

ENDING SEGREGATED EMPLOYMENT FOR PERSONS WITH DISABILITIES: THE CASE FOR FEDERAL SOCIAL COOPERATIVE LEGISLATION IN AUSTRALIA

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Increased focus on phasing out the segregated model of employment of persons with disabilities has ignited contentious debate about the ideal model to serve as a replacement. This article outlines the case for a federal legislative framework of social cooperatives which are managed and led by persons with disabilities. The Committee on the Rights of Persons with Disabilities recognises social cooperatives as a preferable alternative to segregated employment and the development of cooperatives is an express obligation provided by the Convention on the Rights of Persons with Disabilities. This article adopts a human rights approach to present the case for social cooperatives, comparing social cooperative legislation from various foreign jurisdictions to determine the most effective features that Australia should adopt.

I INTRODUCTION

For decades, persons with disabilities have faced systemic exclusion and marginalisation within the labour market, resulting in significant disparities in employment opportunities.¹ Historical efforts to integrate individuals with disabilities into the workforce have often been based on a deficit model of disability, which focused on defining and categorising intellectual disability while ensuring people with disabilities received care, treatment and protection.² This approach led to the development of segregated workplaces known as sheltered workshops, now referred to as Australian Disability Enterprises ('ADEs').³ ADEs intend

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1 Linda Steele, 'Ending Disability Segregated Employment: "Modern Slavery" Law and Disabled People's Human Right to Work' (2023) 19(2) *International Journal of Law in Context* 217, 225–30 <<https://doi.org/10.1017/S174455232300006X>>.

2 Ariella Meltzer, Rosemary Kayess and Shona Bates, 'Perspectives of People with Intellectual Disability about Open, Sheltered and Social Enterprise Employment: Implications for Expanding Employment Choice through Social Enterprises' (2018) 14(2) *Social Enterprise Journal* 225, 226 <<https://doi.org/10.1108/SEJ-06-2017-0034>>.

3 Ibid 227, 230.

to provide employment opportunities to persons with disabilities who require significant support to work and therefore are unlikely to obtain roles in competitive employment environments at the minimum wage.⁴ However, ADEs have been widely criticised as treating workers with disabilities unfairly.⁵ By segregating persons with disabilities from the general labour force, ADEs render persons with disabilities unable to easily transition from supported to open employment.⁶ Persons with disabilities working in ADEs are generally paid below the national minimum wage, excluded from managerial and leadership positions and do not receive the assistance necessary to enable transition to open employment.⁷ Indeed, workers with disabilities are often referred to as ‘clients’ or ‘supported employees’ and are seen as distinct from the ‘employees’ who work in managerial or support roles often reserved for persons without disabilities.⁸ Ted, a 56-year-old ADE worker who lives freely and independently, expressed the sense of powerlessness he feels working in an ADE: ‘The other people were getting normal wages and there’s things that they can’t do that I can do. ... If I did not agree with it, I would have lost my job, so it was pretty rough.’⁹

The *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (‘*Royal Commission*’),¹⁰ the United Nations Committee on the Rights of Persons with Disabilities (‘the Committee’) and peak intellectual disability advocacy bodies,¹¹ such as Inclusion Australia,¹² have all called for the phasing out of segregated employment in favour of open employment opportunities, which would ultimately create a more inclusive Australia.

The operation of segregated workplaces like ADEs is inconsistent with the human rights of persons with disabilities. Article 27 of the *Convention on the Rights of Persons with Disabilities* (‘*CRPD*’) grants persons with disabilities the right to freely choose or accept employment in an open, inclusive and accessible labour

4 *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 7, 463 (‘*Royal Commission*’).

5 Linda Steele, ‘Law and Disability “Supported” Employment in Australia: The Case for Ending Segregation, Discrimination, Exploitation and Violence Against People with Disability at Work’ (2023) 49(2) *Monash University Law Review* (advance) 1, 23–41 <<https://doi.org/10.2139/ssrn.4187360>> (‘Law and Disability “Supported” Employment in Australia’); *ibid* 391–3, 466–70, 475–80.

6 *Royal Commission* (n 4) 471–5, 492; Steele, ‘Law and Disability “Supported” Employment in Australia’ (n 5) 26–8. See also Inclusion Australia, Submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (December 2022) 10–11, 20, 31–2, 47–53, 88 (‘Submission to Royal Commission’).

7 *Royal Commission* (n 4) 463.

8 Peter Smith et al, ‘Developing Open Employment Outcomes for People with an Intellectual Disability Utilising a Social Enterprise Framework’ (2018) 48(1) *Journal of Vocational Rehabilitation* 59, 64 <<https://doi.org/10.3233/JVR-170916>>.

9 Inclusion Australia, *Employment* (Web Page) <<https://www.inclusionaustralia.org.au/story/employment/>>.

10 *Royal Commission* (n 4) 491–2, 498.

11 Committee on the Rights of Persons with Disabilities, *General Comment No 8 (2022) on the Right of Persons with Disabilities to Work and Employment*, UN GAOR, 27th sess, UN Doc CRPD/C/GC/8 (7 October 2022) 13 [63]–[65] (‘*General Comment No 8*’).

12 Inclusion Australia, Submission to Royal Commission (n 6) 101.

market.¹³ On 7 October 2022, the Committee expressed its considered view to all States Parties that segregated employment is not a realisation of the rights bestowed by article 27.¹⁴ However, the Committee did recognise the social cooperative model, being jointly-owned and democratically-controlled enterprises, as a venture that falls outside the scope of the prohibition on segregated employment ('the Social Cooperative Alternative').¹⁵ This is congruent with the operation of article 27(1)(f) which requires States Parties to promote the development of cooperatives as a means to safeguard and support the realisation of the right to work.¹⁶ Cooperatives that work toward a goal to serve and enhance the whole community or a specific target group are called 'social cooperatives'. Legislation promoting and regulating the development of social cooperatives serves as a popular instrument globally to provide persons with disabilities access to meaningful employment. The discussion of such legislation has been noticeably absent from Australian discourse. To better understand the requirements and limitations of the Social Cooperative Alternative, this article details the criteria social cooperatives must meet to avoid being characterised as segregated employment.

This article makes the case for a federal social cooperatives regime which promotes the realisation of the right to work of persons with disabilities. Such legislation will satisfy Australia's international obligations under article 27(1)(f) and increase the availability of non-segregated employment within the labour market. Building on existing scholarly and grey literature advocating for the phasing out of ADEs, this article introduces social cooperatives into current Australian discourse as an alternative to ADEs and assesses the role of legislation in facilitating their development.

A human rights model of disability will be employed to interpret the Social Cooperative Alternative and assess the viability of social cooperative legislation as a means to promote employment opportunities for persons with disabilities. The human rights model of disability shifts the focus away from viewing disability as an individualised or medical problem to viewing it as a social issue connected to human rights.¹⁷ Such an approach recognises society's responsibility in ensuring equal enjoyment of the right to fully participate in all areas of life, regardless of a person's abilities.¹⁸ This article analyses article 27 through the lens of the human rights model, focusing on research that empowers and involves people with disabilities in Australia. By emphasising social change, it incorporates the perspectives of persons with disabilities and their advocacy groups to authentically capture their experiences.¹⁹

13 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 27 ('CRPD').

14 *General Comment No 8* (n 11) 4.

15 *Ibid.*

16 *CRPD* (n 13) art 27(1)(f).

17 Anna Arstein-Kerslake et al, 'Introducing a Human Rights-Based Disability Research Methodology' (2020) 20(3) *Human Rights Law Review* 412, 418 <<https://doi.org/10.1093/hrlr/ngaa021>>.

18 *Ibid.*

19 *Ibid* 420.

The study examines social cooperatives legislation by employing a comparative research method. By contrasting social cooperative legislation globally, in both European and non-European regions, this article aims to identify the best legislative framework.²⁰

Part II will introduce and outline the history and discourse behind the segregation of persons with disabilities in employment through ADEs. Social cooperatives and their status in the *CRPD* will then be outlined to contextualise the social cooperative model and article 27. To highlight the purpose and need for the social cooperative legislation proposed by this article, Part III analyses the criteria which must be satisfied to ensure a social cooperative falls outside the *CRPD*'s definition of segregated employment and is otherwise consistent with the Convention. Part IV examines the international guiding principles on establishing cooperatives and compares the formulation of social cooperative legislation from Poland, South Korea, Brazil and Greece. This article will identify the most effective features of existing social cooperative laws and suggest how they should be incorporated into a proposed Australian framework. To demonstrate constitutional validity for the introduction of this framework, Part V shows how the external affairs power would empower the federal government to enact the proposed legislation. The part will also examine the successes of an Australian social cooperative, the Nundah Community Enterprises Cooperative, and suggest the ways in which a federal social cooperative framework would improve that cooperative's operations and inspire the creation of similar businesses.

II A CONTEXTUAL BACKGROUND

A History and Discourse

ADEs, formerly known as sheltered workshops, emerged in the 1950s as an employment option organised by families with the objective of supporting persons with intellectual disabilities.²¹ The introduction of the *Sheltered Employment (Assistance) Act 1967* (Cth) saw these operations begin to receive government funding. In the 1970s and 1980s, the unchallenging work in sheltered workshops, low wages, poor working conditions and lack of reliable pathways into the open labour market became critical concerns for persons with disabilities, their families and policymakers.²² Subsequently, the Handicaps Programs Review was established, and its findings and recommendations were published in a report dated 13 May 1985.²³ The report was especially critical of sheltered workshops due to

20 Sue Farran, 'Comparative Approaches to Human Rights' in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (Routledge, 2018) 134, 135 <<https://doi.org/10.4324/9781315672632-8>>.

