee with a disability. Rather, an

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[153] Report page 86

[154] [2020] FWCFB 1704

[155] Report page 87

employee might be placed in such a job because the nature of the job's duties accommodate the assessed skill capacity of the employee having regard to the circumstances of their disability. As the second basal finding in the December 2019 decision made clear, jobs may be created or tailored so that they are "capable of being performed by a particular person with a particular disability *or by persons with a class of disability*",[156] as this would encompass the scenario which applies at Minda described in the evidence of Mr Greer and Mr Wallace. The way the third criterion is currently drafted, it may be read as suggesting that the relevant job necessarily has to be tailored with a specific individual in mind, and it is perhaps this which has caused the confusion referred to in the Report.

[246] Accordingly, our *provisional* view is that we should change the expression of the current third criterion so that it applies in respect of an employee who has been placed by their employer in a position which consists of duties and a level of supervision which accommodate the circumstances of the employee's disability, and which does not fall into Grades 1-7. As an added protection to ensure that no employee is placed in Grades A or B who is capable of performing a job which falls into any of Grades 1-7, we propose to add a further requirement that Grades A and B will only apply to employees with a disability who, because of their disability, do not have the capacity to undertake the duties or exercise the level of skill and responsibility of any position to which Grades 1-7 apply. Thus, the "gateway" requirements for Grades A and B would, on this *provisional* approach, be as follows:

> "Grades A and B of the classification structure in Schedule A - Classifications apply to any employee with a disability who:
>
> (a) because of their disability, does not have the capacity to undertake the duties or exercise the level of skill and responsibility of any position to which Grades 1-7 apply; and
>
> (b) has been placed in a position by their employer which:
>
> (i) consists of duties and a level of supervision which accommodate the circumstances of the employee's disability; and
>
> (ii) does not fall into Grades 1-7."

[247] Following the hearing, on 23 September 2022 ABI advanced a proposal to supplement the "gateway" requirements with the following text, which is drawn from paragraph [248] of the December 2019 decision:

> "For example, a set of work functions which is capable of being performed as a single job by a single person not relevantly affected by disability is broken up into a number of discrete tasks, each of which will be made into a separate job that aligns with the work capacities of a particular person with a disability or by persons with a class of disability.

[156] [2019] FWCFB 8179 at [248], emphasis added

> This is not the normal case of the employer requiring the employee to perform only a very confined task because the employer considers this to be the most efficient way to conduct its business; rather it is a case of the restricted work capacity of the employee with a disability effectively dictating the nature of the job in which the employer may employ them. The person with a disability does not therefore perform the 'whole job' which the relevantly non-disabled person is capable of performing, notwithstanding that the tasks performed by the person with a disability may constitute part of those that might be performed by the relevantly non-disabled person."

[248] We do not consider it is appropriate to insert a provision of this nature into a modern award and, in any event, we are not sure that whether it would dispel or add to any confusion which exists. ABI would, of course, be entitled to refer to paragraph [248] of the December 2019 decision in explaining the intention of the new award provisions to its affiliates and members.

[249] It might be useful, at a later stage, to add a list of indicative duties to Grades A and B if this could be formulated by a broad consensus of the ADE sector. This might be done by way of separate application in the future. However, we do not have the material before us to permit this to be done at the current time.

Should the "gateway" requirement for Grades 1-7 be modified?

[250] In the proposed classification structure set out in the March 2020 decision, the only "gateway" requirement for Grades 1-7 was that the grades would "*apply to employees with or without a disability who undertake the duties and exercise the level of skill and responsibility specified in the classification descriptors*". ABI has proposed that we add a requirement to the effect that employees in Grades 1-7 must, subject to any necessary training, be capable of performing the full range of duties in the classification descriptors. As was stated in the December 2019 decision, award classifications in industry awards such as the SES Award are established on the basis that the classification of an employee at a given grade carries with it a reasonable expectation that the employee is capable of performing work at a certain level of skill and responsibility and, if required and after the appropriate training, can perform any duties at that classification level.[157] The Full Bench described the fact that the classification structure in the SES Award does not make this implicit position explicit as "a defect which requires remedy".[158] The Full Bench regarded the remedy as involving the deletion of the lists of indicative tasks currently to be found in the classification descriptors for Grades 1-5 in order to "to make it clear that the mere performance of one of those tasks in circumstances in relation to job which has been established or tailored to align with a disabled employee's level of capacity is not sufficient or intended to fall within any of these grades".[159] However, we consider that the ABI proposal has merit in order to put the position beyond doubt. This is desirable in circumstances where some of the material in the Report, and some submissions before us, suggest that one of the drivers of the cost escalation found in the Report may have been the potentially erroneous classification of some employees at Grade 2. Accordingly, the

[157] [2019] FWCFB 8179 at [350]

[158] Ibid

[159] Ibid at [373]

"gateway" requirement which appears at clause B.1.2 of the classification structure in the March 2020 decision will be amended to provide:

> "Grades 1-7 apply to employees with or without a disability who undertake the duties and exercise the level of skill and responsibility specified in the classification descriptors. An employee in any of Grades 1-7 may (subject to any necessary training) be required to perform any or all of the duties in the classification descriptors."

