

Australian Federation of Disability Organisations

National Council on Intellectual Disability

AED Legal Centre

Disability Advocacy Network Australia

People with Disabilities Australia

Down Syndrome Australia

Family Advocacy

Physical Disability Australia

Side by Side Advocacy



Our Line in the Sand

A joint submission from national peak consumer and advocacy organisations in response to an application by the Department of Families, Housing, Communities & Indigenous Affairs for an exemption from the *Disability Discrimination Act 1992* to use the Business Services Wage Assessment Tool

For consideration of the
Australian Human Rights Commission
legal@humanrights.gov.au

Legal Section

Australian Human Rights Commission

GPO Box 5218

Sydney NSW 2001

30 October 2013

In honour of

Mr Michael Nojin,

Ms Elisabeth Nojin

and

Mr Gordon Prior

Sheltered workshops are not right.

People with disability who work there don't get enough money for the job they do.

I know a young man who works five days a week. His wage barely covers the cost of his transport to work.

His pay is \$1.95 per hour. A low paid wage in Australia is \$17 per hour.

After his transport cost to get to work, he is making only 39 cents per hour.

If he was trained to do different jobs, he would have better skills and have a job in the community with a real wage.

Judy Huett

Speak Out Advocacy Tasmania

Chair of "Our Voice", National Council on Intellectual Disability

Member of the Australian Civil Society Parallel Report Group Delegation to the United Nations

Adapted from presentation to the UN, September 3, 2013

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OUR LINE IN THE SAND

1. The Full Federal Court & High Court found the BSWAT disadvantaged workers with intellectual disability
2. Stop this discrimination immediately
3. Provide immediate temporary redress
4. Implement the Supported Wage System nationally across all work settings
5. Temporarily guarantee the viability of ADEs to protect jobs
6. Develop a national program of effective specialist open employment support to comply with the UN CRPD

Our Position in Brief

The Australian Human Rights Commission should refuse the application by FaHCSIA for an exemption to continue to use the Business Services Wage Assessment Tool (BSWAT).

It is unacceptable for unlawful disability discrimination, determined by our highest courts, to continue when redress is available. We propose the following acceptable response.

An immediate but temporary redress

- Employees with intellectual disability earning wages based on BSWAT should have their wages temporarily based on the productivity score of BSWAT, weighted at 100% of the Award.
- This immediately removes the effect of the BSWAT competency test which the Court found to unlawfully discount the wages of workers with intellectual disability.

A permanent redress delivered over time

- The Supported Wage System (SWS) should be deemed the single national pro-rata award wage assessment for workers with disability unable to work at Award level of productivity.
- This immediately resolves significant concerns about the use of competency based wage assessments for employees with intellectual disability.
- The Commonwealth, in consultation with stakeholders, should prepare a plan which, builds the capacity of the SWS to conduct a greater number of assessments; organises SWS assessments for workers in ADEs who require assessments; and amend the Quality Assurance requirements of the *Disability Services Act* to list the SWS as the single national pro-rata award wage system.

Temporarily guarantee ADE viability and job security

- The Commonwealth substantially underwrites ADEs. The Commonwealth should temporarily (up to one year) increase funding, on a case-by-case basis, to meet an increase in wage costs due to SWS assessments.
- Additional Commonwealth funding would enable ADEs to review and adjust business practices to meet fair award wage costs, and to secure the employment of current workers.
- The hiring of new employees should not occur until an ADE has demonstrated business viability which includes wage costs assessed by the SWS.

Increases resources for ‘specialist’ open employment support

- The Commonwealth should develop a national school-to-work and open labour market program for individuals with intellectual disability that require long-term ongoing support. This meets the principle of inclusion and Article 27 of the UN Convention on the Rights of Persons with Disabilities (CRPD).
- Many, if not all, workers with intellectual disability who are directed to ADEs have the capacity to work in the open labour market when provided with evidence-based support.
- The choice for open employment is, however, currently severely limited, as there are few transition to work and open employment services with the capacity to provide this support.

Introduction

Australia is a great nation. We cherish our culture of the 'fair go'.

In 2008, two Australians with intellectual disability made a complaint. They believed something was not fair. They said their employers discriminated against them by using the Business Services Wage Assessment Tool (BSWAT) to assess their wages.

The Full Court of the Federal Court in December 2012 agreed, and decided BSWAT is unlawful. The Court found,

"the criticism of BSWAT is **compelling**" [FCAFC 192, 142, emphasis added]

and

"BSWAT is **skewed against intellectually disabled workers.**" [FCAFC 192, 141, emphasis added]

The Full Federal Court found the "competency elements of BSWAT have the effect of discounting [wages] even more severely, than would otherwise be the case" [FCAFC 192, 142] for workers with intellectual disability.

The Court found this disadvantage is imposed on workers with intellectual disability as a **group of people**. The Court said BSWAT "is discriminatory in the wider and less technical sense of the term so far as intellectually disabled workers are concerned." [FCAFC 192, 139]

The High Court of Australia agreed with the Court's decision in May 2013, and said;

"The Full Court of the Federal Court, by a majority, concluded that **the use of the BSWAT disadvantaged intellectually disabled persons**. Although it was widely used, it was not reasonable. One component of the BSWAT involves the assessment of a person's competencies in the workplace. The unchallenged expert evidence was that the BSWAT produced a differential effect for intellectually disabled persons and reduced their score. We see no reason to doubt the conclusions of the Full Court." [M12 & M13 of 2013, 299-313, emphasis added]

The decision by the Courts is clear. BSWAT imposes unlawful disability discrimination in the setting of pro-rata award wages of workers with intellectual disability.

We submit that the application for an exemption to the Australian Human Rights Commission (AHRC) by the Commonwealth for employers (i.e. ADEs) to continue to use BSWAT to assess and pay the wages of employees with intellectual disability should not be granted. The application should be rejected on the following bases.

Our concern for workers with disability

1. We are concerned that the rights of people with disability to fair wages in ADEs continue to be unfulfilled despite substantial efforts by workers, families and representatives over many years.

- 1.1. Workers with disability are being placed in a position where their continued employment is dependent on accepting discrimination. This is untenable and unnecessary.

- 1.2. Workers with intellectual disability are vulnerable to the interests of ADEs. ADE industrial advocacy is organised and subsidised by the Commonwealth, whereas workers are not afforded independent support or resources.
- 1.3. The issue of fair award wages for workers with intellectual disability in ADEs has remained unresolved for about three decades (See Appendix 2).
- 1.4. We do not wish any employer (including ADEs) of people with disability to have to close their business. We wish to see the placement and support of people with disability in employment where fair and lawful award based wages is upheld by the employer as a matter of basic human rights.

The Federal Court & High Court of Australia have decided

2. The application seeks to permit employers (ADEs) to treat people with intellectual disability with discrimination in the setting of wages when it has already been decided by our nation's highest courts that BSWAT unlawfully disadvantages workers with intellectual disability.
 - 2.1. As a nation, our priority should be to stop unlawful discrimination from continuing.
 - 2.2. Our actions should focus on providing workers with intellectual disability with redress.

More discrimination without redress is inappropriate

3. The application seeks that workers with intellectual disability continue to suffer unlawful discrimination for three years without any evidence that an unknown future pro-rata award wage assessment system will be lawful.
 - 3.1. The application does not provide an explicit solution to the direct matter of discrimination ruled by the Courts. It offers a process with an unknown outcome.
 - 3.2. Due to the unknown nature of the redress, the application may lead to further discrimination against workers with intellectual disability.
 - 3.3. There are currently individual and representative complaints of discrimination in employment made against ADEs before the AHRC and the Courts. This demonstrates concern by other employees about the continued use of BSWAT.