21 Cindy Cheng et al, 'What Constitutes Effective Support in Obtaining and Maintaining Employment for Individuals with Intellectual Disability? A Scoping Review' (2018) 43(3) *Journal of Intellectual and Developmental Disability* 317, 317–18 <<https://doi.org/10.3109/13668250.2017.1327040>>.

22 Ibid.

23 Minister for Community Services, *New Directions: Report of the Handicapped Programs Review* (Report, 1985).

the work performed, low wages, poor working conditions and their inherently segregated nature.²⁴

The *Disability Services Act 1986* (Cth) ('*DSA*') was introduced in response to the report and established two types of employment services in Australia: open employment services and supported employment services.²⁵ Open employment refers to the traditional competitive labour market. Accordingly, open employment services are services that aim to integrate persons with disabilities into the general labour force. On the other hand, *DSA* section 7 enables ADEs to operate as supported employment services which provide paid employment to persons with disabilities who are unlikely to gain competitive employment.²⁶ By definition in the *DSA*, these workplaces operate exclusively for persons with disabilities and this, in practice, congregates and segregates persons with disabilities under the supervision of managerial or support staff who do not have a disability.²⁷

The traditional purpose of establishing, structuring and funding ADEs did not extend to transitioning persons with disabilities into open employment settings.²⁸ This means persons with disabilities remain in ADEs for years or even decades with no ability or understanding of how to transition into open employment. As a result, ADEs remain segregated. Recent data shows that only 30% of National Disability Insurance Scheme ('*NDIS*') participants with an intellectual disability over the age of 25 were employed, with 71% of this cohort working in an ADE.²⁹ Similarly, 72% of *NDIS* participants with Down syndrome were employed by ADEs.³⁰ According to 2014 data, fewer than 1% of ADE employees transition to open employment.³¹ Inclusion Australia attributes these low transition rates to a systemic failure to promote 'structured skill development opportunities within sheltered and segregated employment settings' and the fact that 'time spent working in such settings does not promote later employment in open employment'.³² This conclusion is consistent with a position paper of a coalition of Disability Representative Organisations which contends that segregated systems are justified by 'ableist assertions and cloaked in the language of benevolent paternalism' which fails to respect the rights of people with disability.³³ The model of segregation which underpins ADEs serves to relegate persons with disabilities to the powerless role of beneficiary or 'client' whilst reserving positions of authority and higher pay for those without disabilities.³⁴ Similarly, Linda Steele identifies the central injustices of the ADEs model to be their inherent discrimination and segregation;

24 Trevor R Parmenter, 'Effecting a System Change in the Delivery of Employment Services for People with Disabilities: A View from Australia' (1999) 13(2) *Journal of Vocational Rehabilitation* 117, 119.

25 *Disability Services Act 1986* (Cth) s 7.

26 *Ibid.*

27 Steele, 'Law and Disability "Supported" Employment in Australia' (n 5) 28.

28 *Royal Commission* (n 4) 472.

29 *Ibid* 471.

30 *Ibid.*

31 Inclusion Australia, Submission to Royal Commission (n 6) 48.

32 *Ibid.*

33 *Royal Commission* (n 4) 506.

34 Smith et al (n 8) 67.

pervasive labour exploitation-fuelled wage systems that disincentivise upskilling; and heightened risks of violence and coercion.³⁵

The experiences of persons with disabilities in finding and maintaining open employment is equally fraught with unfairness. Ariella Meltzer, Sally Robinson and Karen R Fisher identify the most prominent barriers to open employment to be inadequate job-seeking services, discouraging attitudes by employers or recruitment advisors, overrepresentation in insecure employment, and exposure to both subtle and overt discrimination.³⁶ For this reason, Inclusion Australia advocates for the end of segregated employment and contends that programs aimed at fixing barriers to employment for people with an intellectual disability have not focused on fixing the foundational issues associated with the segregated system.³⁷ Thus, segregated employment can be understood as the byproduct of two powerful forces: the structural inadequacies of the ADE model that neglects the integration of persons with disabilities into open employment; and the systemic lack of inclusivity in the open labour market. Put simply by Inclusion Australia: ‘To end segregation, we must end the segregation system.’³⁸

The *Royal Commission* recommended the end of segregated employment by 2034 through a National Inclusive Employment Roadmap.³⁹ The roadmap includes the transformation of the ADE model, the elimination of subminimum wages, and the transition of individuals in ADEs to other forms of employment.⁴⁰ The literature is divided over what the most effective model to transform ADEs is. Peter Smith et al argue in favour of the adoption of a social enterprise framework.⁴¹ Steele highlights the need for caution when adopting this approach, as the ‘social enterprise’ brand may lead to widespread ‘disability-washing’ with no material change to ADE operations, governance and remuneration.⁴² Meanwhile, Meltzer, Rosemary Kayess and Shona Bates and the *Royal Commission* advocate for the social firm model: a company that, among other things, pays at or above the minimum wage, possesses a diverse workforce where persons with disabilities are not the majority, and provides support to facilitate the transition into open employment.⁴³ Similarly, Inclusion Australia embraces the ‘Work Integration Social Enterprises’ model to transform existing ADEs and social enterprises into models that improve supported employees’ work readiness and their transitions to hybrid or open employment.⁴⁴ This article proposes social cooperatives as a further

35 Steele, ‘Law and Disability “Supported” Employment in Australia’ (n 5) 25–40.

36 Ariella Meltzer, Sally Robinson and Karen R Fisher, ‘Barriers to Finding and Maintaining Open Employment for People with Intellectual Disability in Australia’ (2020) 54(1) *Social Policy and Administration* 88, 94–7 <<https://doi.org/10.1111/spol.12523>>.

37 Inclusion Australia, Submission to Royal Commission (n 6) 8.

38 Ibid.

39 *Royal Commission* (n 4) 517.

40 Ibid.

41 Smith et al (n 8) 62.

42 Steele, ‘Law and Disability “Supported” Employment in Australia’ (n 5) 34, 36.

43 *Royal Commission* (n 4) 512; Meltzer, Kayess and Bates (n 2) 229.

44 Inclusion Australia, Submission to Royal Commission (n 6) 250.

option. The *CRPD* itself refers to social cooperatives and the Committee on the Rights of Persons with Disabilities endorsed them in *General Comment No 8*.⁴⁵

B Overview of Recent Developments

Australia is undergoing momentous change to transform the supported employment industry. On 31 December 2021, funding for support services completed its transition from ADE employers to individual NDIS participant plans. This allows participants with funding for ‘supports in employment’ to purchase support for a wide range of employment settings outside of ADEs. The Fair Work Commission (‘FWC’) also established the Supported Wage System (‘SWS’) as the only tool to discount the national minimum wage on the basis of disability under the *Supported Employment Services Award 2020* (Cth) (‘*SES Award*’) on 21 December 2022.⁴⁶ Prior to this, there were 22 different wage assessment tools that an employer could use to set the wages of their employees with disabilities below the minimum wage. Such tools exclusively applied to persons with disabilities. Employees covered by the *SES Award* may still have their wages reduced but only through the SWS. Under this framework, employees are compensated based on their assessed productive capacity, with a wage floor set at 12.5% of the current minimum wage.⁴⁷ Given the present minimum wage of \$24.10 per hour,⁴⁸ this translates to a wage floor of \$3.01 per hour. The *Royal Commission* has since recommended that subminimum wages be eliminated by 2034.⁴⁹

To assist with these recent changes, the Albanese Government dedicated \$35 million of the 2023–24 budget over three years for a Structural Adjustment Fund.⁵⁰ This will grant funding to supported employment services, social enterprises and any other eligible organisations to develop their business models to:

- (a) Create pathways to open employment;
- (b) Better meet community expectations; and
- (c) Create sustainable employment opportunities for people with disability.⁵¹

Similarly, the *Royal Commission* endorsed a Structural Adjustment Fund to transition ADEs toward open employment models, particularly social firms.⁵² The Commissioners recommended that the fund provide incremental payments that are conditional on the completion of specified transition targets.⁵³ This article embraces the momentum of the recent developments as an opportunity to introduce social cooperative legislation for policy consideration.

45 *CRPD* (n 13) art 27(f); *General Comment No 8* (n 11) 8 [38]–[39].

46 *4 Yearly Review of Modern Awards – Supported Employment Services Award 2020* [2022] FWCFB 245 (‘*SES Award 2020 Decision*’); Fair Work Commission, *Supported Employment Services Award 2020* (MA000103, 30 June 2023) (‘*SES Award*’).

47 *SES Award* (n 46) sch D.4.

48 *Annual Wage Review 2023–24* [2024] FWCFB 3500, 66 [174(a)] (Hatcher P, Asbury V-P, Hampton and O’Neill DPP, Ms Labine-Romain, Professor Baird and Mr Cully).

49 *Royal Commission* (n 4) 517.

50 Department of Social Services, *The Future of Supported Employment* (Discussion Paper, June 2023) 3.

51 *Ibid.*

52 *Royal Commission* (n 4) 513.

