

IN THE FAIR WORK COMMISSION

Matter: AM2014/286

REGISTRY: SYDNEY

4 yearly review of modern awards – Supported Employment Services Award

Further Submissions on behalf of the Commonwealth of Australia as represented by the Department of Social Services

1. On 18 August 2022, the Fair Work Commission (**Commission**) made orders that the Commonwealth of Australia as represented by the Department of Social Services (**Department**) file submissions:
 - a. responding to the jurisdictional submissions of the AED Legal Centre filed on 13 May 2022, including its position on the proper construction and interrelationship of ss 153 and 284 of the *Fair Work Act 2009* (Cth) (**FW Act**), s 94 of the *Social Security Act 1991* (Cth) (**SS Act**) and s 47 of the *Disability Discrimination Act 1992* (Cth) (**DD Act**);
 - b. on whether the implementation of the award variations proposed in the 3 December 2019 and 30 March 2020 decisions in this matter would affect the entitlement of any disabled employee working in an Australian Disability Enterprise (**ADE**) to the disability support pension (**DSP**); and
 - c. on whether the Department intends to implement the recommendations set out in section 6.3.3 of ARTD Consultants' *Fair Work Commission New Wage Assessment Structure Trial Evaluation – Final Report* (**Report**)
2. The Commonwealth has set out its response to these matters below.

Response to jurisdictional submissions

3. The Commonwealth previously made submissions on the proper construction of s 153 of the FW Act in *Association for Employees with a Disability v Commonwealth of Australia* [2021] FCAFC 36 (**AED v Commonwealth**). These submissions restate those submissions.
4. The Commonwealth notes that while *AED v Commonwealth* was focused narrowly on questions of jurisdiction, the Commission is also currently considering the broader question of whether certain variations to the *Supported Employment Services Award 2020* (**Award**) should be made. To assist the Commission in the task at hand, these submissions contain some additional general observations regarding the modern awards objective (s134) and the minimum wages objective (s284), and the particular context of this matter.

Overview of the relevant legislative provisions

5. The Commonwealth's submissions in *AED v Commonwealth* contained an overview of the relevant legislative provisions, as follows.

6. Pursuant to Part 2-3 of the FW Act the Commission may make, vary and revoke modern awards. Division 2 of Part 2-3 sets out overarching provisions, including the '*modern award objective*'¹ which applies to the performance or exercise of the Commission's powers under Part 2-3 (and Part 2.6, in so far as those powers or functions relate to modern award minimum wages).
7. A modern award must only include terms that are permitted or required and, relevantly, must not include a term that contravenes Subdivision D.² A term that contravenes s 136 has no effect to the extent of that contravention.³ A term may only be included in a modern award to the extent necessary to achieve the modern awards objective (and to the extent applicable, the minimum wages objective).⁴
8. Section 153 of the FW Act appears in Subdivision D. It relevantly provides:
 - (1) *A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employees ... age, physical or mental disability, ...*
 - (3) *A term of a modern award does not discriminate against an employee merely because it provides for minimum wages for:*
 - a. *all junior employees, or a class of junior employees; or*
 - b. *all employees with a disability, or a class of employees with a disability; or*
 - c. *all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.*
9. Section 156⁵ of the FW Act previously set out the process for conducting 4 yearly reviews of modern awards (as opposed to Division 3 of Part 2-3, which sets out terms of modern awards). As part of the 4 yearly review, the Commission is permitted to make a determination varying modern award minimum wages only if it is satisfied that the variation is justified for 'work value reasons'.⁶
10. Section 156(4) provided:

Work values reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

 - a. *the nature of the work;*
 - b. *the level of skill or responsibility involved in doing the work;*
 - c. *the conditions under which the work is done.*
11. Work value reasons continue to apply to other determinations of the Commission notwithstanding the repeal of Division 4. Any determination varying modern award wages must be justified by work value reasons.⁷

¹ FW Act s 135.

² Ibid s 136.

³ Ibid s 137.

⁴ Ibid s 138

⁵ Division 4, which contained s 156 and pursuant to which 4 yearly reviews are undertaken, was repealed by the *Fair Work Amendments (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth). However, clause 26 of Schedule 1 to the FW Act provides that the Division continues to apply to incomplete reviews.

⁶ FW Act s 156(3).