The use of the SWS

[251] The Report did not recommend against the adoption of the SWS as the sole tool to assess supported employees' productivity, nor did it identify any insuperable problem in its operation. The productivity outcomes it produced were within reasonable expectations, and the strong level of concordance between internal and external productivity scores gives confidence as to the accuracy of those outcomes. The large majority of ADE management and staff participating in the ARTD Trial were reasonably content as to the accuracy and consistency of the SWS results and, to the extent that some expressed concerns or a lack of understanding about the SWS, this may largely be attributed to unfamiliarity with the SWS (noting that ADEs where the SWS was already used before the ARTD Trial were clearer as to its use) and the inherent difficulties associated with any system for measuring individual productivity. The Report did not identify any particular difficulty in respect of the supported employees undergoing SWS assessment beyond the unsurprising finding that a small number of employees felt nervous or anxious about being assessed. No party pointed to any of the ARTD Trial findings as a reason not to proceed with the implementation of the SWS as the sole wage assessment tool.

[252] We note, but do not accept, Centacare's submission that the requirement determined in the December 2019 decision that no employee should suffer a reduction of pay as a result of the introduction of the new wages structure[160] is unfair because it will be locked into wages outcomes determined under the existing version of the SWS (which it has applied since 2015) and will be unable to access the modified SWS, and will therefore suffer commercial disadvantage. There is no evidence before us the modified SWS would, in relation to Centacare's workforce, produce any overall reduction in wage rates for employees with a disability. The "no reduction in pay" requirement only grandparents existing rates, so (unless there is a huge disparity) the rate determined under the modified SWS will eventually catch up to the grandparented rate. Finally, it is likely that any commercial disadvantage which Centacare suffers (of which there was no evidence) will likely be diminished when all employees covered by the SES Award move onto the SWS.

[253] There is one aspect of the preferred approach concerning the SWS which we consider should be modified. At paragraph [374] of the December 2019 decision, the Full Bench proposed that there be an absolute minimum rate payable on application of the SWS of $3.50 per hour. This amount is higher than the minimum amount payable for Special national minimum wage 2 under clause A.3.2 of Schedule A to the *National Minimum Wage Order 2022*[161] which, calculated on an hourly basis (assuming a 38-hour week is worked), is $2.50. It is also higher than the minimum amount currently payable under clause D.4.1(b) of Schedule

[160] Ibid at [375]

[161] PR740627

D of the SES Award for the SWS, which is an hourly rate of no less than 12.5% of the relevant classification rate. For practical purposes, this means a minimum rate of $2.75 per hour.[162] The Report found that, but for the $3.50 minimum wage floor (as adjusted by the outcome of the 2020-21 Annual wage review), 16% of employees would have received less than this as assessed in accordance with the SWS. That indicates that the proposed increase to the absolute minimum pay rate has contributed to the cost escalation which the Report has found will occur. In those circumstances, we have determined that the absolute minimum rate upon application of the SWS shall remain at the current effective rate of $2.75. This will remain subject to the requirement that no employee shall suffer any reduction in their current pay rate as a result of the new wages structure.

[254] In the wake of the Report, the major issues raised by ABI about the SWS concerned whether, given the preferred approach will require ADEs which do not currently use the SWS to have all their employees with a disability assessed using that tool:

(1) the Commonwealth would fund the large number of additional SWS assessments that would be required;

(2) sufficient SWS assessors would be available to undertake the task required; and

(3) there might be insufficient time to allow all SWS assessors to undertake the necessary assessments prior to the introduction of the new wages structure.

[255] These concerns are legitimate. In respect of the first concern, the Report recommended funding of independent SWS assessments, but the DSS has not positively committed to this. However, in circumstances where the proposal that the SWS be the sole wage assessment tool for the ADE sector has been "on the table" since the December 2019 decision (in which it was stated that "[i]n order to give effect to our decision, it will be necessary for the Commonwealth to provide funding for a greater number of SWS assessors"[163]) we will proceed on the assumption that if the funding necessary to enable this to be implemented could not be provided, we would have been informed of this. As to the second concern, we appreciate that there may be an issue as to whether the current SWS assessment capacity can be "ramped up" to meet the demand that will be generated by the new wages structure. However, there was no evidence that this could not be done, and some evidence that businesses engaged in SWS assessment would have the capacity to undertake the task.[164] The third concern will be addressed in the context of the transitional arrangements.