Delay is not necessary, redress is available now

4. The application ignores the fact that a fair, valid and available solution (i.e. the Supported Wage System) can be implemented immediately with certainty of redress of the disadvantage highlighted by the Court's decision.
 - 4.1. It is inappropriate to expect workers with intellectual disability to continue to have their wages assessed unlawfully when a lawful pro-rata award wage assessment is available.
 - 4.2. Concerns about the capacity of the SWS to deal with an increase in participants can be addressed by:

- 4.2.1. Temporarily using the productivity assessment element in BSWAT. The Federal Court acknowledged that the productivity element of BSWAT was equivalent to the productivity assessment of the SWS.
 - 4.2.1.1. “BSWAT provided a means of measuring and assessing productivity and competencies. Each counted for 50% of the final assessment. So far as it measured productivity, BSWAT was similar to the SWS tool. No complaint is made about that aspect of its use.” [FCAFC 192, 60]
- 4.3. A priority of SWS assessment could be given to workers with disability who are yet to have a pro-rata award wage assessment to prevent any new unlawful discrimination.
- 4.4. These strategies, together with a rollout plan to progressively conduct SWS assessments for ADEs, would ensure that all workers with intellectual disability could enjoy fair pro-rata award wages in less than 3 years.
- 4.5. The Supported Wage System (SWS) provides employees with intellectual disability with a fair assessment of their productive capacity in comparison to workers paid full award wages. This directly addresses the Court’s criticism of BSWAT.
- 4.6. These solutions are preferable to requiring workers with intellectual disability to have their wages based on an unlawful assessment for the next three years, with no expectation or certainty that a new wage system will be lawful.
5. We recommend that the AHRC reject the application on the grounds that a fair and valid pro-rata award wage assessment exists (i.e. SWS) which specifically responds to the concerns and judgements of the Full Federal Court and High Court of Australia.
 - 5.1. The Supported Wage System operates within the Australian industrial relations framework and has been a feature of Awards and enterprise agreements from 1994. The SWS model provisions are included in the Supported Employment Services Award 2010 [MA000103].
 - 5.2. Crennan and Kiefel JJ in High Court proceedings [M12 & M13 of 2013] recognised that an alternative fair award wage assessment system (i.e. SWS) is available to ADEs.
 - 5.3. Justice Kiefel said to the Commonwealth, “But you are not in a position to say, are you, that the ADEs had no other option, that there was no other choice available? The Commonwealth legal representative replied, “Well, no, there was SWS . . .”
 - 5.4. Justice Crennan asked the Commonwealth, “Was there not an SWS test?” The Commonwealth legal representative replied, “There was an SWS”

Process is not redress

6. An exemption would give employers (ADEs) the right to continue disability discrimination in employment, which has been found to be unlawful by the highest courts in our nation. The application offers no specific future solution that can be measured as being fair or lawful.

- 6.1. The application seeks to undertake a process to consider, devise and/or establish an alternative wage setting arrangement. This could mean or produce anything. (It was such a process conducted by FaHCSIA which produced BSWAT.)
- 6.2. The availability of the SWS in the industrial relations system means that the need to develop another and different pro-rata award wage assessment system is redundant.

Application does not further the objects of the DDA

7. The AHRC should not become an authority where ‘discriminators’ can turn to for ‘oxygen’ following the finding of disability discrimination by the highest courts of our nation, in order to avoid available redress.
 - 7.1. The first object of the Act is to eliminate as far as possible, discrimination against persons on the ground of disability, including in the area of employment.
 - 7.1.1. It is *possible* for the Commonwealth and ADEs to use the SWS. There is no need to continue using BSWAT.
 - 7.2. The second object of the Act is to ensure, as far as practicable, that persons with disability have the same rights to equality before the law as the rest of the community.
 - 7.2.1. It is *practicable* for workers with intellectual disability to have a pro-rata award wage assessment conducted by the SWS. These are regularly performed in both open and supported employment.
 - 7.2.2. The AHRC should take note of the vulnerability of individuals with intellectual disability to negotiate their equal rights due to the nature of their impairment and lack of independent industrial advocacy, compared with the capacity of ADEs.¹
 - 7.3. The third object of the Act is to promote the recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.
 - 7.3.1. According to the Full Federal Court decision, Justice Buchanan said, “The basic entitlement to a rate of pay fairly fixed is no less compelling in the case of an intellectually disabled worker than in the case of any other worker”. [FCAFC 192, 138] The application by the Commonwealth asks the AHRC to *promote* further unlawful discrimination with no guarantee that in the time period requested, workers with intellectual disability would be treated equally in the assessment of their wages.

An exemption avoids doing ‘what is right’, and what can be done now

8. After the promise made to people with disability and their families twenty seven years ago (*Disability Services Act 1986*), and numerous unsuccessful attempts by the Commonwealth to

¹ ADEs were provided with \$4 million by the Commonwealth to access industrial relations advice. The Hon. Amanda Rishworth MP, Parliamentary Secretary for Disabilities, June 13, 2013.

address this discrimination, it is time to “call out” this systemic “avoidance behaviour” and demand that we get on with doing the “right thing”.

- 8.1. The Commonwealth and ADE sector have become focused on using tenuous wage assessments and adding layers of “false” legitimacy through Quality Assurance and other authoritative processes to pretend that these meet principles of fairness.
- 8.2. The Full Federal Court rejected the Commonwealth’s argument that BSWAT was supported at many levels and therefore non-discriminatory. The number of voices, or a person or organisation’s status, is not an argument to show that something is non-discriminatory. The Full Federal Court decision showed that many in authority were wrong about claims made about the fairness of BSWAT.
- 8.3. We have no doubt that the Commonwealth’s application for a *DDA* exemption will also receive support from many levels, for this has been the intention of the Commonwealth’s consultation strategy, and the power of its influence. Our trust is that the AHRC, like the Courts, are above such influence, and have the equal rights of people with intellectual disability at the forefront of its consideration.
- 8.4. The intent of BSWAT has been to maintain low wage costs in the knowledge that a fair pro-rata award wage assessment would mean higher wage costs. This is the awful truth. Discrimination has been used as a means to enhance the viability and legitimacy of many ADEs.
- 8.5. BSWAT has falsely portrayed the productive capacity of people with intellectual disability and resulted in a detriment in the payment of wages and the dignity of a *fair day’s pay for a fair day’s work* over many years.
- 8.6. The Full Federal Court suggested that the design of BSWAT might have been deliberately set high. Justice Buchanan stated that, “Indeed, it gives considerable support to the notion that the test is fixed (deliberately perhaps) at too high a level.” [FCAFC 192, 145]
- 8.7. The Full Federal Court said, “It seems impossible, furthermore, to resist the inference that the tool was adjusted so that it would not produce a better result than a simple productivity measure. The only alternative was a worse result. The disparity between the two results has, on the evidence, simply grown over the years. [FCAFC 192, 142]

Commonwealth & ADEs should implement the SWS

9. The AHRC should recommend to the Commonwealth and ADEs, to implement lawful wages via the SWS as soon as possible without delay. There is no need to devise or establish an alternative wage system.
10. The evaluation of the SWS by KPMG on behalf of the Commonwealth Department of Family and Community Services (FaCS) in 2000/01 recommended that FaCS modify the guidelines and associated mechanisms of the SWS to enable its adoption in business services (i.e. ADEs).

Commonwealth should support job security of workers after implementing the SWS

11. In 2002 the former Minister for Family and Community Services, Senator Amanda Vanstone made it clear that, “Services that fail to comply [with the Quality Assurance System] will be forced out. The government will no longer fund them” (*Access, April-May 2002, p. 14*).
 - 11.1. This statement was made following legislation to amend the Disability Services Act in 2002 to introduce the current Quality Assurance (QA) system.
 - 11.2. It has been eleven years since the introduction of the current QA system. ADEs have had ample time to address business viability and implement fair award wage assessments to meet Standards.
12. The peak disability bodies are concerned that a possible loss of jobs for people with intellectual disability is being used to defend continued discrimination, and to juxtapose equal rights with fear. The *empty* promise of change is being held out like a *lure* to maintain current discriminatory practices.
13. To implement fair wages and protect workers, the peak disability bodies recommend that the Commonwealth address the issue of business viability on a case-by-case basis after SWS assessments have been undertaken to establish the lawful wage cost of individual ADEs.
 - 13.1. The Full Federal Court noted that BSWAT helps with business viability, but that this “benefit comes at the price of imposing a comparative disadvantage on the intellectually disabled.” [FCAFC 142, 132]
 - 13.2. Wage assessments should not be seen as a way of cutting business costs. Business viability should be based on wage costs derived through lawful practices.
 - 13.3. It should be noted that 12% of ADE workers have their wages assessed by the SWS without any known detriment to business viability.²
 - 13.4. The Commonwealth should temporarily (for up to one year) meet the cost of any increase in wage costs, to protect against the loss of jobs, as a result of implementing lawful pro-rata award wage assessment via the SWS.³
 - 13.5. This provides redress to discrimination, and gives time for the Commonwealth to work with ADEs to determine future business viability based on wage costs determined by lawful means.