⁷ Ibid s 157(2A).

12. Subdivision D also includes s 150, which provides that a modern award must not include an objectionable term. That phrase is defined in s 12 to mean a term that permits or requires, or has the effect of permitting or requiring, or purports to permit or require a contravention of Part 3-1 concerning general protections. Within Part 3-1, s 351(1) provides that an employer must not take adverse action against an employee because of inter alia the employee's physical or mental disability. Section 351(1) does not apply to action that is not unlawful under any anti-discrimination law in force in the place where the action is taken.⁸

The Proper Construction of s 153(3) of the FW Act

Principles of construction

13. The Commonwealth's submissions in *AED v Commonwealth* agreed with the principles of statutory construction contained in the submissions of the Applicant in that matter. In summary, these were (citations omitted):
- a. the Commission must consider the ordinary and grammatical meaning of the words, while at the same time taking into account context and purpose;
 - b. remedial or beneficial provisions are to be given a generous, fair, liberal and large interpretation;
 - c. exceptions do not require such an interpretation and may be read narrowly; and
 - d. so far as possible, statutes are to be construed consistently with international legal obligations. These obligations relevantly include art 27 of the *Convention on the Rights of Persons with Disabilities (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.
14. As per its submissions in *AED v Commonwealth*, the Commonwealth also notes s 15AA of the *Acts Interpretation Act 1901* (Cth)⁹ provides that when interpreting a provision of an Act, the construction which best promotes the purpose of the Act is to be preferred.

The text of s 153(3)

15. The Commonwealth's submissions in *AED v Commonwealth* included the following:
16. Applying the principles of statutory construction and beginning with the text of the provision, 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).
17. There is nothing in the language of the subsection as a whole, or in s 153(3)(b) itself that supports either reading the down of s 153(3)(b) or the reading in of additional words to limit its scope.
18. 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 s 153(3)(a) to (c). As used in s 153(3), merely can be read as a synonym for just.

⁸ (s 351(2), see 351(3) for the meaning of anti-discrimination law).

⁹ As at 25 June 2009, see *Fair Work Act 2009* (Cth) s 40A.

19. Minimum wages must be set according to the statutory requirements in the FW Act. An award term which provides for minimum wages for one the categories of employees described in (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).
20. 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).

Context and purpose

21. The Commonwealth's submissions in *AED v Commonwealth* included the following:
22. Section 153(3) of the FW Act 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.¹⁰
23. There is nothing in the context in which s 153(3)(b) appears that supports the reading down of the provision or reading in of additional words. In particular, 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'.
24. 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:
 - a. the modern awards objective, that is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions' taking into account the factors listed at s 134(1)(a) to (h);¹¹ and
 - b. the minimum wages objective, that is to 'establish and maintain a safety net of fair minimum wages' taking into account the factors listed at s 284(1)(a) to (e).
25. Section 156(3) expressly provides that the Commission must be satisfied, when conducting reviews of modern awards required in accordance with s 156, that any variation of award minimum wages is justified for work value reasons (being reasons related to the nature of the work performed, the level of skill or responsibility involved in doing the work and the conditions under which the work is done). Award wage fixation by reference to the value of work performed has long been a feature of the Australian industrial relations system.¹²
26. The observations at [351] to [354] and [357] to [359] of the decision of the Commission (*Re 4 yearly review of modern awards* [2019] FWCFB 8179, 293 IR 1) illustrate the relevance of the work value reasons consideration in the context of employment of the kind covered by the Award.

¹⁰ See, for example, s 123 of the *Industrial Relations Act 1988* (Cth) and s 222 (previously s 90ZR) of the *Workplace Relations Act 1996* (Cth).

¹¹ Those factors include the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s 134(1)(f)).

¹² *4 yearly review of modern awards – Pharmacy Industry Award 2010* [2018] FWCFB 7621 at [129] and following. See also *4 yearly review of modern awards – Award Stage – General Retail Industry Award 2020* [2020] FWCFB 6301 at [28].

27. The policy underpinning s 153(3) is clear. It is a carve out from the general prohibition on discrimination contained in s 153(1), a recognition that in respect of the categories of employees identified at (a) to (c) special minimum wage 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.
28. 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. 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.
29. A plain reading of s 153(3) best promotes the objects of the FW Act.