[256] The frequency with which SWS assessments must be conducted across the ADE sector will impact, in a given year, upon the cost of those assessments and the capacity to provide sufficient independent assessors. This is clearly demonstrated in the DSS's submissions earlier outlined, which are premised on a requirement to assess all employees with a disability covered by the SES Award in a relatively short period of time. Currently, clause D.7.2(a) of Schedule D to the SES Award provides that the SWS assessment of an employee will be reviewed after 12 months' service since the initial assessment, and clause D.7.2(b) provides that the SWS

[162] Applied to the current Grade 2 hourly rate of $21.97.

[163] [2019] FWCFB 8179 at [376]

[164] Transcript, 16 August 2022 at PNs 1205-1206

assessment must be reviewed thereafter within 3 years. Our *provisional* view is that these periods should be changed to 2 years and 5 years respectively in order to reduce the burden of assessments on the industry, although the provision in clause D.7.2(c) for employee- or employer-initiated reviews where there has been a change in the employee's job or work processes will remain. The transitional arrangements discussed below will further affect the timing of SWS assessments over an interim period.

[257] Having regard to the above conclusions, it is not necessary to give consideration to ABI's proposal that, as an alternative to the SWS, additional grades should be introduced. It is sufficient to say that, consistent with the December 2019 decision and the Report, we are satisfied that it is appropriate to implement the SWS as the sole productivity assessment tool for the ADE sector. We also note that, in one sense, ABI's alternative proposal is simply too late. In order to give it serious consideration, it would be necessary to undertake another trial in order to assess its practicality and cost implications. We do not intend to go down that path a second time.

Transitional arrangements

[258] As earlier stated, although ABI sought a long transitional period of 8 years, no actual proposal for a workable transitional arrangement was advanced. The AEDLC, the ACTU and the UWU opposed any lengthy transitional period and urged the early introduction of those aspects of the preferred approach which it favoured, but beyond this made no submissions about the issue. In the circumstances, we think the only available course is to express a *provisional* view about what would constitute appropriate transitional arrangements and then give interested parties an opportunity to comment on this view.

[259] We accept that transitional arrangements need to be put in place having regard to the potential cost of the new wages structure and the need for supported employees to be SWS assessed where the employer considers this necessary. Three issues must be addressed to establish workable transitional arrangements:

(1) the commencement and length of the transitional period;

(2) the transitional process for the introduction of the Grades A and B rates; and

(3) the process by which employees may practicably be SWS-assessed.

[260] In relation to the first issue, we consider that the 8-year transitional period proposed by ABI is too long. No particular rationale was advanced for this period and, as earlier stated, there was no proposal as to how it would work. Having regard to the fact that all parties in the ADE sector have been aware of the wage structure we intend to implement since the December 2019 decision, our *provisional* view is that the transitional process for the implementation of the new wages structure should commence on 1 May 2023 and should be completed by 1 May 2026.

[261] As for the second issue, our *provisional* view is that Grades A and B, together with the modified Grades 1-7, will commence operation on 1 May 2023. It would therefore be necessary for ADEs to determine the classification into which each employee falls by that date. The rates for Grades A and B would start at approximately two-thirds of the full amounts of $7.00 and

$14.00 per hour respectively, and would then increase annually in equal amounts over the three-year transitional period as follows:

Grade	Weekly rate ($)	Hourly rate ($)
Grade A		
From 1 May 2023	180.50	4.75
From 1 May 2024	209.00	5.50
From 1 May 2025	237.50	6.25
From 1 May 2026	266.00	7.00
Grade B		
From 1 May 2023	361.00	9.50
From 1 May 2024	418.00	11.00
From 1 May 2025	475.00	12.50
From 1 May 2026	532.00	14.00

[262] The above pay rates would, of course, be subject to adjustments pursuant to annual wage review decisions over the transitional period.

[263] As to the third issue, we have earlier adverted to ABI's and the DSS's concerns about the difficulty in having all existing employees in the industry assessed under the SWS (noting that a supported employee is not required to be assessed at all if the employer is content with paying the full rate for the employee's classification on the basis that the employee's productivity is not impaired in relation to that classification). Our *provisional* view is that, in order to ameliorate this, the employer would have until 1 May 2026 to have the employee assessed under the SWS. Until that time, the employee would remain on their rate as it was immediately before 1 May 2023, but adjusted in line with percentage increases determined in annual wage review decisions. After that, no review of the assessment would be required until three years later to ensure that no existing employee needs to be assessed more than once during the transitional period.