53 *Ibid.*

C Cooperatives, ADEs and the *Convention on the Rights of Persons with Disabilities*

1 *The Convention on the Rights of Persons with Disabilities*

The *CRPD* was adopted in December 2006 and entered into force on 3 May 2008.⁵⁴ Australia became a signatory to the *CRPD* on 30 March 2007 and ratified it on 17 July 2008.⁵⁵ The purpose of the *CRPD* is to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’.⁵⁶ The preamble specifies that the promotion and protection of human rights applies to all persons with disabilities, ‘including those who require more intensive support’.⁵⁷

The Committee on the Rights of Persons with Disabilities is established under article 34 with the purpose of monitoring the implementation of the *CRPD* by States Parties.⁵⁸ The Committee promotes inclusion, advocates for the human rights of all persons with disabilities and provides recommendations to support the implementation of the Convention.⁵⁹ The Committee may issue guidance through General Comments that ‘aim to help States parties fulfil their obligations’.⁶⁰

Article 27(1) of the *CRPD* requires States Parties to recognise the right of persons with disabilities to work on an equal basis with others.⁶¹ This requires States Parties to ensure that there is an ‘opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities’.⁶² Cooperatives are expressly referenced in article 27(1)(f). The provision requires States Parties to safeguard and promote the realisation of the right to work by taking appropriate steps, including through legislation, to ‘[p]romote opportunities for ... the development of cooperatives’.⁶³

Though cooperatives must comply with the other provisions of the *CRPD*, they are explicitly afforded legal recognition by the Convention. By contrast, segregated workplaces, being sheltered workshops, were a contentious topic that was thoroughly debated during the drafting of the *CRPD*. The decision by the Chair of the drafting committee to entirely omit references to sheltered workshops has been

54 *Resolution Adopted by the General Assembly on 13 December 2006*, 61st sess, Agenda Item 67(b) UN Doc A/RES/61/106 (24 January 2007); *CRPD* (n 13) art 45(1).

55 ‘Status of Treaties: *Convention on the Rights of Persons with Disabilities*’, *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4>.

56 *CRPD* (n 13) art 1.

57 *Ibid* Preamble para j.

58 *Ibid* art 34.

59 ‘Committee on the Rights of Persons with Disabilities’, *Office of the United Nations High Commissioner for Human Rights* (Web Page) <<https://www.ohchr.org/en/treaty-bodies/crpd>>.

60 ‘General Comments: Committee on the Rights of Persons with Disabilities’, *Office of the United Nations High Commissioner for Human Rights* (Web Page) <<https://www.ohchr.org/en/treaty-bodies/crpd/general-comments>>.

61 *CRPD* (n 13) art 27.

62 *Ibid*.

63 *Ibid* art 27(1)(f).

described as a means to avoid an impasse and secure success of the negotiations.⁶⁴ Social cooperatives are an extension of the traditional cooperative model which strictly works toward social goals rather than economic ones. Cooperatives that operate with the primary aim of integrating persons with disabilities into an open, inclusive and accessible labour market are considered social cooperatives.

2 General Comment No 8

The Committee published *General Comment No 8* on 9 September 2022 to clarify the obligations of States Parties regarding the right to work and employment under article 27, placing a particular focus on segregated employment. The *General Comment* stated that segregated employment ‘is not to be considered as a measure of progressive realisation of the right to work’ because this is achieved by employment that is ‘freely chosen or accepted and performed in an open and inclusive labour market’.⁶⁵ The Committee emphasised that this is especially true where ‘the only real opportunity open to persons with disabilities is to work in segregated facilities’.⁶⁶ Identifiable characteristics of segregation in the workplace are:

- (a) Persons with disabilities being isolated from open, inclusive and accessible employment;
- (b) Employment being organised around activities that persons with disabilities are deemed to be capable of carrying out by owners and managers;
- (c) A focus on medical and rehabilitation approaches to disability;
- (d) Ineffective promotion of the open labour market;
- (e) Unequal remuneration for work of equal value; and
- (f) Irregular employment contracts.⁶⁷

However, the Committee acknowledged that social cooperatives do not fall within the scope of this definition of segregation. The Social Cooperative Alternative outlined by the Committee states:

Employment ventures that are managed and led by persons with disabilities, including those that are jointly owned and democratically controlled, may not be considered segregated employment if they provide just and favourable conditions of work on an equal basis with others.⁶⁸

In its draft form, *General Comment No 8* explicitly referred to ‘cooperatives, or jobs organised or run by persons with disabilities in which labour laws are generally respected’.⁶⁹ In response to this draft, the International Disability Alliance (‘IDA’) requested clarification as to whether cooperatives consisting

64 Charlotte May-Simera, ‘Reconsidering Sheltered Workshops in Light of the United Nations Convention on the Rights of Persons with Disabilities (2006)’ (2018) 7(1) *Laws* 1, 11 <<https://doi.org/10.3390/laws7010006>>.

65 *General Comment No 8* (n 11) 4 [15].

66 *Ibid* 3 [12].

67 *Ibid* 4 [14].

68 *Ibid* 4 [15].

69 International Disability Alliance, Submission to Committee on the Rights of Persons with Disabilities, *IDA’s Submission on the CRPD Committee’s Draft General Comment No 8 (2021) on Article 27 of the CRPD (Work and Employment)* (December 2021) 9.

entirely of workers with disabilities would be considered segregation.⁷⁰ It is arguable that the language subsequently employed in the official document is in response to this IDA submission. The phrasing ‘jointly owned and democratically controlled’ is a reference to cooperatives.⁷¹ As this alternative operates alongside Australia’s international obligation to promote the development of cooperatives, the development of a social cooperative framework will simultaneously satisfy two international obligations: article 27(1)(f) and the Committee’s interpretation that the *CRPD* requires States Parties to phase out segregated employment.⁷² The Social Cooperative Alternative has not yet been explored in academic literature, nor has it been acknowledged in Australian policy and scholarly discourse. This article accordingly highlights a dimension of the Committee’s jurisprudence so far neglected by Australian policy and develops the scholarly debate regarding ADEs in order to provide a new and practical contribution to the conversation regarding phasing out segregated employment.

D Current Cooperatives Law in Australia

Cooperatives are internationally defined as democratically controlled and jointly owned enterprises in which persons voluntarily unite to meet a common economic, social and cultural goal.⁷³ Distinct from those organisations whose goal is maximising profit, cooperatives seek to maximise the value of membership by advancing the interests of their owner-members.⁷⁴ In Australia, cooperatives have a strong presence in agriculture as they allow small, rural farm units to pool resources and distribute produce.⁷⁵ Cooperatives are regulated by the states and territories due to constitutional constraints on Commonwealth legislative power. New South Wales passed the *Co-operatives (Adoption of National Law) Act* (‘*CNL*’) in 2012 as a template law to be adopted nationally.⁷⁶ The other states and territories agreed to adopt the *CNL* or a law with consistent provisions under the Australian Uniform Co-operative Law Agreement (‘*AUCLA*’).⁷⁷ New South Wales, the Australian Capital Territory, Victoria and Tasmania operate according to the *CNL*; the Northern Territory and South Australia use the *CNL* with scope for modification by their own legislature; Western Australia operates under a regime consistent with the *CNL*; and Queensland operates under a similar but not consistent law after withdrawing from the *AUCLA* in 2015.⁷⁸ No state or territory has enacted

70 Ibid.

71 See, eg, ‘The CRPD Committee Adopts General Comment No 8 on Article 27 of the *CRPD* (Work and Employment)’, *International Disability Alliance* (Web Page) <<https://www.internationaldisabilityalliance.org/content/crpd-committee-adopts-general-comment-no-8-article-27-crpd-work-and-employment>> (‘CRPD Committee Adopts General Comment No 8’).

72 *General Comment No 8* (n 11) 4 [15].

73 Ann Apps, ‘Legislating for Co-operative Identity: The New Co-operatives National Law in Australia’ (2016) 34(1) *Company and Securities Law Journal* 6, 8.

74 Ibid.

75 Ibid 7.

76 Ibid.

77 Ibid 12–13.

78 *Co-operatives National Law (ACT) Act 2017* (ACT); *Co-operatives (Adoption of National Law) Act 2012* (NSW) (‘*CNL*’); *Co-operatives (National Uniform Legislation) Act 2015* (NT); *Co-operatives National*

legislation that distinguishes social cooperatives from general cooperatives. Rather, social entrepreneurs are required to establish their cooperatives under the relevant state or territory law and apply for funding or related benefits through other government programs. In order to achieve the goal of providing meaningful employment, social cooperatives will require specialised legislation that promotes and safeguards the participation of persons with disabilities. The existing *CNL* framework fails to achieve this. Therefore, this article proposes that a social cooperative framework be enacted on the federal level. The next Part details the Social Cooperative Alternative to ground the proposed legislation in fundamental human rights principles.

III UNDERSTANDING THE SOCIAL COOPERATIVE ALTERNATIVE

A Social Cooperative Alternative: The Obligation for ADEs to be ‘Led and Managed’ by Persons with Disabilities

Effectively managed social cooperatives are not considered segregated employment where they satisfy the two limbs of the Social Cooperative Alternative. To fit within this alternative, social cooperatives must:

- (a) Be managed and led by persons with disabilities, including through joint ownership and democratic governance; and
- (b) Provide just and favourable conditions of work for persons with disabilities on an equal basis with others.⁷⁹

The inclusion of ‘jointly owned and democratically controlled’ enterprises in the first limb recognises social cooperatives as a permissible model so long as they comply with the overriding purpose of being ‘managed and led’ by persons with disabilities.⁸⁰ Second, as the language of the second limb emulates the language of article 27(1)(b), this article draws on the Committee’s guidance on article 27(1)(b) in *General Comment No 8* to interpret the Social Cooperative Alternative.⁸¹ This article now turns to discuss the elements of this alternative.

1 Employment Ventures Managed and Led by Persons with Disabilities

The Social Cooperative Alternative requires persons with disabilities to have influential and authoritative representation in the governance of employment ventures. The medicalised model of ADEs places persons with disabilities in the role of a client and precludes them from managerial positions which are reserved for persons without disabilities.⁸² Consequently, the Committee intended ADEs to shift

Law Act 2020 (Qld); Co-operatives National Law (South Australia) Act 2013 (SA); Co-operatives National Law (Tasmania) Act 2015 (Tas); Co-operatives National Law Application Act 2013 (Vic); Co-operatives Act 2009 (WA).