Harmonious construction

30. The Commonwealth's submissions in *AED v Commonwealth* included the following:
31. Section 153(3)(b) does not need to be given a narrow construction in order to be read harmoniously with s 150 and s 351 of the FW Act.
32. As outlined above, s 351(1) provides that an employer must not take adverse action against an employee because of inter alia the employee's physical or mental disability. Under s 351(2)(a), s 351(1) does not apply to action that is not unlawful under an applicable anti-discrimination law listed in s 351(3).
33. Insofar as s 150 of the FW Act is relevant to the construction of s 153(3), the Commonwealth contends that the general prohibition on the inclusion of objectionable terms in s 150 must be read 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.
34. Section 47(1)(c) of the DD Act provides no real assistance in determining the proper construction of s 153(3) of the FW Act.
35. Pursuant to s 47(1)(c) of the DD Act, anything done in direct compliance with an industrial instrument (within the meaning of the FW Act) is not rendered unlawful by Part 2 of the DD Act '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 ... the salary or wages are determined by reference to the capacity of the person'.
36. Our research has not identified authority which has considered the proper construction of the parts of s 47(1)(c) of the DD Act in issue. In the absence of authority, there is no warrant for reading words into s 47(1)(c) of the DD Act such that the reference to capacity should be read as productive capacity, and then using that reading of s 47(1)(c) to require a narrow construction of s 153(3)(b).
37. As outlined above, award minimum wages are set by the Commission under the FW Act in accordance with the statutory requirements contained in that Act. Those obligations include a requirement that the Commission be satisfied that minimum wages are justified having regard to work value reasons. The purposes of the FW Act can be achieved without using s 47(1)(c) of the DD Act to constrain the Commission's powers to determine modern award terms.

38. Similarly, the award review regime provided for by s 161 of the FW Act and s 46PW of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) does not support a narrow construction of s 153(3).
39. The purpose of that regime is to provide protection from 'acts' which, but for the fact they are done in direct compliance with a modern award, would be unlawful. The regime depends upon the relevant 'act' being done in accordance with the term of a modern award. If a term of a modern award contravened s 153 of the FW Act, pursuant to s 137 such a term would be of no effect and there would be no need to rely upon the regime established by s 161 and s 46PW. Rather, the regime established by s 161 and s 46PW of the AHRC Act establishes a further protective mechanism for review where the modern award requires an 'act' to be done which 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.

'Class of employee'

40. The Commonwealth's submissions in *AED v Commonwealth* included the following:
41. As to the phrase '*class of employees with a disability*', the term 'class' is not defined in the FW Act. It should be given its relevant ordinary meaning '*a set or category of things having some related properties or attributes in common, grouped together, and differentiated from others under a general name of description; a kind, a sort*'.¹³ There is nothing in the text or context of s 153(3), or the FW Act as a whole, that supports the contention that a 'class' must be differentiated in any particular way.

Further Submissions

The Modern Awards Objective and Minimum Wages Objective

42. The Commonwealth makes the following observations regarding the FW Act's modern awards objective and minimum wages objective.
43. It is not necessary for the Commission to make a finding that the award fails to satisfy one or more of the modern awards objective considerations as a prerequisite to the variation of a modern award.¹⁴ In giving effect to the modern awards objective, the Commission's task is to perform an evaluative function, taking into account the matters in s 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.¹⁵
44. The requirement to take the matters listed in s 134 into account means that each consideration, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.¹⁶ However, no particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.¹⁷

¹³ *Cigno Pty Ltd v Australian Securities and Investments Commission* [2020] FCA 479 at [71], citing Oxford English Dictionary Online (Oxford University Press, March 2020).

¹⁴ *National Retail Association v Fair Work Commission* [2014] FCAFC 118 [105]–[106].

¹⁵ *Alpine Resorts Award 2010* [2018] FWCFB 4984 [52].

¹⁶ *National Retail Association v Fair Work Commission* [2014] FCAFC 118 [56].

¹⁷ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, [33].