[264] All the above arrangements would be subject to the overriding grandparenting requirement that no employee is to have their pay rate reduced as a result of the introduction of the new wages structure.

[265] How these proposed transitional arrangements would work in combination may be illustrated by the following examples (noting that all the Grades A and B wage rates referred to, and amounts calculated by reference to them, will be as adjusted by future annual wage review decisions):

(1) Supported employee AB is currently paid $6.00 per hour pursuant to a wage assessment tool other than the SWS. Her employer determines that AB is to be classified in Grade A. No SWS assessment is required because the employer considers that AB performs the duties of her Grade A-classified job at full productive capacity. AB will continue to be paid a grandparented rate of $6.00 per hour as at 1 May 2023, because her current rate is higher than the transitional rate of $4.75 per hour (presumably even when that rate is adjusted in line with the

2023 annual wage review decision). She will also continue to be paid $6.00 per hour as at 1 May 2024, because her current rate is higher than the transitional rate of $5.50 per hour. AB will be paid $6.25 per hour as at 1 May 2025, and $7.00 per hour as at 1 May 2026.

(2) Supported employee CD is currently paid $9.00 per hour pursuant to a wage assessment tool other than the SWS. His employer determines that CD is to be classified in Grade B, but also that an SWS assessment is required because the employer considers that CD does not perform the duties of his Grade B position to full productive capacity. As at 1 May 2023, CD has not been SWS assessed, and therefore remains at $9.00 per hour, adjusted in line with the 2023 annual wage review decision. As at 1 May 2024, CD has still not been SWS assessed, and therefore remains on $9.00 per hour, as further adjusted in line with the 2024 annual wage review decision. On 1 September 2024, CD is assessed under the SWS as having a productive capacity for his job of 80%. This would amount to $8.80 per hour on the transitional rate for Grade B at that time (i.e. 80% of $11.00). Because CD's current rate of $9.00 per hour (as adjusted) is higher, he remains on that grandparented rate for the time being. As at 1 May 2025, CD's rate becomes $10.00 per hour (80% of the transitional Grade B rate of $12.50 per hour). As at 1 May 2026, CD's rate becomes $11.20 per hour (80% of the full Grade B rate of $14.00 per hour). CD does not need his SWS assessment to be reviewed until 1 September 2027, being three years after the SWS assessment during the transitional period was undertaken (unless his job or work process changes and a new assessment is requested within three years).

(3) Supported employee EF is currently paid $3.00 per hour pursuant to a wage assessment tool other than the SWS. Her employer determines that EF is to be classified in Grade A but also that an SWS assessment is required because the employer considers that EF does not perform the duties of her Grade A position to full productive capacity. As at 1 May 2023, EF has not been SWS assessed, and therefore remains at $3.00 per hour, adjusted in line with the 2023 annual wage review decision. On 1 August 2023, EF is assessed under the SWS as having a productive capacity for her job of 40%. Under all transitional rates and the final rate for Grade A, EF's assessed wage rate is lower than $3.00 per hour (as previously adjusted in line with the 2023 annual wage review). Therefore, EF remains on the grandparented $3.00 hour (as adjusted in line with the 2023 annual wage review decision) until such time as 40% of the Grade A rate exceeds this amount as a result of subsequent annual wage review adjustments. EF does not need to have her SWS assessment reviewed until 1 August 2026, being three years after the SWS assessment during the transitional period was undertaken (unless her job or work process changes and a new assessment is requested within three years).

(4) Supported employee GH is currently paid $15.00 per hour pursuant to a wage assessment tool other than the SWS. Their employer determines that GH is to be classified in Grade 2, but also that an SWS assessment is required because the employer considers that GH does not perform the duties of their Grade 2 position to full productive capacity. As at 1 May 2023, GH has not been SWS assessed,

> and therefore remains on $15.00 per hour, adjusted in line with the 2023 annual wage review decision. On 1 April 2024, GH is assessed under the SWS as having a productive capacity for their job of 70%. GH's rate is increased to $15.38 per hour (70% of the Grade 2 rate of $21.97 per hour). GH thereafter remains on a rate calculated as 70% of the Grade 2 rate, subject to any future SWS assessments, with the review of their SWS assessment due on 1 April 2027, being three years after the SWS assessment during the transitional period was undertaken (unless their job or work process changes and a new assessment is requested within three years).