79 *General Comment No 8* (n 11) 4 [15].

80 *Ibid.*

81 *CRPD* (n 13) art 27(1)(b); *General Comment No 8* (n 11).

82 Smith et al (n 8) 67.

away from frameworks built on the medical model of disability to a human rights model which promotes self-determination and enhances the control that persons with disabilities have in their workplaces. This requires increased representation in decision-making positions.

Jane Buchanan and Haydn Hammersley concluded in a report for the European Disability Forum that the key qualities of employment ventures which fall under the Social Cooperative Alternative are adherence with the *CRPD*, respect for labour rights and the fulfilment of the transition process towards the open labour market.⁸³ These qualities are possessed by organisations that prioritise social goals over economic ones, multiply social benefits through profit-reinvestment strategies and operate according to a democratic or participatory governance structure.⁸⁴ According to the IDA, social cooperatives are an employment venture that embody this emphasis on social goals and recognise the importance of joint ownership and democratic control.⁸⁵ Such social cooperatives necessarily promote the overriding purpose of creating workplaces that are ‘managed and led’ by persons with disabilities.⁸⁶ The European Association of Service Providers for Persons with Disabilities emphasised that cooperatives must simultaneously possess democratic governance and not just joint ownership to satisfy the Social Cooperative Alternative.⁸⁷ Therefore, persons with disabilities must in fact enjoy the right to occupy authentic roles of leadership or governance that enable them to impact the operations of their workplaces when working for firms that operate under the Social Cooperative Alternative.

2 Just and Favourable Conditions of Work on an Equal Basis with Others

(a) Social Cooperative Alternative and Article 27(1)(b)

Social cooperatives aiming to adhere to the Social Cooperative Alternative should draw guidance from article 27(1)(b) of the *CRPD* to ensure that persons with disabilities are provided just and favourable conditions of work on an equal basis with others. This includes:

- (a) Equal opportunities and equal remuneration for work of equal value;
- (b) Safe and healthy working conditions, including protection from harassment; and
- (c) The redress of grievances.⁸⁸

This right is an important component of other rights provided by article 27, including trade union rights under article 27(1)(c), and is a prerequisite for the enjoyment of certain rights in the Convention, including the right to an adequate standard of living under article 28.⁸⁹ This also ensures persons with disabilities receive

83 Jane Buchanan and Haydn Hammersley, ‘The Right to Work: The Employment Situation of Persons with Disabilities in Europe’ (2023) 7 *European Human Rights Report* 1, 91.

84 *Ibid.*

85 ‘CRPD Committee Adopts General Comment No 8’ (n 71).

86 *General Comment No 8* (n 11) 4 [15].

87 European Association of Service Providers for Persons with Disabilities, *Fostering Employment through Sheltered Workshops: Reality, Trends and Next Steps* (Final Report, 15 December 2022) 29.

88 *CRPD* (n 13) art 27(1)(b).

89 *General Comment No 8* (n 11) 6 [25].

the benefits and protections enjoyed by other workers, including superannuation, sick leave, long service leave, parental leave, promotions, rest, leisure and periodic holidays.⁹⁰ The requirement for equal remuneration for work of equal value yields the conclusion that payment below the minimum wage on the basis of disability is not justified under any circumstances.⁹¹ As a result, the Committee emphasised that workplaces transitioning away from segregated employment must not be exempt from paying below the minimum wage.⁹² Therefore, employment ventures aiming to adhere to the Social Cooperative Alternative must ensure persons with disabilities enjoy equal benefits to those without disabilities, are protected from harassment, have access to effective remedies and are not paid below the minimum wage on the basis of disability.

(b) *Equal Remuneration for Work of Equal Value*

As Australia's separate minimum wage framework actively operates through an exception from discrimination legislation, it fails to provide equal remuneration for work of equal value on a non-discriminatory basis. Though the FWC's recent decision to employ the SWS as the sole wage assessment tool marks progress,⁹³ Australia's domestic discrimination and industrial law regimes continue to provide persons with disabilities unequal remuneration for work of equal value. The Committee declared that the payment of wages below the minimum wage on the basis of disability is not justified under any circumstances and expressed concerns regarding Australia's payment of subminimum wages in ADEs.⁹⁴ Despite this, the Australian Government argues that wages paid below the national minimum wage are not 'sub-minimum' because they are legally paid in accordance with the *SES Award* or the SWS.⁹⁵ However, this argument fails to appreciate the role Australian law has in facilitating systemic non-compliance with Australia's international obligations. The application of a lower wage through the *SES Award* and the SWS only applies to persons with disabilities and is exempt from the operation of the *Disability Discrimination Act 1992* (Cth) by virtue of section 47.⁹⁶ This section exempts industrial instruments authorised through the *Fair Work Act 2009* (Cth) ('*FWA*') and tribunal or court orders, awards or determinations.⁹⁷ In turn, the *FWA* expressly excludes enterprise agreements that provide separate wages for 'all employees with a disability, or a class of employees with a disability' from its definition of 'discriminatory term'.⁹⁸ The operation of these two exemptions together

90 Ibid 6 [27].

91 Ibid 6 [26].

92 Ibid 8 [38].

93 *SES Award* (n 46).

94 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, UN GOAR, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019, adopted 26 August-20 September 2019) 12-13 [49]; *General Comment No 8* (n 11) 6 [26].

95 Australian Government, Submission No SUBM.0026.0001.0001 to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (15 August 2022) 8 ('Government Submissions').

96 *Disability Discrimination Act 1992* (Cth) ss 47(1)(c)-(d).

97 Ibid.

98 *Fair Work Act 2009* (Cth) s 195(3)(b).

places persons with disabilities in a separate class of persons who are subject to a separate minimum wage system that predominantly provides remuneration lower, often significantly lower, than persons without disabilities performing the same or similar task. This is contradictory to the Committee on the Rights of Persons with Disabilities' ('CRPD Committee') interpretation of the obligations imposed on States Parties by the *CRPD*.⁹⁹ Therefore, Australia's minimum wage framework remunerates persons with disabilities below the National Minimum Wage or relevant award on the basis of their disability. This is in direct contravention of the requirements of the Social Cooperative Alternative.

B Facilitating Choice between Employment Settings

A precondition to any policy enacted pursuant to article 27(1), including those adhering to the Social Cooperative Alternative, is the presence of freely chosen work facilitated through reduced barriers between different modes of employment. The Committee emphasised that the right bestowed by article 27(1) is 'not realised where the only real opportunity open to persons with disabilities is to work in segregated facilities'.¹⁰⁰ As admitted by the Australian Government in the *Royal Commission*, Australian policy fails to satisfy article 27(1) in this respect because for 'some people with disability their employment opportunities may currently be limited to working in an ADE'.¹⁰¹ The research of Meltzer, Robinson and Fisher supports this by outlining the barriers for finding and maintaining open employment for persons with disabilities.¹⁰² Ironically, this is the same argument ADE providers make to justify the ADE model. For example, Greenacres Disability Services argues that ADEs need to exist as a 'safety net' for when people choose 'not to go [into open employment] or have come back following very bad experiences'.¹⁰³ Similarly, Wangarang Industries advertises their workplace as a 'safety net for people with disabilities who may not be able to fulfil a role in open employment'.¹⁰⁴ This safety net argument embraces the charity model of disability, which portrays persons with disabilities as reliant on persons without disabilities to perform tasks due to their impairment,¹⁰⁵ and fails to embody freely chosen work. Consequently, social cooperatives must be a legitimate and freely chosen option for work rather than a mere 'safety net'.

Therefore, the proposed social cooperative framework must ensure workplaces are 'managed and led' by persons with disabilities through joint ownership and democratic control. These businesses must provide just and favourable conditions of work on an equal basis with others, including through non-discriminatory

99 *General Comment No 8* (n 11) 6 [26].

100 *Ibid* 3 [12].

101 Government Submissions (n 95) 4–5 [15].

102 Meltzer, Robinson and Fisher (n 36) 97.

103 Greenacres Disability Services, Submission No ISS.001.00359 to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (14 August 2020) 7.

104 'Wangarang Industries', *ADEs Directory* (Web Page) <<https://ade.org.au/ades-directory/directory/wangarang-industries>>.

105 Marno Retief and Rantoa Letšosa, 'Models of Disability: A Brief Overview' (2018) 74(1) *HTS Theological Studies* a4738:1–8, 6 <<https://doi.org/10.4102/hts.v74i1.4738>>.

remuneration. As their existence cannot be legitimately justified as a ‘safety net’, their social dimension should embody the integration of persons with disabilities into the open labour market. This article now turns to an analysis of the main features of social cooperative legislation in foreign jurisdictions to provide a basis for describing the legislation this article proposes for Australia.

IV RECLAIMING THE ‘DISABILITY’ IN ‘AUSTRALIAN DISABILITY ENTERPRISE’: EMPOWERING WORKERS WITH DISABILITIES THROUGH SOCIAL COOPERATIVES

A Introduction to Social Cooperatives

This section outlines the international guiding principles of social cooperative governance and demonstrates how they create workplaces that are ‘managed and led’ by persons with disabilities. In particular, this article will illustrate how the social cooperative model empowers persons with disabilities by making managers, support staff and supervisors accountable to them.