² Department of Families, Housing, Community Services and Indigenous Affairs. (2010). Australian Government Disability Services Census 2008. (Note: No public available data subsequent to 2007/08 is available.)

³ In 2000, the Commonwealth conducted a review of ADEs which set out 52 recommendations to promote a ‘new paradigm for business services’ to address future viability. This review recognised that ADEs were required to secure a level of revenue to provide ‘appropriate employment conditions for their employees’.

UN CRPD committee recommends that Australia stop using BSWAT

14. Article 27 1 (b) of the CRPD states that nations must;
 - 14.1. “Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;”
15. We encourage the AHRC to be coherent with and recognise the UN CRPD Committee’s concluding recommendation that Australia;
 - 15.1. “Immediately discontinues the use of the BSWAT”, and
 - 15.2. “Ensures that the Australians Supported Wage System (SWS) is changed to secure the right assessment of the wages of persons in support[ed] employment.”⁴
16. The Commonwealth can immediately address the UN CRPD Committee’s recommendation by temporarily using the productivity element of the BSWAT assessments, and implementing the SWS as the single national pro-rata award wage system for ADEs in a systematic rollout.
17. Continued use of BSWAT is contrary to *The National Disability Insurance Scheme Act 2013* object to (a) . . . *give effect to Australia’s obligations under the Convention on the Rights of Persons with Disabilities*
 - 17.1. The UN CRPD Committee has recognised that Australia’s use of BSWAT is a non-conformance under the CRPD. The Committee requires the SWS to be used for the assessment of pro-rata award wages in order to comply with the CRPD.

An inclusive employment vision coherent with the UN Convention

18. Australia’s employment vision must turn to increasing the number of people with intellectual disability participating in the open labour market. This is the intent of the CRPD.
19. Inclusive employment requires the provision of school transition-to-work and employment assistance programs that provide support for people with intellectual disability to participate in the open labour market.
 - 19.1. Australia originally began this vision in 1986 with the *Disability Services Act* to promote services to assist persons with permanent disabilities to achieve employment and integration in the community.
 - 19.2. Whereas early gains were made, the number of people with intellectual disability moving into open employment has stagnated. Just 1 in 10 persons with intellectual disability of adult working age currently participate in the open labour market.⁵

⁴ United Nations. (4 October 2013). Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013). Ref: CRPD/C/AUS/CO/1

⁵ AIHW (2013). Disability Support Services 2011-12

20. The UN High Commissioner for Human Rights published a report in December 2012 on the employment of people with disabilities and noted that nations often misunderstand the *principle of inclusion* in the CRPD.
- 20.1. “. . . a wide range of efforts undertaken by States parties to promote employment of persons with disabilities. Nevertheless, such efforts often focus on creating jobs or training opportunities in separate settings and fail to respect the principle of inclusion provided for in the Convention. It is imperative that States parties move away from sheltered employment schemes and promote equal access for persons with disabilities in the open labour market.”⁶
21. Australia’s vision for supported employment is a misinterpretation of the CRPD
- 21.1. Sheltered employment schemes, (which involve the grouping of people with disabilities in separate businesses), are not employment programs which meet the principle of inclusion of the CRPD.
- 21.2. There is a lack of recognition of the evidence and demonstration of the capacity of people with intellectual disability to work in the open labour market when given the right support.
- 21.3. “Supported employment” was originally conceived as an alternative to “sheltered employment” to provide support to people with disabilities who require explicit assistance to find a job, job training, and long term ongoing support in the open labour market.
- 21.3.1. Some of this group will not be able to work at, or above, minimum award wages. The SWS provides a legal instrument for employers to hire this group via a fair and non-discriminatory award wage assessment.
- 21.4. A vision of inclusive employment requires the availability of effective service support for all people with intellectual disability to have the opportunity to participate in the open labour market. Without this support, Australia falls short of its signature to the CRPD, or its stated principle of ‘choice’.
- 21.5. The current ADE and Disability Employment Services (DES) programs do not - in general - have the capacity to provide all people with intellectual disability with the evidence based support needed to be included in the open labour market.⁷
- 21.5.1. Options for evidence-based support to move into open employment are significantly limited.
- 21.5.2. There is an urgent need to consider what works and what doesn’t work. Australia has outstanding examples of service that have supported people with intellectual disability to successfully participate in the open labour market in paid jobs for award-based wages.

⁶ United Nations High Commissioner for Human Rights (2012). Thematic study on the work and employment of persons with disabilities. Report of the Office of the United Nations High Commissioner for Human Rights. United Nations, A/HRC/22/25

⁷ DEEWR (2013) Evaluation of the Moderate Intellectual Disability Loading.

21.5.3. We need Government, in partnership with people with intellectual disability, their families, and their representatives to begin to build service support that offers all youth with intellectual disability the opportunity to move from school to participation in the open labour market.

Appendix 1: Other Matters Related to the Application

FaHCSIA's application is seeking to continue the use of BSWAT for three years when a fair pro-rata award wage assessment (SWS) is available to respond to the concerns of the Court.

It should be recalled that the Commonwealth defended the complaint made against BSWAT in the Courts as a joint respondent with employers.

The Commonwealth has not made an apology or statement of regret for the discrimination caused to either the two individuals that made the complaint, or to the thousands of people with intellectual disability BSWAT has disadvantaged.

The Commonwealth has, however, provided \$4 million dollars to ADE employers to purchase industrial legal advice in response to the Court's decision.

No legal resources or independent support has been provided to workers with intellectual disability to provide independent industrial advice.

It is of concern to peak consumer organisations that FaHCSIA has been leading the consultation with workers when the Commonwealth vigorously defended the use of BSWAT. In this regard, and with respect, the consultations in July this year cannot be perceived as independent without bias.

There are a number of questionable statements in the application by FaHCSIA. We have quoted FaHCSIA statements in italics followed by a brief response.

The use of BSWAT was found to constitute unlawful discrimination in the particular circumstances relating to Mr Nojin and Mr Prior. FaHCSIA considers that it may still be lawful to use the BSWAT (including paying wages assessed under BSWAT) in certain circumstances.

The statement by FaHCSIA that BSWAT *may still be lawful . . . in certain circumstances* is highly questionable.

the assessment under BSWAT may result in a more favourable outcome to the employee than they would have received under any other available tools

It is not possible to determine the comparative advantage of one assessment wage tool over another, in terms of wage outcome, unless a worker is entitled to have their wage assessed by other tools. It is important to note that workers do not get to choose the wage assessment tool.

Buchanan J noted that Mr Nojin and Mr Prior had the BSWAT imposed on them by ADEs. Both workers did not have a choice of wage assessment even though the relevant Award contained the SWS model provisions [FCAFC 192, 123].

FaHCSIA's application proposes to prevent individuals with intellectual disability, currently paid wages based on BSWAT, and future workers in ADEs that use the BSWAT, from having their wage assessed by anything other than BSWAT over a further 3 years.

This would continue to impose unlawful discrimination and disadvantage on many thousands of people with intellectual disability when a lawful and fair wage assessment is available.

the assessment under BSWAT may reasonably measure the actual capacity of the employee in question to undertake or perform the requirements of their job

FaHCSIA claim that BSWAT may be a reasonable measure of the actual capacity of an employee to perform the requirements of a job. Yet the competency assessment, as determined by the Court, inherently assesses matters outside the requirements of the job. This is one of the key points of discrimination made clear by the Court.

BSWAT cannot be aligned to the requirements of a job because it selects competency assessments from industry training certificates which do not match the actual job tasks of an individual's job. This is further exacerbated, as identified by the Court, through the use of the "all or nothing" assessment method, the fixed number of industry competencies, and the interview process.

there may be circumstances relating to the operational needs/demands of an ADE which justify the use of BSWAT despite any failure of the tool to accurately measure or assess the actual capacity of the employee to undertake or perform the requirements of their job

FaHCSIA claim that there may be operational needs or demands of an ADE that justify the continued use of BSWAT. The Court ruled that while BSWAT may benefit the economic viability of ADEs, that this was achieved by imposing a disadvantage on workers.

A claim that there are operational needs or demands that require an ADE to use BSWAT continues the practice of putting business needs ahead of the rights of workers with intellectual disability.