45. In the *Annual Wage Review 2017-2018* decision, the Expert Panel noted there is a substantial degree of overlap in the considerations to be taken into account under the minimum wages objective and the modern awards objective.¹⁸ Similar to the modern awards objective, the statutory task under s 284(1) is an evaluative exercise, in which the statutory considerations inform the evaluation of what might constitute a safety net of fair minimum wages, but do not necessarily exhaust the matters which might be considered relevant.¹⁹
46. Fairness is central to both the minimum wages objective and the modern awards objective, with fairness to be assessed from the perspective of employees and employers.²⁰ This assessment balances the interests of these two groups, and must be done ‘...in the context of any broader economic or other considerations which might affect the public interest’. Further, a necessary element of fairness in the context of setting modern award minimum wages is that those wages ‘...bear a proper relationship to the value of the work performed by the workers in question’.²¹

Context of this matter

47. In the matter before it, the Commission is considering a variation to the structure of minimum wages in the Award. The Commonwealth makes the following submissions regarding the operation of section 153(3) in the particular context of this matter.
48. 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 necessary to achieve the modern awards objective and the minimum wages objective.²²
49. The Commonwealth submits that the consideration of promoting social inclusion through increased workforce participation would be particularly relevant to any exercise of power by the Commission in accordance with s 153(3). This consideration is relevant to both the modern awards objective (at s 134(1)(c)) and the minimum wages objective (at s 284(1)(b)).
50. The Commonwealth notes that Expert Panels in several Annual Wage Review decisions have confirmed that the consideration of social inclusion through workforce participation includes both obtaining employment, and the pay and conditions attaching to that employment.²³ The pay and conditions of work are relevant considerations because ‘...they impact upon an employee’s capacity to engage in community life and the extent of their social participation’.²⁴
51. The Commonwealth submits that, 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. Without limiting the circumstances that might lead to unfairness, the Commonwealth submits

¹⁸ *Annual Wage Review 2017-2018* [2018] FWCFB 3500, [9].

¹⁹ *Annual Wage Review 2017-2018* [2018] FWCFB 3500, [8].

²⁰ *Four yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, [117].

²¹ *Application by United Voice & Australian Education Union* [2015] FWCFB 8200, [272].

²² FW Act, ss 138 and 157.

²³ *Annual Wage Review 2009-10* [2010] FWA FB 4000, [275]; *Annual Wage Review 2010-11* [2011] FWA FB 3400, [261].

²⁴ *Annual Wage Review 2011-12* [2012] FWA FB 5000, [210].

that differential treatment that is unreasonable, disproportionate, or unnecessary to achieve a legitimate goal is likely to be unfair.

52. This requirement of fairness is particularly evident in the minimum wages objective, which requires 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.²⁵
53. The Commonwealth submits that, since the objective of establishing and maintaining a safety net of fair minimum wages is required by the chapeau of the minimum wages objective in s 284(1), further inclusion of fairness as a consideration in s 284(1)(e) demonstrates a clear legislative intention that the Commission be alive to the fairness of minimum wages applicable to these categories of employees. The categories of employees set out at s 284(1)(e) align in substance with the categories of employees included at paragraphs (a) to (c) of s 153(3).
54. The Commonwealth notes that the Commission has identified in these proceedings that supported employment covered by the Award has a valuable and socially significant role in providing employment primarily to people with intellectual disability for whom the achievement and maintenance of open employment would not be viable.²⁶
55. In an earlier decision in these proceedings, the Commission made the following factual findings:
 - a. people with disability place great weight upon the companionship, stimulation, independence, learning opportunities and the sense of dignity, achievement and self-worth which supported employment provides them;
 - b. for the carers and family members of people with disability employed in ADEs, the support and respite which employment in ADEs provides them, and the positive personal effects such employment has on the person with disability, is regarded as being of huge worth; and
 - c. ADEs are not just employers of people with disability 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.²⁷
56. Ensuring that ADEs continue to be able to provide these benefits is a legitimate objective.
57. 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 circumstances. The Commonwealth submits that the relevant circumstances should include:
 - a. whether the proposed special minimum wage will in fact lead to the achievement of its objectives;²⁸
 - b. whether a less discriminatory alternative is available that would also achieve these objectives; and

²⁵ FW Act s 284(1)(e).

²⁶ *4 yearly review of modern awards – Supported Employment Services Award 2010* [2018] FWCFB 2196, [15].

²⁷ *4 yearly review of modern awards – Supported Employment Services Award 2010* [2019] FWCFB 8179, [245].

²⁸ FW Act, s134 and s 284.