1 What are the International Guiding Principles for Social Cooperatives?

Social cooperatives are a realisable alternative to ADEs that both provide meaningful employment and do not involve segregation as understood by the CRPD Committee. The International Cooperative Alliance (‘ICA’) defines cooperatives as ‘autonomous associations of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.’¹⁰⁶ The Social Cooperative Alternative outlined by the CRPD Committee emulates this definition. Democratic control is facilitated through the ‘one member, one vote’ rule.¹⁰⁷ The ICA provides a set of guiding principles associated with the creation and management of cooperatives. These principles include:

- (1) Voluntary and open membership to all persons willing to accept the responsibilities of membership;
- (2) Democratic control by members through equal voting rights and active participation in setting the organisation’s policies and making decisions;
- (3) Members contributing equally to, and democratically controlling, the capital of their cooperative with profit being set aside for further developing the cooperative with member approval;
- (4) Agreements with other organisations being made in a manner that ensures the maintenance of democratic control by members and cooperative autonomy;

106 ‘Cooperative Identity, Values and Principles’, *International Cooperative Alliance* (Web Page) <<https://www.ica.coop/en/cooperatives/cooperative-identity>>.

107 Ibid.

- (5) Cooperatives should provide education for members, elected representatives, managers and employees so they can contribute effectively;
- (6) Mutual support and collaboration should be provided between cooperatives to enhance efficiency and impact; and
- (7) Cooperatives should work for the sustainable development of their communities through policies approved by their members.¹⁰⁸

These principles are enshrined in domestic law under section 10 of the *CNL*.¹⁰⁹

Cooperatives that combine the principles of democratic control with a general interest mission, being a goal to serve and enhance the whole community or a specific target group, are called social cooperatives.¹¹⁰ The International Labour Organization describes ‘[s]trong and well-developed’ social cooperatives as an ‘overlooked’ form of employment for persons with disabilities that has the capacity to promote equality of opportunity, improve livelihoods and help break barriers for persons with disabilities.¹¹¹

Leandro Sepulveda, Fergus Lyon and Ian Vickers assert that democratic participation in and ownership of corporate governance must extend beyond legal mechanisms and address psychological-cultural facets to promote effective engagement and enfranchisement.¹¹² Psychological ownership is achieved through positive engagement processes whilst the cultural elements are realised in enterprises that foster a culture of inclusion and empowerment.¹¹³ Sepulveda, Lyon and Vickers argue in favour of better educational support and opt-in frameworks to avoid disengaged tokenistic governance.¹¹⁴ The ICA principles operate as safeguards for these facets of ownership. For example, the first principle of voluntary and open membership, which by definition excludes compulsory membership, coincides with Sepulveda, Lyon and Vickers’ advocacy for opt-in models.¹¹⁵ Similarly, the call for better education, training and information is satisfied through strict adherence to the fifth principle, the provision of adequate education.¹¹⁶ Therefore, social cooperative frameworks must observe all ICA principles to address all facets of democratic control.

108 International Cooperative Alliance, *Guidance Notes to the Co-operative Principles* (Report) 5–99 (‘ICA Guidance’).

109 *CNL* (n 78) app pt 1.3 s 10.

110 Daniel Hernández Cáceres, ‘Social Enterprises in the Social Cooperative Form’ in Henry Peter, Carlos Vargas Vasserot and Jaime Alcalde Silva (eds), *The International Handbook of Social Enterprise Law: Benefit Corporations and Other Purpose-Driven Companies* (Springer, 2023) 173, 174 <https://doi.org/10.1007/978-3-031-14216-1_9>.

111 International Labour Office, ‘A Cooperative Future for People with Disabilities’ (Issue Brief, December 2012) 2–4.

112 Leandro Sepulveda, Fergus Lyon and Ian Vickers, ‘Implementing Democratic Governance and Ownership: The Interplay of Structure and Culture in Public Service Social Enterprises’ (2020) 31(3) *Voluntas* 627, 630 <<https://doi.org/10.1007/s11266-020-00201-0>>.

113 *Ibid* 638.

114 *Ibid*.

115 *ICA Guidance* (n 108) 7.

116 *Ibid* 57.

2 Why Social Cooperatives?

The pursuit of the most effective legal form to facilitate the ideal social enterprise model requires consideration of two distinct options: companies and cooperatives. Australia has historically leaned toward the company legal form, evidenced by the *Royal Commission*'s call for social firms.¹¹⁷ The segmented nature of Australian cooperative law has likely deterred many Australians from adopting, or even leaving them unaware of, the social cooperative model. However, social cooperatives have become the dominant legal form in a large number of foreign jurisdictions. The preference for cooperatives can be articulated by the following:

[C]ooperatives may better serve the criteria of social enterprises given their democratic governance, openness to new members, joint ownership and control by members and social orientation through cooperation with other cooperatives and a commitment to benefit the community as manifested in the International Cooperative Principles.¹¹⁸

Social firms often assert they possess democratic participation, despite operating under the company legal form. Although this may be the case, a study of social firms operating under Finnish law by Pekka Pättiniemi found that participants rarely 'had any actual influence on the decision making' and 'did not have any formal rights to affect the decision making'.¹¹⁹ Unlike companies, the legal right to the opportunity to vote is an inherent and essential component of the social cooperative model. The limitations of social cooperative participation relate only to the cultural-psychological facets of democratic participation described by Sepulveda, Lyon and Vickers rather than insufficient legal rights.

As Australia phases out segregated employment, it is important to engage with disability advocacy bodies and those they represent. The approach advocated for by Inclusion Australia is to reimagine the workplace for persons with disabilities through effective consultation with these workers.¹²⁰ This strategy requires the 'recognition of the power imbalances that exist inside ADEs between people with an intellectual disability and other staff'.¹²¹ The voting rights of social cooperatives embody this by guaranteeing ongoing consultation through voter sentiment, thereby minimising power imbalances. As Ulrika Levander observed in the Swedish context, democratic governance

can be viewed as an example of how the power and control exercised over individuals in welfare interventions, such as rehabilitation and activation measures, may become less visible – especially when the activities conducted are carried out by actors independent from the state and who are renowned as participatory

117 *Royal Commission* (n 4) 512.

118 Adam Sofia and Douvitsa Ifigenia, 'Theoretical Foundations of Social Enterprise, Cooperative and Voluntary Action Principles and Values: Complementarities, Contradictions and Their Implications' (Conference Paper, EMES International Research Conference on Social Enterprise, 4–8 October 2021) 4.

119 Pekka Pättiniemi, 'Work Integration Social Enterprises in Finland' (Working Paper No 04/07, EMES: European Research Network, 2004) 13.

120 Inclusion Australia, Submission to Royal Commission (n 6) 101.

121 *Ibid.*

and democratically run third-sector organizations, rather than public authorities exercising official authority.¹²²

As set out in Figure 1, enfranchisement of persons with disabilities in social cooperatives results in managers, supervisors and support staff being accountable to their employees. This may be contrasted with the ADE model which relegates persons with disabilities to a client with no ability to effect change.

Social Cooperative Model

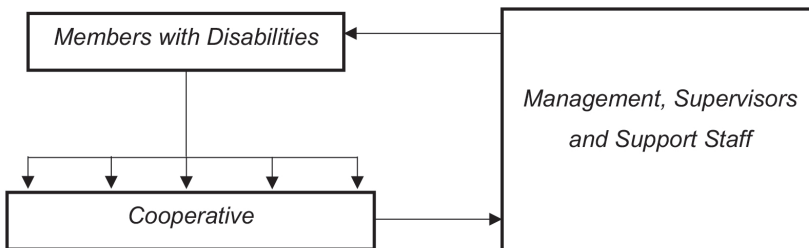


Figure 1: Social cooperative model.

Therefore, social cooperatives adhering to ICA principles empower persons with disabilities to effect change in their workplaces and hold their superiors to account. The proposed federal social cooperatives framework must codify the ICA principles to ensure effective enfranchisement among persons with disabilities and promote efficient governance.

B The Formulation of Social Cooperative Laws Throughout International Jurisdictions

The formulation of the proposed social cooperative legislation by this article draws from comparable legislation from foreign jurisdictions having due regard for the Social Cooperative Alternative. This section examines how these international frameworks frame general interest missions, membership thresholds and integrated funding facilities.

1 International Legal Forms of Social Cooperatives

The modern legal form of social cooperatives arose in Italy over three decades ago through *Law 381/1991 on Social Cooperatives* (Italy), which recognised and regulated cooperatives that have an explicit ‘aim to pursue the general interest of

122 Ulrika Levander ‘Narratives of Social Enterprises: Their Construction, Contradictions and Implications in the Swedish Debate’ in Linda Lundgaard Andersen, Malin Gawell and Roger Spear (eds), *Social Entrepreneurship and Social Enterprises: Nordic Perspectives* (Routledge, 2016) 232, 247 <<https://doi.org/10.4324/9781315621982>>.

the community in the human promotion and social integration of citizens'.¹²³ Since then, 21 of the 27 European Union Member States have legislated on the topic of social enterprises with social cooperatives being the most common legal form.¹²⁴ This legislative popularity extends beyond Europe with notable examples found in Asia and South America.¹²⁵ The global adoption of this model stands in stark contrast to the prevailing misconceptions about the decision-making abilities of persons with disabilities in social cooperatives.