We should recall that Buchanan J said, "The basic entitlement to a rate of pay fairly fixed is no less compelling in the case of an intellectually disabled worker than in the case of any other worker". [FCAFC 192, 138].

an ADE may be required to use the BSWAT by an enterprise agreement or another industrial instrument (see s 47 of the DDA).

FaHCSIA claim that an ADE may be required to use BSWAT by an enterprise agreement or other industrial agreement. According to Buchanan J, the inclusion of the BSWAT in an Award is not a defence. He says:

Even though the award itself contemplates that BSWAT and a range of other tools may be used, that does not carry the issue across the threshold presented by the Act [FCAFC 192, 138].

According to Katzmann J [FCAFC 192, 267];

- BSWAT is not mandated by the relevant Award
- The s 47 defence was abandoned by the Commonwealth during the case

- Even if BSWAT was in direct compliance with an Award or industrial agreement, this would not mean that its use is reasonable. Katzmann J stated:

I appreciate that the award countenances the use of the BSWAT and that is obviously a relevant consideration. It does not, however, mandate it. During the trial the respondents abandoned a defence that the use of the BSWAT was in direct compliance with an industrial instrument (see s 47 of the Act). Even if it were, by itself that would not mean that the imposition of the requirement or condition was reasonable. See s 46PW(8) of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (now the Australian Human Rights Commission Act 1986 (Cth)).

Section 46PW(8) of the *Australian Human Rights Commission Act 1986* states:

“(8) For the purposes of the definition of **discriminatory act under an industrial instrument** in subsection (7), the fact that an act is done in direct compliance with the industrial instrument does not of itself mean that the act is reasonable.”

Any Award or industrial agreement that contains BSWAT for the purpose of wage assessment for workers with intellectual disability is not reasonable as per section 46PW(8) of the *Australian Human Rights Commission Act 1986*.

The Full Federal Court of Australia has made it clear that the use of BSWAT cannot be brought within an applicable exemption under s 47 of the DDA. A decision confirmed by the High Court of Australia.

The Supported Employment Services Award 2010 contains the SWS provisions which provides broad coverage of ADEs. A temporary use of BSWAT productivity score would be appropriate in light of the Court decision.

Other industrial agreements can be amended. We would expect that the Fair Work Commission would welcome applications from ADEs seeking an amendment to an industrial agreement to remove unlawful disability discrimination provisions and replace this with the SWS model provisions.

However, having regard to the judgment, the use of the BSWAT may potentially be unlawful under the DDA in some circumstances.

The Court recognised that BSWAT disadvantages people with intellectual disability as a class of people. This is not *some circumstances*. People with intellectual disability make up almost 80% of workers in ADEs, which amounts to many thousands of people.

In addition to this, there is an emerging need to ensure that ADEs are able to meet legislated quality assurance requirements, particularly Standard 9, Employment Conditions. Failure to meet these requirements jeopardises the ability of organisations to continue to receive government funding to deliver supported employment.

The concept of disability service standards is for disability services to meet those standards (obviously). Failure to meet these standards means that a service does not receive ‘certification’ which is required to receive government funding. This is the law.

It follows that ADEs should ensure that workers with intellectual disability do not have their wages assessed via BSWAT. This would be unlawful and therefore a breach of the Standards. The continued use of BSWAT would be a poor choice and puts certification and funding at risk through non-conformance with the Standards.

The High Court of Australia has said that ADEs can use the Supported Wage System. A fair pro-rata award wage assessment is available to meet the Standards.

The need to meet the principles and objectives of the DSA standard of employment conditions has been an expectation since 1987. Standards which set out what is required to meet the principles and objectives of the Disability Services Act have been in place since 1993. The requirement of ADEs to meet such a standard of employment is not an *emerging* need, but rather a long held expectation.

FaHCSIA has sought expert advice about the judgment to help understand the decision and has implemented a series of actions to work through the implications. These include:

- The establishment of a specific taskforce to work through the implications of the judgment and take any appropriate action;*
 - The establishment of an Inter-Departmental Committee to consider the ramifications across Government;*
 - Completion of the first stage of an extensive consultation with people with disability, parent/carers, peak bodies, and Australian Disability Enterprises about potential ways forward, which may include a new approach to wage assessment;*
 - Support for people with disability, their families and carers through the establishment of a phone line to provide reassurance to callers about their ADE employment arrangements; and*
 - Reconvening of the Sustainable Supported Employment Vision Advisory Group (including representatives of people with disability, academics, service providers, peak bodies and social enterprise experts) to provide advice on areas of priority as we work through this issue.*
-

It has been 10 months since the Full Federal Court decision, and 6 months since the High Court agreed with the Full Federal Court decision. All actions taken by FaHCSIA have not provided redress to the discrimination caused by the use of BSWAT. There has been no apology or statement of regret to individuals with intellectual disability. There has been no offer of compensation. There has been no action to provide temporary redress or a plan to implement available redress. All actions taken to date have resulted in the continuation of discrimination.

It is proposed that FaHCSIA will again publicly consult before the end of 2013 with people with disability, their families and carers, peak bodies, providers and other stakeholders to test alternatives for wage determination for this workforce.

FaCHSIA's proposal to conduct more consultation while workers with intellectual disability continue to be discriminated against, when redress is available, is unnecessary and unacceptable.

A range of forums and discussions have also been facilitated on this issue, including by the industry peak, National Disability Services. It is understood that the Australian Human Rights Disability Services Commissioner has been involved in some of these conversations.

It is unclear why this statement in the application is relevant. There is no indication of what was discussed or the purpose of such meetings. We do not know why the *Australian Human Rights Disability Services Commissioner* was party to these discussions. We do not have any record of these discussions of what was said or concluded.

As described above there are still a number of unresolved issues in relation to the case and FaHCSIA are actively seeking to clarify these.

The case is resolved and the decision is clear. The Court ruled that BSWAT is unlawful for workers with intellectual disability. The competency assessment severely disadvantages the work value of workers with intellectual disability when compared to a simple productivity assessment.

There is a real risk that ADEs who continue to use BSWAT will be assessed as having not met legislated quality assurance requirements, particularly Standard 9, Employment Conditions. The Disability Services Act (1986) (Cth) requires funded organisations to hold a current certificate of compliance (against the current disability standards), to receive funding for supported employment. Having a major non conformity against any of the standards including Standard 9 may result in certification being revoked and funding being withdrawn.

Employment services must meet Disability Service Standards in order to be certified and qualify for government funding. This has been the case since 2002 when the DSA was amended to introduce the current JAS-ANZ quality assurance system. ADEs supported and signed up to these laws. The application appears to place service certification and funding as more important than the equal rights of workers with intellectual disability. The former Minister Amanda Vanstone in 2002 assured people with disability that the Commonwealth would no longer accept the past practice of giving employment services an unending timeline to meet Standards. Following the Court's ruling, JAS-ANZ certified bodies have not issued major non-conformances as a rule against ADEs using BSWAT. ADEs have been permitted to continue to use BSWAT and maintain certification of compliance with the DSA standards. This makes a mockery of the protections against

discrimination provided by the Disability Services Act and its Standards, and the promise by Government to people with disability to be tough on non-conformance.

Moving towards any alternative wage setting model, such as that used by the Supported Wage System, would take time to develop and implement. It would be difficult to move immediately to alternative wage setting arrangements, as this may result in:

- ADE closure, resulting in unemployment for workers with disability, and adverse financial impacts for these workers, until alternative employment (if available within the community) is individually achieved;

Is this true? Is this true for all ADEs? What evidence supports this statement?

What is the financial viability and profitability of each of the 194 ADEs?

There is no accompanying evidence with FaHCSIA's application indicating the impact of implementing fair award based wages?

How does FaHCSIA predict the quantum of increase in wages when fair award based wage assessments have not yet been conducted?

Further, what are the employment terms and conditions of support and executive staff at ADEs? Are their wages discounted due to poor business viability?

The implementation of lawful award wage assessments can provide workers with disability with dignified and positive financial impacts. It would signal to all employers that lawful wage costs are integral to business practices under Australia law. This immediately addresses the Court's concern that the use of BSWAT by ADEs imposes a disadvantage for workers with intellectual disability.

- An inability for existing systems (for example, the Supported Wage System) to meet immediate demand for assessments.