[266] Because of the cost implications of the introduction of the new wages structure, we propose to carefully monitor its implementation during the course of the transitional period. If there is evidence that the implementation of the new wages structure is endangering the viability of ADEs (generally or in a particular case), this should be brought to the attention of the Commission and the Commission will, on application or on its own initiative, consider appropriate variations to the transitional arrangements or any other relevant aspect of the SES Award pursuant to s 157 of the FW Act.

Report recommendations

[267] Our above final and provisional conclusions address, we consider, recommendations (2) and (4) of the Report as outlined in paragraph [26][25] above. We received no evidence or submissions concerning recommendation (3) and accordingly we do not intend to change any of the SES Award provisions pertaining to the operation of the SWS. However, the matters adverted to in recommendation (3) may be addressed by the DSS as the "owner" of the SWS assessment tool. The other recommendations, which mainly focus on the provision of information and support concerning the requirements and implementation of the new wages structure, are beyond the purview of the Commission. We generally support all of those recommendations, but action upon them rests with the DSS, the Fair Work Ombudsman, relevant employer organisations and unions, and other organisations for people with a disability such as Our Voice and the AEDLC. We express our hope that all of these bodies will participate constructively in implementing these recommendations.

Conclusions re requirements of the FW Act

[268] We are satisfied for the purpose of s 138 of the FW Act that the variations to the SES Award which will be made as a result of this decision (subject to finalisation of the transitional arrangements) are necessary to achieve the modern awards objective in s 134(1) and the minimum wages objective in s 284(1). In paragraphs [342] and [343] of the December 2019 decision, the Full Bench found that the provisions of the SES Award relating to the setting of minimum wages for employees with a disability do not meet either the modern awards objective or the minimum wages objective, and are not fair, and no party in the most recent stage of the proceedings sought to revisit this finding. Accordingly, variations to the wages provisions of the SES Award are plainly necessary in order to achieve the modern awards objective and the minimum wages objective.

[269] In relation to the modern awards objective, we consider the variations to the SES Award which will be made will ensure that the SES Award, together with the NES, constitutes a fair

and relevant safety net for ADE employees with a disability. We repeat and adopt for the purpose of that finding the reasoning and conclusions in paragraphs [367]-[376] of the December 2019 decision, which set out the design principles of the preferred approach to which the variations we propose to make will give effect. Those parts of the December 2019 decision are demonstrative of the fairness and relevance of the variations. In respect of the mandatory considerations in s 134(1), we have taken these matters into account in the following way (using the paragraph designations in the subsection):

(a) Employees with a disability under the SES Award are "*low paid*" (in accordance with the established meaning of that expression). Insofar as the wages component of their overall income is concerned, the variations will either maintain or improve (and in some cases significantly improve) employees' wages. However, in assessing the effect on employees' relative living standards and needs, regard must be had to the likely tapering of employees' DSP entitlement in some cases where wage increases are significant. Nevertheless, the overall income of employees will either improve or stay the same, and this weighs in favour of the variations.

(b) There is no basis to make a positive finding that the variations will encourage collective bargaining, and therefore this consideration weighs against the variations to a minor degree.

(c) This consideration is a particularly important one for employees with a disability in ADEs since social inclusion through participation in the workforce is the fundamental purpose, and not just the effect, of their employment. The increase in labour costs projected by the Report requires the tempering of the conclusion stated in respect of s 134(1)(c) in paragraph [377] of the December 2019 decision. However, as explained above, certain modifications we have made to the preferred approach are likely to reduce the cost of the variations. More fundamentally, the variations will place the payment of wages by ADEs to supported employees on a legally sustainable and stable footing within the framework of the FW Act, in the context where the legal status of the existing wage assessment tools remains in question following the decision in *Nojin* (as explained in paragraphs [315]-[364] of the December 2019 decision). In the long term, we consider that this will support and promote the participation of persons with disability in the workforce and serve the purpose of promoting social inclusion.

(d) To the extent that the variations will implement a minimum wages system which is consistent across the ADE sector and accords with the requirements of the FW Act, it may to some degree promote flexible modern work practices and the efficient and productive performance of work. This weighs in favour of the variations to a minor degree.

(da) These matters are not relevant and therefore have neutral weight.

(e) This matter is not relevant and therefore has neutral weight.

(f) The variations are likely to increase the cost of employing employees with a disability although, as we have earlier observed, the cost of such employees is

only a small proportion of the total employment cost for ADEs. The introduction of the SWS across the board will ensure that employees with a disability are paid in accordance with their productivity but the variations are otherwise likely to have a neutral effect on overall productivity. The regulatory burden will increase for employers in the short term because of the necessity to establish internal structures to implement the new wages structure, but in the longer term it is likely to reduce the regulatory burden as ADEs are relieved of the necessity to administer their own wage assessment tools. Overall, this consideration weighs against the variations.