Adam Sofia and Douvitsa Ifigeneia demonstrate how the theoretical principles of social cooperatives translate to specific legal provisions. They argue that the social dimension of social cooperatives can be achieved through provisions requiring a general interest mission rather than the traditional mutual interest mission.¹²⁶ Instead of limiting the productive activities that a cooperative may engage in, effective social cooperative laws seek to include certain social groups that are often excluded from the labour market in the productive activity. Put simply, under the legislation proposed by this article, social cooperatives would work toward the general aim of integrating persons with disabilities into the open labour market instead of working toward the mutual interest of maximising profit. The focus is on the inclusion of persons rather than the content of the cooperative's production. To achieve this, social cooperative regimes often stipulate certain thresholds for the inclusion of vulnerable groups as members and workers.¹²⁷ Daniel Hernández Cáceres identifies three structures social cooperatives take through different manifestations of general interest missions:

- (a) Social integration cooperatives which are formed by a certain percentage of persons with disabilities and which seek to facilitate social and professional inclusion through their associated work;
- (b) Small social cooperatives which are often formed by health professionals, teachers, or social workers to facilitate social and professional inclusion of persons with disabilities; and
- (c) Broad-spectrum social cooperatives which are formed by persons with and without disabilities to facilitate social and professional inclusion of persons with disabilities and provide health, educational or cultural services. Unlike social integration cooperatives, these do require a minimum percentage of members to have a disability.¹²⁸

123 Antonio Fici, 'Models and Trends of Social Enterprise Regulation in the European Union' in Henry Peter, Carlos Vargas Vasserot and Jaime Alcalde Silva (eds), *The International Handbook of Social Enterprise Law: Benefit Corporations and Other Purpose-Driven Companies* (Springer, 2023) 153, 159, 161 <https://doi.org/10.1007/978-3-031-14216-1_8>.

124 Ibid 159.

125 *Framework Act on Cooperatives 2021* (Republic of Korea) Act No 17818 ['Framework Act on Cooperatives', *Korea Legislation Research Institute* (Web Page) <https://elaw.klri.re.kr/eng_service/lawView.do?hseq=55947&lang=ENG>] ('*Framework Act on Cooperatives*'); *Lei n.º 9.867, de 10 de Novembro de 1999* [Law No 9.867 of November 10, 1999] (Brazil) ('*Law No 9.867*').

126 Sofia and Ifigeneia (n 118).

127 Ibid.

128 Cáceres (n 110) 178–81.

Distinct from the *CNL* which permits cooperative groups to allocate up to five votes to members,¹²⁹ social cooperative laws should rigidly follow the one member, one vote rule to facilitate democratic governance referenced by the Social Cooperative Alternative.

2 *General Interest Purposes*

The social dimension of social cooperative laws is captured through a departure from the traditional cooperative mutual interest mission in favour of a general interest mission.¹³⁰ This is not achieved through a sole focus on productive activities but rather the inclusion of persons with disabilities in the productive activity.¹³¹ In contrast to ADEs, the productive activity must be meaningful and provide employees with the skills necessary to transition into open employment. This model of social cooperative mirrors the social firm model endorsed by the *Royal Commission* whilst empowering persons with disabilities to enact change and make managers accountable to them through their membership. Overseas social cooperative laws often operate for the benefit of ‘disadvantaged people’ who are specified by the particular law or an ancillary law. For example, article 1 of *Law No 9.867 of 10 November 1999* (Brazil) specifies that ‘Social Cooperatives, established with the purpose of inserting disadvantaged people into the economic market, through work, are based on the general interest of the community in promoting the human person and the social integration of citizens’.¹³²

Article 3 includes persons with disabilities within the definition of ‘disadvantaged people’.¹³³ Similarly, article 2 of the South Korean *Framework Act on Cooperatives* defines a social cooperative as a ‘cooperative that carries out business activities related to the enhancement of rights, interests, and welfare of local residents or provides social services or jobs to disadvantaged people ... but that is not run for profit’.¹³⁴

This broad framing of the general interest purpose incorporates the social dimension into the cooperative model and allows for the entity to engage in a broad spectrum of productive activities whilst requiring them to include persons with disabilities in the productive activities. For example, a café may operate as a cooperative where all members act with the mutual interest of maximising the café’s profits, thereby increasing their individual earnings and membership value. Alternatively, a café might operate to serve the general interest of providing meaningful employment to persons with disabilities, incorporating them into the productive activity of making coffee to provide them meaningful employment, not necessarily maximising returns. In line with these frameworks, the legislation proposed by this article will depart from the *CNL* by limiting its application to cooperatives that adopt a general interest

129 *CNL* (n 78) app pt 2.3 div 1 s 228(3).

130 *Sofia and Ifigeneia* (n 118).

131 *Ibid.*

132 *Law No 9.867* (n 125) art 1.

133 *Ibid* art 3.

134 *Framework Act on Cooperatives* (n 125) art 2(3).

mission to integrate persons with disabilities into an open, inclusive and accessible labour market through meaningful work.

3 Membership Thresholds for Persons with Disabilities

Social cooperative legislation often establishes thresholds that specify a minimum percentage of disadvantaged workers who hold active membership or are employed by the cooperative. The legislation contemplated by this article seeks to comply with the Social Cooperative Alternative whilst remaining within the scope of article 27(1)(f).¹³⁵ This requires social cooperatives to be ‘democratically controlled’ in a way that results in the workplaces being ‘managed and led’ by persons with disabilities.¹³⁶ Therefore, it is essential that the primary focus of such thresholds be on ensuring a significant percentage of persons with disabilities are active members, rather than merely employees. This approach prevents the formation of social cooperatives that employ persons with disabilities without adequately including them in the membership, ensuring true democratic control. The importance of this approach is exemplified in the Brazilian federal social cooperative framework.¹³⁷ Initially, the federal law required at least 50% of social cooperative employees to be disadvantaged persons.¹³⁸ These employees were also required to be members of the cooperative if it was compatible with the law of the cooperative’s state or municipality.¹³⁹ However, Brazilian legislators raised concerns that this weak threshold primarily applied to employees directly, not to members.¹⁴⁰ They said this allowed for the existence of non-member workers in the social cooperatives.¹⁴¹ In effect, this permitted cooperatives whose membership did not include even one person considered to be at a disadvantage and therefore would distort the spirit of the project.¹⁴² Legislators went so far as to assert that this focus on employee thresholds would result in the proliferation of fraudulent work cooperatives, without any social nature of protecting the people the cooperative seeks to benefit.¹⁴³ To put this in the context of this article, requiring persons with disabilities to constitute a certain percentage of employees, rather than members, in social cooperatives does not guarantee that these cooperatives are ‘managed and led’ by individuals with disabilities.

Of the jurisdictions reviewed by Cáceres, these member thresholds ranged from 30% to 51%.¹⁴⁴ However, a more comprehensive analysis of these laws shows that a significant portion of the thresholds set at or around 30% are specific to

135 *CRPD* (n 13) art 27(1)(f).

136 *General Comment No 8* (n 11) 4 [15].

137 *Law No 9.867* (n 125) art 5, as vetoed by Message No 1,673 from Fernando Henrique Cardoso (President) to the President of the Federal Senate, 10 November 1999 <https://www.planalto.gov.br/ccivil_03/leis/Mensagem_Veto/1999/Mv1673-99.htm> (‘Message No 1,673’).

138 *Law No 9.867* (n 125) art 3 §1, as vetoed by Message No 1,673 (n 137).

139 *Law No 9.867* (n 125) art 3 §1.

140 Message No 1,673 (n 137).

141 *Ibid.*

142 *Ibid.*

143 *Ibid.*

144 Cáceres, ‘Social Enterprises in the Social Cooperative Form’ (n 110) 179.

persons with disabilities whilst requiring a higher threshold for other disadvantaged persons. This can be observed in article 14(1)(aa) of *Law No 4430 2016* in Greece and article 4 of the *Act of April 27, 2006 on Social Cooperatives* in Poland.¹⁴⁵ Such an approach is inherently discriminatory and fails to guarantee workplaces that are ‘managed and led’ by persons with disabilities. Although the *Royal Commission* advocates for social firms because persons with disabilities would not be the majority of workers,¹⁴⁶ the purpose of the proposed legislation is to ensure social cooperatives are sufficiently controlled by persons with disabilities. This is attained through a threshold that requires the majority of members, not employees, to be persons with disabilities.

A final consideration for social cooperative thresholds is the extent to which the legislation will safeguard the ability of persons with disabilities to exercise their rights in Annual General Meetings or Special General Meetings. In both social and general cooperative laws, this is achieved by regulating the quorum. For example, the Greek social cooperative regime requires the attendance of 50% of members to establish a quorum.¹⁴⁷ In contrast, the *CNL* permits cooperative rules to regulate the quorum.¹⁴⁸ In the spirit of article 27, the legislation advanced by this article should regulate the quorum through the attendance requirements of members with disabilities at Annual General Meetings and Special General Meetings.

4 Structural Adjustment Fund Tied to Social Cooperative Legislation

Finally, a Structural Adjustment fund may be administered through the legislative instrument. Distinct from the funds established by the Albanese Government and proposed by the *Royal Commission*,¹⁴⁹ social cooperative laws sometimes integrate a funding facility into the social cooperative legislation. For example, article 10 of the Greek regime establishes a social economy fund to be administered by the Ministry of Labour, Social Security and Social Solidarity.¹⁵⁰ Similar to the Structural Adjustment Funds, the specified purpose of the fund is to finance programs and actions to strengthen the Social Solidarity Economy Agencies, which include social cooperatives.¹⁵¹

By taking a similar approach, Australian policymakers could administer a federal funding facility that facilitates the provision of just and favourable conditions of work, on an equal basis with others, by social cooperatives. A critical objective of this facility would be ensuring persons with disabilities are paid at or above the national minimum wage and have access to benefits like sick leave and annual leave. Thus, by adopting a model akin to the Greek social economy fund

145 *NΟΜΟΣ ΥΠ’ ΑΡΙΘΜ. 4430 Κοινωνική και Αλληλέγγυα Οικονομία και Ανάπτυξη των Φορέων Της και Άλλες Διατάξεις* [Law No 4430 Social and Solidarity Economy and Development of Its Agencies and Other Provisions] (Greece) art 14(1)(aa) (*‘Law No 4430’*); *Ustawa z dnia 27 kwietnia 2006 r. o spółdzielniach socjalnych* [Act of 27 April 2006 on Social Cooperatives] (Poland) art 4.