The Supported Wage System will redress the discrimination identified by the Court. Addressing the need for a SWS assessment for thousands of workers will require a roll out plan and this will indeed take some time. Yet this is possible and effort in this direction provides redress. We should *devise* a plan which takes into account the current capacity of the SWS, what we can do temporarily, and what we can do to enhance the current capacity of the SWS to meet assessment demand.

As stated earlier, BSWAT contains a productivity assessment component which is similar to the SWS. This could provide a temporary redress. Priority of SWS assessments could be given to new and review assessments to prevent further discrimination in a timely manner. A plan to systematically assess workers with intellectual disability via the SWS would provide immediate redress at the earliest possible time. It would also provide actual evidence of wage costs so that

ADEs may discuss viability issues with the Commonwealth as this arises, rather than raise issues of viability without any objective evidence.

Consultations about the issue were undertaken in July and August 2013 with around 600 people with disability, their families and carers, stakeholders and providers. Points raised by this audience include:

- *Agreement with the goals articulated in Inclusive Employment (the Australian Government vision for supported employment);*
 - *Mixed views on the best way forward for a future wage tool;*
 - *The economic environment had impacted negatively on the hours of work on offer; and*
 - *Concern about the viability of their workplaces.*
-

As a respondent to the Court case defending the use of BSWAT, it is inappropriate for FaHCSIA to be consulting with workers and their families. This is not the basis for independent discussion or independent advice to government.

FaHCSIA is acutely aware that the exemption may result in some ADE employees not receiving wages as high as they might if an alternative wage-setting tool were to be used. For this reason, it is proposed that three years be the maximum amount of time for the exemption to apply.

The application will result in *thousands* of employees continuing to receive severely discounted award wages. It is incorrect that continued use of BSWAT will disadvantage only “some” ADE employees.

An exemption for a 3 year period is needed to allow further consultation, investigation and determination of potential ways forward which may include a new wage setting approach, and to allow all parties to transition to, and implement, actions identified.

What are these ‘potential ways’? What is this ‘new wage setting approach’? A transition to what? What will be implemented? These are all unknown elements of FaHCSIA’s application.

The proposition of the application is to continue to use BSWAT, an unlawful wage assessment, in order to pursue an unknown redress. The proposition fails to recognise that a valid fair wage assessment is available and redress could be implemented without delay. Instead, the application seeks time to explore ways forward to an unknown outcome. There is no certainty that such a process will provide a lawful wage assessment.

Steps to move towards a new wage setting approach within the three year timeframe are proposed as follows:

- Further consultations later in the year with people with disability, their families and carers, providers, representatives, peaks and stakeholders to test options;
 - Fast tracking of *Inclusive Employment 2012-2022: A vision for supported employment (the Vision)*. The Vision aligns with the DDA, in particular, ensuring people with disability employed at ADEs enjoy the same working conditions as other mainstream workplaces. This process will include consideration of assistance for ADEs to develop more financially sustainable business lines in order to pay the significantly higher wages expected from a new wage determining method;
 - Assessment of the impact of choice on supported employment in DisabilityCare Australia launch sites;
 - Support and training for people with disability, their families and carers, and service providers in any new requirements for wage assessment through appropriate industrial channels; and
 - Implementation of a new DDA compliant wage assessment approach in ADEs across Australia within 36 months.
-

Further consultation is unnecessary when an available fair award wage assessment is available.

The DSA employment service standard that people with disability enjoy working conditions comparable to those of the general workforce has been an expectation since 1986. Disability discrimination in employment has been unlawful since 1992. And Australia signed the UN CRPD which came into force on 16 August 2008. Equal rights in employment is not a vision to occur in some distant future, these are rights that exist now.

The need for ADEs to be financially sustainable has been identified as a critical element for many years. In 2000, the business services review reported that:

A Business Service's capacity to provide good employment conditions for its employees (that is people with disabilities) is dependent, in the main, on its ability to develop and maintain a commercially viable enterprise.⁸

The business services review in 2000 identified that 47% of business services were unable to break even or return a profit.

In 1995, the Commonwealth review of disability employment services found that the Commonwealth had regularly met the costs of services in financial difficulty.

Additional funding has been given as "bail outs" for services in financial difficulty and to provide maintenance funds to meet new or changing occupational and safety requirements. Service received extra funding as "augmentation". The department reports that 'one-off' bail-outs had become de facto ongoing increases to the base recurrent funding of services. Last year

⁸ Department of Family and Community Services & ACROD. (2000). *A Viable Future. Strategic imperatives for Business Services*. p. x

*the department issued a policy statement clarifying that the use of bail-outs was for exceptional circumstances only.*⁹

In June 2013, the Commonwealth announced that it had invested \$8 million in the financial year 2012/13 to support ADEs with industrial relations, help to meet new disability standards, and assistance to build viable business models.¹⁰

The implications of the Court decision is that lawful wages is an integral business cost. Business viability should not be achieved by imposing disadvantage on workers with disability. The principle that should guide the placement and support of a person with disability in any business, whether this is an ADE or a mainstream employer, is that the worker will be paid fair award wages and that the business is viable and able to meet its obligations. This is what we expect for workers without disability.

It would be inappropriate to place and support people with disabilities in jobs in businesses that use unlawful wage assessments. This would be a breach of the DSA, the DDA, and the NDIS legislation which is meant to give effect to Australia's obligations under the UN CRPD. The UN CRPD Committee has clearly indicated that the use of BSWAT does not meet Article 27 of the CRPD.

The Commonwealth has provided considerable resources to assist the disability service sector in the NDIS launch sites. The Commonwealth established a \$122.6 million Sector Development Fund to help the disability sector prepare for the launch of the NDIS. The Commonwealth also gave more than \$2 million to National Disability Services as part of this fund to help disability organisations take part in the launch of the NDIS.

A significant concern of the peak consumer bodies is that there is currently no Commonwealth funded independent industrial advocacy support for individuals and families.

⁹ Baume, P. & Kay, K. (1995). *Working Solution*. Report of the Strategic Review of the Commonwealth Disability Services Program. Commonwealth of Australia.

¹⁰ Jenny Macklin MP, Minister for Families, Community Services and Indigenous Affairs, Amanda Rishworth MP, Parliamentary Secretary for Disabilities and Carers. *More Support for workers with disability*. Media Release, 13 June 2013

Appendix 2: Award Based Wages for Employees with Intellectual Disability

The issue of award wages for people with intellectual disability in receipt of employment assistance has been discussed and debated for around 30 years since the early 1980s.

There have been many consultations, working groups, policies, principles, objectives, standards, reviews and recommendations, and national and international statements that have attempted to address and resolve discriminatory and poor wage conditions in sheltered employment (i.e. ADEs).

In 2013 we are still not able to say that all people with intellectual disability in sheltered employment services (ADEs) are paid wages that are fair and equitable.

The continued failure to act is a systemic discrimination.

There have been substantial efforts from people with intellectual disability, their families and representatives to bring about fair and equitable wage assessments in sheltered employment.

In contrast, there has been an enormous effort by ADEs to design and promote wage assessments to undermine the rights of people with intellectual disability to fair award wages. The purpose of this effort is to keep wages low. Low wages mean lower business costs. Low wage costs mean that the viability of ADEs is set at a low bar.

The technical know-how to conduct a productivity based award wage assessment is known and available via the Supported Wage System. There is no valid reason why this cannot be implemented in any employment setting as many employers have already done so.

The continued use of discriminatory wage assessments for many thousands of people with intellectual disability makes a mockery of the principles and objectives of the Disability Services Act.

The following is a timeline of events over 30 years, with excerpts from reports, which have repeatedly promised equal rights in employment.¹¹

1983 -1985 Report of the Handicapped Programs Review. New Directions.

Much criticism was directed at the unchallenging and inappropriate work frequently found in workshops and at the low level of wages paid. . . .

It is recommended that the Commonwealth Minister for Community Services in conjunction with the Minister for Employment and Industrial Relations consider establishing a productivity based minimum wage for people working in long term supported employment on a pro-rata basis keyed to prevailing able bodied rates for that industry;

1987 Principles and Objectives of the Disability Services Act

¹¹ This is not an exhaustive list.

Principle (1) People with disabilities are individuals who have the inherent right to respect for their human worth and dignity.

Objective (2) Services should contribute to ensure that the conditions of the every-day life of people with disabilities are the same as, or as close as possible to, norms and patterns which are valued in the general community.