(g) The variations, once properly implemented, will serve to ensure a relatively simple, comprehensible, stable and sustainable modern award wages structure for the ADE sector, and this weighs in favour of the variations being made. No issue of overlap of modern awards arises.

(h) We do not consider that the variations will have any implications for or discernible effect upon the national economy, and this is accordingly a neutral consideration.

[270] In relation to the minimum wages objective, we consider that the variations will establish a safety net of fair minimum wages for employees with a disability. In respect of the fairness of the minimum wages safety net to be established, we again rely upon the reasoning and conclusions in paragraphs [367]-[376] of the December 2019 decision, which demonstrate the variations will appropriately remunerate employees for the work value of the jobs they perform and for their productivity in the performance of their work. As to the mandatory considerations in s 284(1) of the FW Act, for paragraphs (a), (b), (c) and (d), we repeat respectively our conclusions in respect of paragraphs (h), (c), (a) and (e) of s 134(1). In relation to s 284(1)(e), the variations will, for the first time, establish a truly comprehensive range of fair minimum wages for employees with a disability covered by the SES Award by replacing the range of wages assessment tools currently permitted by clause 18 with classifications which cover the full range of jobs performed in ADEs accompanied by properly-set minimum wages and the capacity to apply the SWS to assess impaired productivity caused by disability. As to the fairness of the wage rates to be established, we rely upon the reasons already stated.

[271] To the extent that former s 156(3) of the FW Act is applicable to the variations, we are satisfied that the variations are justified by work value reasons. As explained in paragraphs [369] and [371]-[373] of the December 2019 decision, the new Grades A and B and the modifications to Grades 1-7 are intended to "provide a classification structure which accommodates in a comprehensive way the jobs which the evidence shows actually exist in the ADE sector and properly reflects their work value".[165] The descriptor for each classification is now drafted in a way which bases the application of the classification upon the nature of the work and the level of skill and responsibility involved in doing the work at that level. The wage rates set for Grades A and B are, we consider, appropriate for the nature of the work and the skills and responsibilities required at those levels. In reaching this conclusion, we have taken into account the relative work value of those grades compared to Grade 2, the existing wage rates for work of that nature paid by ADEs, and the findings in the Report.

[165] [2019] FWCFB 8179 at [373]

OTHER MATTERS

[272] There are two separate matters which require consideration apart from the wages structure in the SES Award:

(1) the definition of the expression "*supported employment services*" in clause 4.3, by reference to which clause 4.1 specifies the coverage of the SES Award; and

(2) a proposal advanced by Our Voice to vary clause 32, *Rights at work for supported employees*, to require that certain obligations for which the clause provides be discharged "*in a timely manner*".

Award coverage

[273] In paragraph [386] of the December 2019 decision, the Full Bench adverted to a submission made by the DSS in respect of the coverage of the SES Award to alter the definition of "*supported employment services*" (now) contained in clause 4.3 of the award to ensure that it properly reflected the definition of that expression in s 7 of the DS Act. In relation to that submission, our *provisional* view is that clause 4.3 should be varied to provide as follows:

> **4.3 Supported employment services** has the meaning given to that term in section 7 of the *Disability Services Act 1986* (Cth).

Our Voice proposal

[274] At paragraphs [384]-[385] of the December 2019 decision, the Full Bench acceded to a proposal advanced by Our Voice to vary the SES Award to include a clause concerning "*Rights at work for supported employees*". The provision is now clause 32 of the SES Award, and in broad terms confers special entitlements upon supported employees in respect of the provision of information, representation and consultation. Our Voice now seeks that clause 32 be varied as follows (with the additional words sought in bold):

> **32. Rights at work for supported employees**
>
> **32.1** When dealing with employment matters affecting supported employees the employer shall take all reasonable steps to provide such employees with the information they require to exercise their employment rights.
>
> **32.2** Such reasonable steps will include, but are not limited to, the following:
>
> **(a)** providing information to supported employees of their right to be a member of the union and be represented in the workplace by a union representative;
>
> **(b)** providing information in relation to seeking information and or assistance from the Fair Work Ombudsman;

(c) providing information **in a timely manner** to a supported employee about their right to have their nominee, guardian, carer, parent or other family member, advocate or union assist them in making decisions about employment matters.

32.3 In addition to those matters listed in clause 32.2 the employer shall take reasonable steps to provide the opportunity **in a timely manner** to the supported employee to have their nominee, guardian, carer, parent or other family member, advocate or union involved in or consulted or act as the employee's representative in employment matters that affect or may affect the supported employee's interests.