146 *Royal Commission* (n 4) 512.

147 *Law No 4430* (n 145) art 19(3).

148 *CNL* (n 78) app pt 2.1 div 5 s 34(2).

149 *Royal Commission* (n 4) 511.

150 *Law No 4430* (n 145) art 10.

151 *Ibid* art 10(2).

within Australian social cooperative legislation, policymakers could significantly enhance the employment, remunerative and working conditions of persons with disabilities.

In conclusion, this article proposes that Australia should adopt social cooperative legislation to integrate persons with disabilities into an open, inclusive and accessible labour market. The legislation should require that persons with disabilities hold a majority membership and have adequate representation in the quorum. Additionally, a funding facility administered through the proposed legislation will ensure social cooperatives provide just and favourable working conditions on an equal basis with others. Having outlined the legislative design of the proposed social cooperative law, the article will now address the necessity for federal enactment and the constitutional bases supporting it.

V THE CASE FOR A FEDERAL SOCIAL COOPERATIVE FRAMEWORK

A The Constitutional Basis for Federal Social Cooperative Legislation

Employment initiatives for persons with disabilities must be uniform throughout Australia to ensure their effectiveness and widespread adoption. Consequently, it is essential that the legislation proposed in this article be enacted at the federal level, which requires a constitutional basis. Legislating on cooperative law is typically the responsibility of the states, as it is not covered by the *Australian Constitution*. However, the proposed legislation has a limited scope, focusing solely on the employment and human rights of persons with disabilities and grounded in the *CRPD*. This allows it to invoke the external affairs power under section 51(xxix) of the *Australian Constitution*. Additionally, the constitutional basis for the proposed legislation can be achieved through a referral from the states under section 51(xxxvii). This article will outline how the existing state-based cooperative framework has inhibited its success and explore the two aforementioned constitutional bases to demonstrate how the proposed law can be adopted at the federal level.

A failure to ensure uniformity throughout the states in the legislative design and administration of the proposed social cooperative law will inevitably risk jeopardising its success. The existing state-based design of the *CNL* has led to the dramatic decline in the use of the cooperative model.¹⁵² Under the existing cooperative framework, the decline in the adoption of cooperatives has further reduced government funding and limited the availability of educational and information services to prospective cooperative entrepreneurs.¹⁵³ This lack of funding is further impacted by the complete exclusion of cooperatives from federal funding facilities due to their omission from federal legislation like the *Corporations*

152 Apps (n 73) 10.

153 International Co-operative Alliance Asia and Pacific, *Legal Framework Analysis within the ICA-EU Partnership: National Report of Australia* (Report, April 2020) 17 <<https://coops4dev.coop/sites/default/files/2021-06/Australia%20Legal%20Framework%20Analysis%20National%20Report.pdf>>.

Act 2001 (Cth).¹⁵⁴ For example, the Indigenous Advancement Strategy excluded cooperatives because they were not incorporated under federal legislation, resulting in Indigenous cooperatives converting to corporations or companies.¹⁵⁵ In addition to this, employment initiatives targeted toward persons with disabilities primarily exist through federal strategies. Without federal oversight, cooperatives would risk being omitted from important national employment strategies, particularly those arising out of the *Royal Commission*. Therefore, it is vital to the success of the proposed social cooperative framework that it be legislated and administered at the federal level to ensure it is adopted nationally, funded through a single agency and advanced in unison with federal employment strategies aiming to improve the working rights of persons with disabilities.

Legislation promoting the development of social cooperatives to provide persons with disabilities with meaningful work has a constitutional basis under the external affairs power. The power to implement treaty obligations into domestic law under section 51(xxix) is not unconstrained, the ‘law must be reasonably capable of being considered appropriate and adapted to implementing the treaty’.¹⁵⁶ This is a test of reasonable proportionality between the purpose or object of the obligation being implemented and the means adapted to pursue it.¹⁵⁷

This test only applies when the relevant international instrument imposes an ‘obligation’.¹⁵⁸ The need for an ‘obligation’ was affirmed by the joint judgment of Hayne and Kiefel JJ and a separate judgment by Heydon J in *Pape v Federal Commissioner of Taxation* (2009) (‘*Pape*’).¹⁵⁹ In that matter, their Honours held that the lack of an obligation was a sufficient basis upon which to reject the Commonwealth’s submission that the *Tax Bonus for Working Australians Act [No 2] 2009* (Cth) was valid because it implemented an international agreement or understanding.¹⁶⁰ Notably, the international agreement or understanding relied upon in *Pape* was not intended to bind the nations whose leaders signed the declaration to any particular course of action.¹⁶¹ This is not the case with article 27(1)(f) of the *CRPD* which imposes an explicit obligation on States Parties to safeguard and promote the realisation of the right to work for persons with disabilities by taking steps to promote opportunities for the development of cooperatives.¹⁶² The legislation proposed by this article is a direct realisation of this international

154 Ibid.

155 Ibid; Senate Economics References Committee, Parliament of Australia, *Cooperative, Mutual and Member-Owned Firms* (Report, March 2016) 38 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Cooperatives/~/_media/Committees/economics_ctte/Cooperatives/report.pdf>.

156 *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (‘*Industrial Relations Act Case*’).

157 Ibid 487–8.

158 *Commonwealth v Tasmania* (1983) 158 CLR 1, 103 (Gibbs CJ), 123–4 (Mason J) (‘*Tasmanian Dam Case*’); *Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54, 86 (Barwick CJ); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 126–8 [370]–[374] (Hayne and Kiefel JJ) (‘*Pape*’).

159 *Pape* (n 158) 126–8 (Hayne and Kiefel JJ), 164–5 (Heydon J).

160 Ibid 126–8 [370]–[374] (Hayne and Kiefel JJ).

161 Ibid 127 [372].

162 *CRPD* (n 13) art 27(1)(f).

obligation and, therefore, satisfies this requirement that the relevant legislation implement an international obligation.

The development of the proposed social cooperative legislation aligns directly with article 27(1)(f) and is specifically designed to benefit persons with disabilities. Such legislation is capable of being considered reasonably appropriate and adapted to implementing the obligation imposed by article 27(1)(f). However, if the legislation were broadened to include social cooperatives in general, not limited to persons with disabilities, it would likely exceed the scope of section 51(xxix) and would not be appropriately adapted to implement article 27(1)(f). Therefore, it is crucial to maintain the focus of the legislation on benefiting persons with disabilities to ensure it remains constitutionally valid and effectively implements article 27(1)(f).

Although the proposed legislation does not wholly implement the *CRPD* in its entirety, constitutional validity is not inhibited by the implementation of a limited number of treaty obligations. The High Court has held that the partial implementation of a treaty is not necessarily fatal to the validity of a law.¹⁶³ Deane J emphasised in *Commonwealth v Tasmania* that a law under section 51(xxix) which partly carries a treaty into effect will be valid where it leaves the remaining provisions or obligations to be left unimplemented or actioned by successive Commonwealth legislation.¹⁶⁴ However, such legislation will not be valid where it implements terms which are inconsistent with the terms of the treaty.¹⁶⁵ Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ expanded on Deane J's dicta in *Victoria v Commonwealth of Australia*:

Deficiency in implementation of a supporting Convention is not necessarily fatal to the validity of a law; but a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention.¹⁶⁶

Consequently, for legislation to partially implement treaty obligations under section 51(xxix), it must be sufficiently connected to the international instrument to maintain its character and be entirely consistent with the treaty's terms.

In the context of implementing article 27(1)(f) of the *CRPD*, such an exercise of section 51(xxix) by legislators is valid as long as the character of the *CRPD* is upheld and the legislation is fully consistent with its terms. This can be achieved through strict adherence to the elements of the Social Cooperative Alternative outlined above, namely by providing just and favourable conditions of work on an equal basis with others, ensuring that cooperatives are 'managed and led' by persons with disabilities and offering actual opportunities for career advancement to facilitate genuine workplace choice. This approach ensures that implementing article 27(1)(f) through a social cooperative law remains consistent with the *CRPD*'s terms, particularly article 27 as a whole. It focuses solely on the working

163 *Tasmanian Dam Case* (n 158) 268.

164 *Ibid.*

165 *Ibid.*

166 *Industrial Relations Act Case* (n 156) 489.

rights of persons with disabilities, keeping it within the *CRPD*'s scope. Therefore, legislation aiming to provide persons with disabilities the right to meaningful work by safeguarding and promoting access to work in social cooperatives is supported by the external affairs power.

Beyond section 51(xxix), the proposed legislation can also be referred to the Commonwealth by the states under the referral power provided by section 51(xxxvii). Termed 'cooperative federalism',¹⁶⁷ the referral power authorises the Commonwealth Parliament to make laws with respect to matters referred to it by the states. However, such laws will only apply to the states that referred the matter or those that choose to adopt the law later.¹⁶⁸ Uniform schemes that do not resort to section 51(xxxvii) 'may involve complementary legislation of both Commonwealth and States and the use of agencies exercising powers derived from both sources'.¹⁶⁹ The *CNL* is an example of such efforts to adopt uniform legislation throughout Australia. However, as evidenced by the demise of the *CNL* in Queensland, these uniform schemes are susceptible to changes made by individual State legislatures.¹⁷⁰ As a result, the most effective method of guaranteeing uniformity throughout the states is through federalising the proposed law under section 51(xxxvii).