1990 Minimum Outcomes

That people with disabilities will enjoy similar working conditions to those expected and enjoyed by the general workforce.

1992, Development of a National Assessment Framework for a Supportive Wage Assessment

Included in the Budget announcement was provision for further consideration of the development of a supportive wages system for people with disabilities

The consultants prefer the term tasks . . . The reasons are:

- the term skills carries with it some potential for confusion as to whether the term refers to the requirements of the position or the knowledge and abilities of the individual. The term tasks is less ambiguous when referring to job requirements*
- many of the jobs performed by people with intellectual disabilities are entry level positions organised around a number of relatively routine and readily identifiable tasks with unambiguous outcomes. For example, the tasks in a grounds assistants job might include: raking leaves, sweeping up rubbish, emptying bins, weeding garden, watering lawns.*

1992 Disability Discrimination Act

15 Discrimination in employment

(1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability:

- (a) in the arrangements made for the purpose of determining who should be offered employment; or in determining who should be offered employment; or*
- (c) in the terms or conditions on which employment is offered.*

(2) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability:

- (a) in the terms or conditions of employment that the employer affords the employee; or*
- (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or*
- (c) by dismissing the employee; or*
- (d) by subjecting the employee to any other detriment.*

1993 - current: The DSA Standards and QA Framework

Standard 9: Each person with a disability enjoys working conditions comparable to those of the general workforce

1994 Australian Industrial Relations Commission - The Supported Wage System

These matters came before the Commission as a result of joint applications under section 113 of the Industrial Relations Act 1988 (the Act) by the ACTU (acting on behalf of the relevant unions) and employers to vary the above awards by consent to include a model clause (annexured to this decision) which makes provision for the operation of the "Supported Wage System".

1995 Review of the Commonwealth Disability Services Program (Working Solution Recommendation 32, 33, 34)

No valid reason has been presented to the Reviewers as to why all services should not pay at least pro-rata award wages for all employees

By August 1995, the DSP should have validated an assessment tool for productivity.

By September 1995, the DSP should ensure that a process and timetable for the assessment of productivity of DSP-funded clients have been developed.

By June 1996, all DSP-funded services should be paying employees under an award or certified agreement and should paying at least pro-rata award wages consistent with the principles of the Supported Wages System

2000 A Viable Future. Strategic Imperatives for Business Services

. . . a number of business services have successfully used the Supported Wage System as part of their general operations

That for Business Services to meet their employment obligations it is recognised that they are required to secure a level of revenue generation that enables them to maintain their employment base and provide appropriate employment conditions for their employees.

2001 Review of the Supported Wages System

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

2001 Senate Committee for Community Affairs Legislation Committee - Disability Services Amendment (Improved Quality Assurance) Bill 2001

The National Caucus of Disability Consumer Organisations submission stated:

Performance indicators that Caucus propose include:

The service ensures that employees with disability receive employment conditions and wages according to a legal industrial agreement consistent with the principles and objectives of the Commonwealth Workplace Relations Act 1996.

The service ensures that any assessment of pro-rata award based wages shall be in accordance with the Supported Wage System.

These indicators provide an assurance to employees with disability that their employment conditions are comparable to employees without disability.

2002 Case Based Funding Trial Evaluation Report

There were no notable differences between the level of satisfaction of workers funded under block grant compared with those funded under the CBFT. The differences were marked however between the level of satisfaction among workers in business services and workers employed in an open setting.

Business service workers raised more concerns than open employment workers about lack of choice and variety in their work tasks, low hourly pay rates and wages, and lack of on-the-job support. These findings were common amongst CBFT and block grant funded business service workers.

2003 BSWAT Development

The National Caucus of Disability Consumer Organisations report to the Commonwealth stated:

The Caucus has consistently held the policy position that the Supported Wage System (SWS) is the only valid, reliable, tested and legal method of pro-rata award wage assessment when a worker's disability impacts on productive capacity.

The [BSWAT] wage assessment is not sufficiently fair or equitable.

The use of competency assessment for pro-rata award wage assessment is questionable and likely to disadvantage workers.

The use of competency assessment to determine productive capacity or value is not supported by the research.

2006 UN Convention on the Rights of Persons with Disabilities - Article 27

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of

equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

2012 UN High Commissioner on Human Rights

Submissions to this study highlighted a wide range of efforts undertaken by States parties to promote employment of persons with disabilities. Nevertheless, such efforts often focus on creating jobs or training opportunities in separate settings and fail to respect the principle of inclusion provided for in the Convention. It is imperative that States parties move away from sheltered employment schemes and promote equal access for persons with disabilities in the open labour market.

2013 UN Convention on the Rights of Persons with Disabilities Committee

The Committee recommends that the State party:

- (a) Immediately discontinues the use of the BSWAT*
- (b) Ensures that the Australians Supported Wage System (SWS) is changed to secure the right assessment of the wages of persons in support employment.*

Appendix 3: Response to Joint Accreditation System of Australia & New Zealand

The Joint Accreditation System of Australia and New Zealand (JAS-ANZ) is responsible for setting down requirements for bodies seeking accreditation to audit Australian Disability Enterprises (ADEs).

JAS-ANZ on 13 August 2013 issued advice on how certification bodies (CBs) should audit ADEs in relation to the use of the Business Services Wage Assessment Tool (BSWAT).

JAS-ANZ policy advice promotes continued discrimination

S 43 of the *Disability Discrimination Act* 1992 makes it an offence to incite, assist, or promote others in doing a discriminatory act. JAS-ANZ advice, however, encourages CBs to make judgements which are contrary to the rulings of the Courts.

A decision to issue a certificate of compliance with the Standards, when an ADE continues to use BSWAT, promotes discrimination through the use of an unlawful wage assessment for workers with intellectual disability.

JAS-ANZ policy is contrary to the Convention on the Rights of Persons with Disabilities (CRPD)

The United Nations' Committee on the Rights of Persons with Disabilities has reviewed Australia's compliance with the CRPD. The Committee's concluding recommendations issued on 4 October 2013 included:

Right to work (art. 27)

49. *The Committee is concerned that employees with disabilities in Australian Disability enterprises (ADE) are still being paid wages based on the Business Services Wage Assessment Tool (BSWAT).*

50. *The Committee recommends that the State party:*

(a) Immediately discontinues the use of the BSWAT

(b) Ensures that the Australians Supported Wage System (SWS) is changed to secure the right assessment of the wages of persons in support employment.

Certificates of compliance provided to ADEs, when BSWAT is used to assess and pay wages of workers with intellectual disability, is in breach of the CRPD.

JAS-ANZ advice to CBs should be that use of BSWAT to assess and pay wages of workers with intellectual disability is unlawful and a major non-conformance of the DSA Standards.

Certificates of compliance before 21 December 2012

JAS-ANZ has advised certification bodies that:

For DEES certified on or before 21 December 2012

The Full Federal Court decision did not preclude the continued use of the BSWAT (as it applied only to the two employees the subject of the case). However, a court is likely to apply similar principles (as summarised below) in analogous circumstances. Certification bodies are not obliged to review all certificates of compliance issued to DEES that have used the BSWAT; however, if certification bodies cease to be satisfied that a particular DEES meets the standard

(including because of the way the BSWAT is used in a particular ADE or for particular employees) they should consider whether a DEES should be issued with a major nonconformity.

The advice is a misinterpretation of the Full Federal Court and High Court of Australia decisions. The Full Federal Court decision specifically referred to BSWAT as being discriminatory for workers with intellectual disability broadly.

Fourthly, part of the reason why, in my view, use of BSWAT is not reasonable is because it is discriminatory in the wider and less technical sense of the term so far as intellectually disabled workers are concerned. Such persons make up the bulk of workers in ADEs. As a class of people they have had imposed on them a tool to measure their work contribution, compared to that of a Grade 1 worker, which does not measure like for like and which subjects them to a disadvantage. The likely result in most cases, and the actual result for Mr Nojin and Mr Prior, is a calculation which understates their actual contribution relative to the work for which the Grade 1 rate of pay is fixed. Understatement of the value of the actual work contribution of an intellectually disabled worker is, in my respectful view, neither necessary nor reasonable. [emphasis added, Buchanan 139]

I accept that BSWAT is skewed against intellectually disabled workers. The preponderance of the evidence was to that effect. [emphasis added, Buchanan 141]

Powerful evidence was given in these cases, however, that it was unfairly skewed against the intellectually disabled. [emphasis added, Katzmann 268]

The High Court ruling confirmed BSWAT's general disadvantage of workers with intellectual disability.