32.4 Such matters shall include but not be limited to the following:

(a) consultation about significant workplace change under clause 29—Consultation about major workplace change;

(b) consultation about changes to rosters or hours of work under clause 30—Consultation about changes to rosters or hours of work;

(c) any dispute under clause 31—Dispute resolution or other grievance;

(d) wage assessments under clause 18.1 and Schedule D—Supported Wage System;

(e) any disciplinary matter; and

(f) performance appraisals.

[275] Our Voice's claim arises out of the circumstances in which the closure of seven ADE worksites operated by Activ in Western Australia was publicly announced at the same time that some 700 supported employees were notified of their redundancy. Our Voice submitted that the timing of this announcement "*denied those employees of the opportunity to access the necessary supports they needed to deal with this workplace issue at the time*". The variation it proposes is intended to address this situation.

[276] We are not persuaded that clause 32 should be varied in the manner proposed. The requirement in clause 32.1 to take "*all reasonable steps*" and in clause 32.3 to take "*reasonable steps*" already imports a condition of appropriate timeliness in order to make the operation of those provisions effective. The variations proposed do not actually address the circumstances of the announcement of the Activ closures where, on the limited information before us, it appears that redundancies were publicly announced before any consultation with affected supported employees. If so, this may raise a question about whether clause 29, *Consultation about major workplace change* (operating in conjunction with clause 32) was complied with, but that is a different issue not addressed by Our Voice's proposed variations to clause 32.

NEXT STEPS

[277] A draft determination to give effect to our decision (including the *provisional* views expressed) will be published with this decision. Parties may file submissions **by 5.00 pm on 30 November 2022 addressing the following matters only**:

(1) the *provisional* view concerning the modification to the "gateway" requirements for Grades A and B (see paragraph [246] above and proposed clause A.1.1 of the draft determination);

(2) the *provisional* views concerning the operative date for the variations and the transitional arrangements (see paragraphs [260]-[265] above and proposed clauses 15.2 and Schedule I and the operative date of the draft determination);

(3) the *provisional* view concerning alteration of the requirements as to the timing of SWS assessments (see paragraph [256] above and proposed clause D.7 of the draft determination);

(4) the *provisional* view concerning the redrafting of the definition of "*supported employment services*" in connection with the coverage of the SES Award (see paragraph [273] above and proposed clause 4.3 of the draft determination); and

(5) any other drafting issues identified in the draft determination.

[278] Where any party proposes in its submissions that the draft determination be modified, it shall file with its submissions a marked-up version of the draft determination which sets out the amendments sought.

[279] We will additionally provide parties, on request (**to be made on or before 30 November 2022**), an opportunity to make oral submissions about the issues identified in paragraph [277] above. We will reserve the morning of **7 December 2022** for this purpose.

[280] We will consider all submissions made in response to the draft determination and then issue a final determination varying the SES Award to give effect to the December 2019 decision, this decision, and any further decision we make in response to the submissions. Once that is done, the 4 yearly review in respect of the SES Award will be complete. Any future review of the wages provisions of the SES Award will be conducted via separate proceedings instituted in accordance with the FW Act.

VICE PRESIDENT

Appearances:

M Harding SC for the AED Legal Centre, Australian Council of Trade Unions, United Workers Union and Health Services Union, with *S Kemppi* for the Australian Council of Trade Unions.

N Ward with *C Simmons* for Australian Business Industrial and the NSW Business Chamber.

E Gruschka for the Commonwealth Department of Social Services.

C Christodoulou for Greenacres Disability Services.

K Langford for National Disability Services.

M Walsh for Our Voice Australia.

Hearing details:

2022.

Sydney, with video link to Melbourne using Microsoft Teams:
15, 16, 17 and 18 August.

Attachment A – Proposed new wages structure for the purposes of the ARTD Trial contained in the March 2020 decision

Schedule B—Classifications

B.1 Explanation of Classification Structure

B.1.1 Grades A and B of the classification structure in this Schedule apply to any employee with a disability:

(a) who meets the impairment criteria for receipt of a disability support pension; and

(b) for whom an employer has created a position consisting of duties and a level of supervision tailored or adjusted for the circumstances of the employee's disability that does not fall into Grades 1-7 above.

B.1.2 Grades 1-7 apply to employees with or without a disability who undertake the duties and exercise the level of skill and responsibility specified in the classification descriptors.

B.2 Grade A

Employees at this grade will perform a simple task or tasks consisting of up to three sequential steps or sub-tasks, any of which may involve the use of jigs or equipment or tools with basic functionality, under direct supervision and constant monitoring.

B.3 Grade B

Employees at this grade will perform a simple tasks or tasks consisting of more than three sequential steps or sub-tasks, each of which may involve the use of mechanical or electric equipment or tools, under direct supervision with regular monitoring.