Uniformity throughout Australia is imperative for the success of the social cooperative legislation proposed by this article. Without a formal referral to the Commonwealth by all states, the law must be legislated, administered and funded by individual State agencies and legislatures. This creates a risk that some states might deviate from the law under pressure from their respective legislatures.¹⁷¹ However, whilst the referral power has its own challenges in intergovernmental diplomacy and domestic politics, the unanimous referral of the proposed social cooperative legislation to the Commonwealth overcomes these issues and risks. A federally administered funding facility will encourage prospective social cooperative entrepreneurs to choose this model over other social firm or company models. This federal administration will also ensure uniformity between national employment strategies for persons with disabilities and social cooperative law. Additionally, although it is beyond the scope of this article, a referral would enable a broader social cooperative framework targeting both persons with disabilities and other disadvantaged groups. Thus, section 51(xxxvii) offers an alternative constitutional basis to the external affairs power, allowing for uniformity of the legislation proposed by this article.

Therefore, as demonstrated by the above, the legislation proposed by this article is capable of being adopted at the federal level under the external affairs power and the referral power. In order to overcome the adoption and funding

167 Robert S French, 'The Referral of State Powers' (2003) 31(1) *Western Australian Law Review* 19, 31; Alex De Costa, 'The Corporations Law and Cooperative Federalism After *The Queen v Hughes*' (2000) 22(3) *Sydney Law Review* 451; James McConvill and Darryl Smith, 'Interpretation and Cooperative Federalism: *Bond v R* from a Constitutional Perspective' (2001) 29(1) *Federal Law Review* 75 <<https://doi.org/10.1177/0067205X0102900104>>.

168 *Australian Constitution* s 51(xxxvii).

169 French (n 167) 22.

170 *Ibid.*

171 *Ibid.*

issues posed by the existing state-based framework, it has been conclusively shown that a federal framework is vital. If the proposed framework is to be adopted without intergovernmental diplomacy between the states, and solely to provide opportunities for persons with disabilities, the external affairs power provides a persuasive constitutional basis. Alternatively, should the Commonwealth be willing to engage in political negotiations with the states, it may adopt a broader social cooperative framework than the one proposed by this article under the referral power. The framework, therefore, has a valid constitutional basis to be enacted by the Commonwealth Parliament. This article will now explore an example of a successful cooperative that is managed and led by persons with disabilities, the Nundah Community Enterprise Cooperative, but demonstrates how this cooperative may be improved through a federal framework and stricter adherence to the *CRPD*.

B Australian Case Study: Nundah Community Enterprises Cooperative

An examination of the Nundah Community Enterprises Cooperative ('NCEC') showcases the efficacy of social cooperatives in empowering persons with disabilities under the existing Australian cooperative framework. This examination will demonstrate how social cooperatives can better serve persons with disabilities under a federal legislative framework.

The NCEC is made up of 26 members with an 'intellectual disability, learning difficulty or mental illness' and employs 35 people in total.¹⁷² 80% of those 26 members have remained at the NCEC since its establishment in 1998.¹⁷³ The cooperative employs people in their Espresso Train Café and parks maintenance service in Brisbane.¹⁷⁴ All profits of the NCEC are reinvested to improve services and conditions for worker members.¹⁷⁵ With no federal social cooperative framework, the NCEC was developed under Queensland cooperative legislation and is registered as a charity by the Australian Charities and Not-for-profits Commission.¹⁷⁶

A study of the NCEC conducted by Peter Westoby and Lynda Shevellar observed social barriers between 'boss and worker' to be less apparent compared to the previous workplaces of interviewees; that supervisors were respectful of worker autonomy and their capacity to solve situations; and that personal development was facilitated through the meaningful work provided by the cooperative.¹⁷⁷ The study

172 Stevie Ackerman et al, *The Lived Experiences of Nundah Community Enterprise Cooperative Members* (Research Report, 2016) 8; Community Praxis Co-op, *Case Study: Nundah Community Enterprise Cooperative (NCEC)* (Case Study, March 2023) 1.

173 Ackerman et al (n 172) 8.

174 Ibid 7–8.

175 Business Council of Co-operatives and Mutuals, *Nundah Community Enterprise Cooperative* (Case Study) 12 ('*Nundah Community Case Study*').

176 'Nundah Community Enterprises Cooperative Ltd', *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/charity/charities/abe7e226-38af-e811-a95e-000d3ad24c60/documents/>>.

177 Peter Westoby and Lynda Shevellar, 'The Possibility of Cooperatives: A Vital Contributor in Creating Meaningful Work for People with Disabilities' (2019) 34(1) *Disability & Society* 1613, 1624, 1629 <<https://doi.org/10.1080/09687599.2019.1594699>>.

observed active participation by workers through one-on-one casual meetings and regular member meetings with one worker commenting: ‘I get to vote and have a part/say. Being a member, if I think something’s not right I can put my hand up and say, “Hey, I disagree with this”’.¹⁷⁸

Through the exercise of their voting rights, NCEC members established a ‘no-firing policy’ which is emblematic of the empowerment fostered by the inclusive and democratic governance of social cooperatives.¹⁷⁹ Beyond this, the NCEC Board reserves a position for worker members and allows any other member to attend and participate in Board meetings.¹⁸⁰

Although the NCEC manifests certain dimensions of the Social Cooperative Alternative, there are two shortfalls: cultural-psychological ownership and wages. First, despite regular member meetings and active voting rights, Westoby and Shevellar identified some dissonance between members and their participation in formal meetings.¹⁸¹ This study highlights and emphasises the need for experimentation in creative incentives and training for participation in governance to promote the realisation of Sepulveda’s cultural-psychological dimension of democratic ownership.¹⁸² To address this, a case study noted that the NCEC is considering changing its governance to include worker members in the preparation of reports and to differentiate worker members with disabilities from those without disabilities through differing membership classes.¹⁸³ While the features resemble those suggested in Part IV, a federal social cooperative framework that regulates the representation of persons with disabilities necessary for a quorum would uniformly address the challenges faced by the NCEC and other existing and future social cooperatives across Australia.

The second shortfall arises from the use of the SWS which is inconsistent with the delivery of ‘just and favourable conditions of work on an equal basis with others’. The cooperative acknowledges that:

At a philosophical level we would love to pay workers with a disability a full award wage; however in a market based economy productivity is an inescapable factor. The only way to not use a productivity based system would be if an external player, eg customer or the Government met the productivity difference.¹⁸⁴

Despite this, the NCEC adopts the view that no worker should be remunerated at less than 60% of the National Minimum Wage – contrasted with the significantly lower 12.5% wage floor provided by the *SES Award*.¹⁸⁵ The NCEC’s call for an ‘external player’ underscores the importance of integrating the government funding mechanism specified in Part IV into the proposed legislation. Such a provision is

178 Ibid 1629.

179 Ackerman et al (n 172) 21.

180 *Nundah Community Case Study* (n 175) 10.

181 Westoby and Shevellar (n 177) 1617.

182 Sepulveda, Lyon and Vickers (n 112) 641.

183 *Nundah Community Case Study* (n 175) 16.

184 Nundah Community Enterprise Cooperative, Submission to Department of Social Services, *The Future of Supported Employment 1* <https://engage.dss.gov.au/the_future_supported_employment-submissions/1520232259/>.

185 Ibid.

essential to ensure that enterprises can practically conform to the requirements of the Social Cooperative Alternative, namely that all workers be paid at least the minimum wage.

Despite the aforementioned shortfalls, the NCEC continues to empower persons with disabilities through the social cooperative model. For every dollar spent by the NCEC, it has generated \$3.31 of value to its members and stakeholders.¹⁸⁶ This blueprint, though not perfect, provides inspiration for policymakers to draw on and develop a federal social cooperative framework. To quote Westoby and Shevellar:

Cooperative members, particularly those living with disabilities, experience meaningful work in the context of a socially supportive and democratised cooperative workplace. However, unlike sheltered workshops, they are not segregated from society or congregated only with other people with disabilities, but experience solidarity with a range of people in an everyday setting in community.¹⁸⁷

The NCEC is both a testament to the ability for social cooperatives to empower persons with disabilities and underscores the need for social cooperative legislation to establish models that are uniform and comply with both article 27(1)(f) and the Social Cooperative Alternative. However, it also serves as an indication that federal social cooperative legislation is necessary to streamline the establishment of similar businesses; create uniform practices, rules and voting requirements; and fund the social cooperatives endeavour to provide just and favourable conditions of work on an equal basis with others.

VI CONCLUSION

As the desegregation movement gains momentum, the case for promoting social cooperatives becomes more convincing. Not only is the development of cooperatives required by the *CRPD*, but the social cooperative model is endorsed by the *CRPD* Committee. These international obligations create a constitutional basis for a federal social cooperative framework. This article advocates for the establishment of a federal social cooperative legislative framework that integrates persons with disabilities into an open, inclusive and accessible labour market.

The proposed social cooperative legislation should reflect the ICA principles and draw on similar legislation from foreign jurisdictions. To codify the ‘social’ dimension of social cooperatives into the legislation, it should require the adoption of general interest missions rather than the traditional mutual interest mission. Social cooperatives should also establish membership thresholds for persons with disabilities to ensure these enterprises are ‘led and managed’ by persons with disabilities. Given the success of the Greek framework and the shortfalls of the NCEC, a structural adjustment fund should be incorporated and administered through the proposed legislation. This formulation will promote the development of social cooperatives that empower persons with disabilities in the labour market and conform with the Social Cooperative Alternative.

186 *Nundah Community Case Study* (n 175) 12.

187 Westoby and Shevellar (n 177) 1632.

As this article introduces a novel topic into a discourse with widespread interest, it provides ample opportunity for future research. Scholars and policymakers could analyse the relationship between supported decision-making practices and voluntary membership, investigate other employment ventures that fall within the Social Cooperative Alternative and evaluate the efficacy of different educational or information services on membership participation. Therefore, there is a compelling argument for the promotion of a federal social cooperative framework in Australian policy discourse.