The Full Court of the Federal Court, by a majority, concluded that the use of the BSWAT disadvantaged intellectually disabled persons. Although it was widely used, it was not reasonable. One component of the BSWAT involves the assessment of a person's competencies in the workplace. The unchallenged expert evidence was that the BSWAT produced a differential effect for intellectually disabled persons and reduced their score. We see no reason to doubt the conclusions of the Full Court. [emphasis added, 306-313]

JAS-ANZ policy should require CBs to review all certificates of compliance of ADEs. Any use of BSWAT for people with intellectual disability should be understood as unlawful and a major non-conformance of Standard 9 of the *Disability Services Act 1986*.

Certificates of compliance after 21 December 2012

JAS-ANZ has advised CBs that they *should only grant or maintain certification* of an ADE after 21 December 2012 if the ADE *continues to meet the standard*.

Accurate measure of actual work

According to JAS-ANZ,

. . . certification bodies need to be satisfied that if BSWAT is used in relation to intellectually disabled employees:

use of the BSWAT results in a reasonably accurate measure or assessment of the actual capacity of the particular employee to undertake or perform the requirements of his or her employment Grade; or

use of the BSWAT is able to be justified despite any failure accurately to measure or assess the actual capacity of the particular employee to undertake or perform the requirements of his or her employment Grade; or

The Full Federal Court of Australia has already determined these matters, and these decisions have been confirmed by the High Court of Australia. A key conclusion of the Full Federal Court is that the competency assessment of BSWAT assesses matters other than the actual tasks of the job. The BSWAT includes an assessment of competencies that workers with intellectual disability are not required to do as part of their job.

First . . . In that comparison it was not, in my view, reasonable to introduce an examination or assessment of matters which play no part in the evident range of work for which a Grade 1 rate is fixed. Yet that is precisely what BSWAT does. Furthermore, the attempt to assess competencies distracts attention from the comparison required under the award and has the likely result (in the case of intellectually disabled workers) of penalising workers in an ADE in terms of the percentage score able to be achieved. The score is no longer based on a direct comparison of work done, skills used and results achieved. The score is based in significant part on other matters which play no part in the wage of a Grade 1 worker. [Buchanan 135]

The basic defect in the use of BSWAT is that it reduces wages to which intellectually disabled workers would otherwise be entitled by reference to considerations which do not bear upon the work that they actually do. [Buchanan 148]

Looking at the matter objectively, and giving due weight to all the relevant factors, like Buchanan J and for largely the same reasons, I am persuaded that it was unreasonable to use the “all or nothing” competency testing and the question and answer method of assessment for which the BSWAT provides to determine whether the appellants’ wages should have been increased. Put another way, I am satisfied that the requirement or condition was not reasonable. In particular, it strikes me as manifestly unreasonable that the appellants’ wages be determined (even in part) by their ability to undertake tasks they would never be called upon to perform, by a method of assessment that imposes real disadvantages on them because of their intellectual disabilities and which, as Buchanan J puts it, understates the value of their actual work contributions, and when they also have to fulfil criteria that non-disabled employees against whose wages their wages are to be measured need not fulfil. [Katzmann 265]

The Full Federal Court and High Court of Australia decided that BSWAT is not an accurate measure of the work value of workers with intellectual disability.

The decision of the Full Federal Court, agreed by the High Court of Australia, is that the use of the BSWAT disadvantages people with intellectual disability. A key element of this disadvantage is the assessment of matters other than the actual tasks of the job.

It is inappropriate for JAS-ANZ to advise CBs to re-consider or determine if the *use of the BSWAT results in a reasonably accurate measure or assessment of the actual capacity of the particular employee to undertake or perform the requirements of his or her employment Grade*. The Courts have already decided this.

JAS-ANZ advises CBs that, even if BSWAT is not an accurate measure of work value, this may be justified. JAS-ANZ believes they may give CB’s the discretion to approve the discrimination of people with intellectual disability in employment.

JAS-ANZ advice to CBs is incoherent with the decision of the courts. The advice encourages CBs to make decisions to approve the continued use of BSWAT for workers with intellectual disability despite the ruling of the Courts.

JAS-ANZ's advice to certification bodies brings into question:

- the legitimacy of such advice when it is contrary to the findings of the Full Federal and High Courts,
- whether it is appropriate for JAS-ANZ to direct certification bodies to make their own judgment of the DDA in relation to the use of BSWAT when the Courts have made decisions on these matters,
- the role, expertise and authority of certification bodies to make DDA interpretations about a wage assessment already determined by the highest courts of Australia as unlawful,
- whether the JAS-ANZ QA system has the right to make interpretations and determinations of discrimination law when a justice system exists with such powers of court process and court decision making authority.

In light of the Full Federal Court decision, agreed by the High Court of Australia, the proper course of action for JAS-ANZ is to advise CBs to find that the use of BSWAT, to assess the pro-rata award wage of workers with intellectual disability, to be a major non-conformance of the Standard.

DDA Exemptions

According to JAS-ANZ,

For DEES certified after 21 December 2012

... certification bodies need to be satisfied that, if BSWAT is used in relation to intellectually disabled employees:

use of the BSWAT can be brought with an applicable exemption such as s 45 of the DDA . . . or s 47 of the DDA (for example, the use of the tool may not be unlawful if it was used in direct compliance with an award or enterprise agreement).

The Courts' decision in relation to s 45 of the DDA

The Federal Court (Gray J) and the Full Federal Court (Buchanan, Flick, Katzmann, JJJ) all agreed that the use of BSWAT did not fall within the scope of section 45 of the DDA.

According to Buchanan J [FCAFC 192, 151-154]

- the use of BSWAT was not *reasonably necessary to permit the employment* of the workers,
- the BSWAT is a choice made by ADEs from possible alternatives to measure wages, and,
- that ADEs would not lose funding, or the workers lose employment, if BSWAT was not used to measure work value as there are other alternatives for measure work value

According to Buchanan J, the trial judge (Gray J) made clear his view that s 45 did not apply [FCAFC 192, 155-157].

The trial judge concluded the use of BSWAT by Challenge and SIS was not an act which was intended to afford access to "services or opportunities, or to benefits or programs, of one or more of the requisite kinds". He said (at [100]):

100 ... It is insufficient to make out the case that the application of the BSWAT occurred in the course of providing access to services or opportunities, or to programs or benefits, of the requisite kinds. The acts that were part of applying the BSWAT had to have that intention, and the intention had to be reasonable.

(Emphasis added.)

The trial judge went on to note at [101]:

101 ... There was no evidence to the effect that the decision to use the BSWAT was made in order to provide access to services or opportunities, or to benefits or programs. That access was already being provided. Whatever the result of assessment by BSWAT, the access would continue to be provided.

(Emphasis added.)

In my view these conclusions were correct, and the Notice of Contention should be dismissed.

According to Flick J [FCAFC 192, 218]

... the primary Judge was correct in concluding that the evidence did not "... justify findings that Coff's Harbour Challenge and Stawell Intertwine used the BSWAT with any intention of the kind required by s 45": [2011] FCA 1066 at [101], 283 ALR 800 at 840. As pointed out by the primary Judge, "[it] is insufficient to make out the case that the application of the BSWAT occurred in the course of providing access to services or opportunities, or to programs or benefits, of the requisite kinds": [2011] FCA 1066 at [100], 283 ALR 800 at 840.

According to Katzmann J [FCAFC 192, 269]

Section 45

On this issue, raised by the notice of contention, I agree with Buchanan J and have nothing to add.

The Federal Court and the Full Federal Court of Australia made it clear that the use of BSWAT cannot be brought within an applicable exemption under s 45 of the DDA. A decision confirmed by the High Court of Australia.

The Courts decision in relation to s 47 of the DDA

According to Buchanan J, the inclusion of the BSWAT in an Award is not a defence. He says:

Even though the award itself contemplates that BSWAT and a range of other tools may be used, that does not carry the issue across the threshold presented by the Act. [FCAFC 192, 138]

According to Katzmann J [FCAFC 192, 267];

- BSWAT is not mandated by the relevant Award
- The s 47 defence was abandoned by the Commonwealth during the case
- Even if BSWAT was in direct compliance with an Award or industrial agreement, this would not mean that its use is reasonable.