- c. whether sufficient regard has been paid to the rights and interests of those employees who would be affected.

58. The Commonwealth notes that the objectives set out in paragraph 52 above are likely to overlap with the modern awards objectives which the FW Act requires the Commission to consider.

Disability Support Pension

59. The Commission has sought submissions on whether the implementation of the award variations proposed in the Full Bench's decision of 3 December 2019 and 30 March 2020 decisions in this matter would affect the entitlement of any disabled employee working in an ADE to DSP. The substantive elements of the Commission's proposed changes to the Award are set out in the Full Bench's decision of 3 December 2019 and, as a result, these submissions focus on the content of that decision.

60. In order to qualify for DSP, a person must satisfy each of the requirements in s 94(1) of the SS Act. In summary:

- a. section 94(1)(a) requires the person to have a physical, intellectual or psychiatric impairment;
- b. section 94(1)(b) requires the person's impairment to be of 20 points or more under the '*Impairment Tables*';
- c. section 94(1)(c) requires the person to either have:
 - i. a '*continuing inability to work*' (s 94(1)(c)(i)); or
 - ii. satisfy the Secretary that they are participating in the Supported Wage System (**SWS**) (s 94(1)(c)(ii)).

61. A person has a continuing inability to work (**CITW**) for the purposes of s 94(1)(c)(i) if the Secretary is satisfied that they meet the criteria in s 94(2). People falling under the Award who are participating in the SWS meet the criterion in s 94(1)(c)(ii), and therefore are not required to have a CITW in order to be qualified for DSP.²⁹

62. The submissions by the AED are, at times, not fully developed. However, the Commonwealth understands the contention to be that the introduction of the proposed wage structure, as set out in the Full Bench's decision of 3 December 2019 (**Proposed Wage Structure**), particularly introducing Grades A and B, would result in employees not having a CITW and prevent them from participating in the SWS, such that they cannot satisfy either s 94(1)(c)(i) or (ii) and are therefore not qualified for the DSP.

²⁹ For completeness, we note that section 94(2) states:

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

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

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

(b) in all cases—either:

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

(ii) if the impairment does not prevent the person from undertaking a training activity—such activity is unlikely (because of the impairment) to enable the person to do any work independently of a program of support within the next 2 years.'

63. The Commonwealth does not agree with the AED's contention and submits the implementation of the Proposed Wage Structure would not affect the entitlement of an employee working in an ADE to the DSP. That is because, for the reasons that follow, the Proposed Wage Structure would not:

- a. prevent employees from participating in the SWS; and / or
- b. result in employees not having a CITW.

We have expanded on these submissions below.

Participation in the SWS

64. The AED's submissions appear to assume that employees in Grade A or B of the Proposed Wage Structure could not be assessed under the SWS because the position has been '*created*' with tasks and a level of supervision '*tailored or adjusted*' to the employee's disability.³⁰ However, the Full Bench observed that a SWS assessment can be performed in relation to Grades A and B as an '*assessment of their productivity as compared to that of a relevantly non-disabled person*'.³¹
65. The focus of the modified SWS assessment is not whether a task can be performed by a supported employee, but on the productivity of that employee in performing those same tasks as contrasted with a non-disabled person. That the tasks are selected or tailored to a person's disability does not mean that they will necessarily be able to perform the task at the same level as a '*relevantly non-disabled person*'.³²
66. For those reasons, the Commonwealth submits that the Proposed Wage Structure will therefore not prevent employees from participating in the SWS.
67. The Commonwealth anticipates that most, if not all, employees engaged under the Award in the Proposed Wage Structure will undergo a SWS assessment.³³ Employees who undergo a SWS assessment will satisfy s 94(1)(c)(ii) of the SS Act and therefore be qualified for the DSP.
68. To the extent that there are any employees who are not subject to a SWS assessment but are captured by Grades A or B, for the reasons outlined below they would none the less be qualified for the DSP.

CITW

69. To be qualified for the DSP, employees who do not undergo a SWS assessment will need to have a CITW for the purposes of s 94(1)(c)(i). For the reasons that follow, the Commonwealth submits that employees under the Proposed Wage Structure will have a CITW.

³⁰ AED's Submissions on Jurisdiction dated 13 May 2022 at [29] - [31]. See also *4 yearly review of modern awards—Supported Employment Services Award 2010* [2019] FWCFB 8179 at [373].