B.4 Grade 1

Employees at this grade will undertake on the job induction and/or training to perform work in Grade 2 or above for a period not exceeding 3 months.

B.5 Grade 2

Employees at this grade will perform a basic task or tasks in accordance with defined procedures under direct supervision. Such employees will understand and undertake basic quality control/assurance procedures including the ability to recognise basic quality deviations/faults. This may include the performance of work included in the following awards classifications:

- Food, Beverage and Tobacco Manufacturing Award 2010: Level 2
- Gardening *and Landscaping Services Award 2010:* Level 1

- Manufacturing *and Associated Industries and Occupations Award 2010:* Level C13
- *Textile,* Clothing*, Footwear and Associated Industries Award 2010:* Skill Level 1

B.6 Grade 3

Employees at this grade will perform work above and beyond the skill of an employee at Grade 2 and to their level of training. Such employees will perform a more complex task or tasks than at Grade 2 in accordance with defined procedures under routine supervision. This may include the performance of work included in the following awards classifications:

- *Dry* Cleaning *and Laundry Industry Award 2010:* Laundry employee level 2
- *Food,* Beverage *and Tobacco Manufacturing Award 2010:* Level 3
- Gardening *and Landscaping Services Award 2010:* Level 2
- Manufacturing *and Associated Industries and Occupations Award 2010:* Level C12
- Storage *Services and Wholesale Award 2010:* Storeworker grade 1
- *Textile, Clothing, Footwear and Associated Industries Award 2010:* Skill Level 2
- *Waste Management Award 2010:* Level 2

B.7 Grade 4

Employees at this grade will perform work:

(a) above and beyond the skill of an employee at Grade 3 and below and to their level of training. Such employees will hold a qualification at or equivalent to AQF II or above or an equivalent level of training and experience. Employees at this grade will:

- work independently from complex instructions and procedures; and
- assist in the provision of on the job training for other employees; and
- co-ordinate work in a team environment or work individually under general supervision; and
- be responsible for ensuring the quality of their own work; or

(b) encompassed in any of the following award classifications:

- *Dry Cleaning and Laundry Industry Award 2010:* Laundry employee level 3
- *Food,* Beverage *and Tobacco Manufacturing Award 2010:* Level 4
- *Gardening and Landscaping Services Award 2010:* Level 3
- Manufacturing *and Associated Industries and Occupations Award 2010:* Level C11
- *Storage* Services *and Wholesale Award 2010:* Storeworker grade 2
- *Textile,* Clothing*, Footwear and Associated Industries Award 2010:* Skill Level 3
- *Waste* Management *Award 2010:* Level 3

B.8 Grade 5

Employees at this grade will perform work:

(a) above and beyond the skill of an employee at Grade 4 and below and to their level of training. Such employees will hold a trade certificate or an equivalent qualification or an

equivalent level of training and experience. Employees at this grade will perform work primarily involving the skills of their trade and may also perform work that is incidental to that work; or

(b) encompassed in any of the following award classifications:

- *Dry Cleaning* and *Laundry Industry Award 2010:* Laundry employee Level 4
- *Food, Beverage and Tobacco Manufacturing Award 2010:* Level 5
- *Gardening and Landscaping Services Award 2010:* Level 4
- Manufacturing *and Associated Industries and Occupations Award 2010:* Level C10
- *Storage* Services *and Wholesale Award 2010:* Storeworker grade 4
- *Textile,* Clothing*, Footwear and Associated Industries Award 2010:* Skill Level 4
- *Waste* Management *Award 2010:* Levels 4, 5 and 6

B.9 Grade 6

Employees at this grade will perform work above and beyond the skill of an employee at Grade 5 and below and to their level of training. Such employees will hold a qualification at or equivalent to AQF IV or above or an equivalent level of training and experience. Such employees will perform the work described below:

- assess the ability of an employee with disability to carry out specific work tasks; and/or
- design, develop and provide individual instruction or training for an employee with a disability; and/or
- undertake specialist functions in the workplace such as procurement or marketing; and/or
- supervise employees in a section of the workplace.

B.10 Grade 7

Employees at this grade will hold a qualification at AQF IV to or above, of which one third of the competencies are related to the supervision or training of employees, or an equivalent qualification or an equivalent level of training and experience. Employees at this grade will perform work above and beyond the skill of an employee at Grade 6 and below and to their level of training. Such employees will perform the work described below:

- co-ordinate and supervise employees; and/or
- have responsibility for the content and delivery of training; and
- be capable of operating all of the equipment or tools to be used by employees that they are supervising or training.

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