³¹ *Ibid.*, [374].

³² *Ibid.*

³³ In the Trial conducted by ARTD, all employees were subject to SWS assessments.

70. At paragraph 26 of the AED's submissions dated 13 May 2022, the AED appears to have inadvertently misconstrued the criteria for active participation in s 7(1)(b) of the *Social Security (Active Participation for Disability Support Pension) Determination 2014 (Determination)* by submitting that 'section 7(1)(b), calls up additional criteria, all of which must be 'satisfied in relation to the person and the program of support'³⁴. Paragraph 26 goes on to suggest subsection 7(5) must be satisfied for a person to meet the active participation requirement in s 94(2)(aa). However, paragraph 7(1)(b) of the Determination requires that only one of subsections (2), (3), (4) or (5) be satisfied in relation to the person.
71. Regardless, the implementation of the Proposed Wage Structure would not impact whether a person is prevented from 'doing any work independently of a program of support' as required by s 94(2)(a). The AED submit that an employee who falls under clause B.1.1 will as a matter of necessity, not have a CITW because they will be engaging in 'work' as defined by s 94(5) of the SS Act. With respect, this submission is incorrect for two key reasons being:
- a. work under the Proposed Wage Structure is not 'independent of a program of support' [our emphasis]; and
 - b. work under the Proposed Wage Structure is not 'work' within the meaning of the SS Act.

Work under the Award is not independent of a program of support

72. The Award covers employers who operate supported employment services.³⁵ The Determination prescribes matters which must be taken into account by the Secretary when determining whether a person has actively participated in a program of support and this includes whether the program of support was provided by a 'designated provider'. An ADE is a 'designated provider'.³⁶
73. Employees of ADEs are receiving supported employment services because they need substantial ongoing support to obtain or retain paid employment as a result of their disabilities.³⁷ ADEs are a program of support in line with the definition prescribed in s 94(5) of the SS Act.
74. Therefore, an employee working in an ADE under the Proposed Wage Structure would not be considered as working 'independently [our emphasis] of a program of support' for the purposes of s 94(2)(a).³⁸

Work under the Award does not meet the definition of 'work' in the SS Act

³⁴ AED's submissions dated 13 May 2022 [26].

³⁵ Section 7 of the *Disability Services Act 1986* (Cth) defines supported employment services as follows '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.' A 'program of support' is then defined in s 94(5) of the SS Act as meaning a program that:

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

(b) either:

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

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

³⁶ s 5(1) and 9 of the Determination.

³⁷ See *Disability Services Act 1986* (Cth).

³⁸ This is reflected in the *Social Security Guide* (the Department's policy for its implementation of social security legislation) at Topic 1.1.I.95 - Independently of a program of support (accessible at <https://guides.dss.gov.au/social-security-guide/1/1/i/95>) which relevantly states 'DSP recipients working in an ADE are generally accepted as being unable to work independently of a POS [Program of Support] while they remain in an ADE. There is no time limit on the duration of their involvement in an ADE. Recipients working with assistance from an ADE funded under the *Disability Services Act 1986*, are not paid at or above the relevant minimum wage, so the hours worked are not subject to the work test'.

75. The Commonwealth submits that employees covered by the Proposed Wage Structure if introduced to the Award would not be considered as performing 'work' for the purposes of the definition in the SS Act and rejects the AED's submission to the contrary.
76. 'Work' means work *'that is for at least 15 hours per week on wages that are at or above the relevant minimum wage; and...that exists in Australia, even if not within the person's locally accessible labour market'*.³⁹ The Commonwealth submits there is judicial authority on the meaning of 'work' under s 94 of the SS Act relevant to this matter.
77. 'Work' for the purposes of s 94 of the SS Act has been interpreted by the Courts as referring to work that exists in a normal or open workplace. In *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Harris* (2010) 114 ALD 560 (**Harris**), Greenwood J engaged in a detailed consideration of s 94 of the SS Act, including the historical context of the provisions and previous authorities noting at [92] that:

'As to s 94(2)(a): Does the impairment of itself considered in isolation from other matters that may influence the person's attitude to working (such as motivational matters and the like) have such an impact on the person's capacity for work that it prevents him or her from doing at least 15 hours of work per week that exists anywhere in Australia for persons with such an impairment judged in a normal or open workplace in that part of the labour market relevant to the person's skills and experience (recognising that such work includes less skilled or unskilled work with no regard to discretionary suitability on the part of the claimant), on wages that are at or above the relevant minimum wage, being work which the person is by reason of his or her existing work skills and experience capable of performing without retraining, independent of a relevant program of support designed to assist the person in preparing for, finding, or maintain such work.' (emphasis added)

78. Also, applying the judicial authority above, the Commonwealth submits employees undertaking work under the Proposed Wage Structure, if introduced to the Award, would not be receiving wages *'that are at or above the relevant minimum wage'*. The *'relevant minimum wage'* for the purposes of determining whether a person has a CITW is therefore the relevant minimum wage that the person would be entitled to for work performed in the open employment market, namely the national minimum wage (or the minimum rate under an otherwise applicable modern award).
79. Employees working for an ADE under the Award are not working in a *'normal or open workplace'*. Rather, they are working in employment specifically tailored for people with disability. They are persons for whom *'competitive employment at or above the relevant award wage is unlikely'* (s 7 of the *Disability Services Act 1986* (Cth)). The Social Security Guide reflects this at Topic 1.1.R.133 (accessible at <https://guides.dss.gov.au/social-security-guide/1/1/r/133>):

There are different categories of employees and the relevant minimum wage for a person depends on the category under which a person is or would be employed. In effect, relevant minimum wages are wages lawfully paid to people in the open employment market.

...

Work that is at or above the relevant minimum wage does NOT include:

³⁹ Section 94(5) SS Act.

pro-rata wages under SWS, other industrial agreement or special National Minimum Wage that allows for the payment of reduced wages to employees with a disability, based on their productivity, or wages paid at reduced rates under an exemption from the minimum rate of pay, special wage permit, or similar, because of the employee's disability.
Example: Employees participating in an Australian Disability Enterprise.

80. For all of those reasons, the Commonwealth submits that the Proposed Wage Structure would not have an impact on whether a person has a CITW for the purposes of s 94(1)(c)(i) of the SS Act nor would it otherwise have any impact on an employee's entitlement to DSP.

Recommendations in the Report

81. At the outset, the Commonwealth notes that the recommendations on page 126 of the Report concern the modified SWS, while the recommendations on page 127 concern the Commission's new Proposed Wage Structure. The Department administers the SWS in accordance with the terms of the Award determined by the Commission, but has no role in determining, administering or providing guidance on new wage grades. The Commonwealth has addressed each set of recommendations separately below.
82. The Commonwealth intends to consider whether and / or how to implement the recommendations set out in page 126 of the Report once the Commission issues a decision relating to the proposed changes to the Award, which the Commonwealth understands will likely include transitional arrangements for implementation of Award changes, over a period of time.
83. The Commonwealth is not in a position to decide on the implementation of the recommendations at this time as:
- a. Before implementation, it is important that the Commonwealth undertake consultation on the recommendations (and the best way to implement any recommendations) with key stakeholders, including assessors, ADEs and people with disability. That consultation may affect if and how the recommendations are implemented;
 - b. Some of the recommendations are necessarily contingent on a decision by the Commission on whether the SWS will be further modified, as contemplated by paragraph 374 of the Full Bench's decision of 3 December 2019;
 - c. Some matters may also be decisions for Government.
84. Following consultation, and any required decisions of Government, the Commonwealth would look to implement these recommendations where appropriate. This may include updating the currently available SWS e-Learning modules, as well as delivering training to assessors, to account for the recommendations. Any decisions to implement recommendations will have regard to transitional arrangements determined by the Commission.
85. The Commonwealth considers the recommendations on page 127 relating to the Proposed Wage Structure are matters for the Commission to consider and determine as it deems appropriate.
86. However, the Commonwealth raises the following matters for the Commission's consideration with respect to the recommendations on page 127:

- a. It is critically important that the Commission ensure the terms of modern awards are clear as well as easy to understand and implement. This should be a particular priority where employees covered by the award are people with a disability; and
- b. A number of the recommendations speak to the need to provide further guidance on implementing the Proposed Wage Structure. The Commonwealth is broadly supportive of any variations to the Award which would improve usability.

9 September 2022

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