Katzmann J stated:

I appreciate that the award countenances the use of the BSWAT and that is obviously a relevant consideration. It does not, however, mandate it. During the trial the respondents abandoned a defence that the use of the BSWAT was in direct compliance with an industrial instrument (see

s 47 of the Act). Even if it were, by itself that would not mean that the imposition of the requirement or condition was reasonable. See s 46PW(8) of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (now the Australian Human Rights Commission Act 1986 (Cth)).

Section 46PW(8) of the *Australian Human Rights Commission Act 1986* states:

“(8) For the purposes of the definition of **discriminatory act under an industrial instrument** in subsection (7), the fact that an act is done in direct compliance with the industrial instrument does not of itself mean that the act is reasonable.”

Any Award or industrial agreement that contains BSWAT for the purpose of wage assessment for workers with intellectual disability is not reasonable as per section 46PW(8) of the *Australian Human Rights Commission Act 1986*.

The Full Federal Court of Australia has made it clear that the use of BSWAT cannot be brought within an applicable exemption under s 47 of the DDA. A decision confirmed by the High Court of Australia.

Promotion of exemption provisions

The Full Federal Court has ruled that BSWAT is discriminatory for workers with intellectual disability. The continued use of BSWAT cannot be held to meet the Standard on the basis of either DDA exemption categories at s 45 or s 47.

JAS-ANZ advice, however, promotes s 45 and s 47 of the DDA as possible reasons for certification bodies to be satisfied that ADEs meet the Standard.

JAS-ANZ’s advice to certification bodies brings into question:

- the legitimacy of such advice when it is contrary to the findings of the Full Federal and High Courts,
- whether it is appropriate for JAS-ANZ to direct certification bodies to make their own judgment of the DDA and its exemption provisions in relation to the use of BSWAT when the Courts have made decisions on these matters,
- the role, expertise and authority of certification bodies to make DDA exemption rulings about a wage assessment already determined by the highest courts of Australia as being unlawful,
- whether the JAS-ANZ QA system has the right to make interpretations and determinations of discrimination law when a justice system exists with such powers of court process and court decision making authority.

Review of wage assessment tools

JAS-ANZ provides advice to certification bodies on how to review wage assessment tools.

From 21 December 2012, CBs should be able to demonstrate how they have reviewed the acceptability of the wage assessment practices of a DEES. The CB should ensure that it has a robust process for supporting the review of wage assessment tools.

The advice contains a series of questions and suggested guidance on how to answer these questions.

1. *Is the BSWAT being used for people with an intellectual disability? If no then it probably still complies with Standard 9. If yes,*

2. *Is the BSWAT being used in the assessment of low grade tasks? If no then it probably still complies with Standard 9. If yes,*
3. *Is there an enterprise agreement made under the Fair Work Act 2009 (or any other applicable instrument) that limits the choice of wage assessment tools to the particular tool used (eg the BSWAT)? If yes then it probably still complies with Standard 9. If no,*
4. *Is there good alignment between task and test (i.e., more in keeping with the expectations of a productivity assessment)? If yes then it probably still complies with Standard 9. If no, then the CB should undertake further analysis, and if appropriate obtain expert advice, to satisfy itself as to whether the DEES continues to meet the standard.*

There are many problems with this advice.

First and foremost, the Full Federal Court and the High Court have ruled that BSWAT is unlawful. The continued use of BSWAT for workers with intellectual disability does not require further investigation by certification bodies. Identification of its continued use is sufficient for the reporting of a major non-conformation of the Standard.

It is almost 10 months after the Federal Court decision and the response by JAS-ANZ has shown an inability to protect the rights of workers with intellectual disability.

Number 1 in the advice above assumes all other wage tools used for workers with intellectual disability comply with the Standard. It is clear that the SWS does comply. The Courts, however, have not tested all other wage tools. Many, if not all, of these tools use competency assessment, and wage assessment and calculation designs, that are questionable in terms of fairness.

Number 2 of JAS-ANZ advice is that BSWAT may comply if it is used to assess workers with intellectual disability performing tasks that are not low grade tasks. Such advice fails to take into account the breadth of the Federal Court decision. The disadvantage for people with intellectual disability in the use of BSWAT, identified by the Court, was due to several factors related to the use of the competency based assessment.

This factors included;

- the assessment of matters not relevant to the actual work tasks
- the question and answer method of assessment
- the calculation of industry competencies not part of the actual job
- the “all or nothing” competency testing
- the lack of correlation between productivity and competency scores

That such factors;

- understate the value of work of employees with intellectual disability
- impose a competency assessment on workers not required of workers with disability in open employment to determine wages
- impose an unfair wage calculation as workers without disability would not score 100% of the award rate of pay if assessed with BSWAT

This disadvantage is discriminatory on a class of people; being people with intellectual disability.

Even if a person with intellectual disability was performing tasks that were not basic and routine in nature, which would be rare and unusual in ADEs, the discriminatory nature of BSWAT is much more comprehensive than the consideration of just the award level of actual work.

Number 3 advises that an enterprise agreement made under the Fair Work Act 2009 which limits the choice of wage assessment to the BSWAT still complies with Standard 9. This ignores the decision of Katzmann J which specifically states that section 46PW(8) of the *Australian Human Rights Commission Act 1986* states:

“(8) For the purposes of the definition of *discriminatory act under an industrial instrument* in subsection (7), the fact that an act is done in direct compliance with the industrial instrument does not of itself mean that the act is reasonable.”

The advice of JAS-ANZ to certification bodies is contrary to the law. It is not sufficient to impose the BSWAT just because it is part of an industrial agreement.

Number 4 of JAS-ANZ’s advice asks certification bodies to consider whether there is a good alignment between task and test. This advice addresses an important principle about pro-rata award wage assessment.

The BSWAT clearly is not a good alignment with task and test. This is one of the core reasons why the Court ruled that BSWAT disadvantaged workers with intellectual disability. The test of competency can include assessments which have nothing to do with the actual job tasks. The test of competency can discount wages just because the worker doesn’t perform a fixed number of tasks. The question and answer test and ‘all or nothing’ calculation can discount wages because of abstract matters not related to the job tasks. This is poor *alignment between test and tasks* and one that causes severe discount of the wages of workers with intellectual disability.

Poor alignment between tasks and test is the nature of competency based testing and its associated wage calculations. Such wage assessments are generally not designed to be an alignment with the actual job tasks of individual workers. Many assessments also place substantial limits in the wage calculation, and lack evidence of comparative research with workers with and without disability performing the same work tasks.

If an employer uses an industry training competency test, it is highly likely that elements of the test will not relate to the job tasks at hand. This is why productivity testing (i.e. SWS) is highly relevant, for it focuses on the job tasks at hand in direct comparison to a full award rate for the same tasks. Any variation from this basic principle, to include “other” measurements, moves the test quickly outside a principle of fairness and comparative equality. It becomes something with poor alignment between tasks and test.

The Full Federal Court decision includes direction on this matter. Buchanan J wrote;

The wage which is, under the award, to be assigned to an intellectually disabled worker is not, in my view, intended to represent the value of the employee to an employer measured in some abstract or theoretical way. . . . that relationship should be one which is reasonable having regard to the output of the disabled worker compared with the output of the non-disabled worker. The introduction and overlay of other theoretical considerations should not, in my view, be permitted to distract attention from this fundamental entitlement. [Buchanan 148]

It is of great concern that the JAS-ANZ quality system is unable to protect workers from intellectual disability from discrimination in employment.

There is a human service concept that JAS-ANZ should consider. It is called the “conservatism corollary”.

This concept recognises that some individuals or groups are vulnerable to being ‘devalued’ and treated with disadvantage more so than others. The more vulnerable a person is, the more important it is to reduce or prevent any risk of disadvantage by balancing this with greater safeguards and protections than other people may need.

Workers with intellectual disability in ADEs have, and continue to suffer, disadvantage in employment terms and conditions. This is a group of people vulnerable in industrial relations processes where intellectual impairment will often place them in powerless positions of negotiation when compared to ADE employers.

The conservative corollary concept encourages us to provide a set of industrial safeguards that are deliberately conservative, beyond reproach and without any concern about unfairness in employment terms and conditions.

It is for this reason that a CB should refuse to certify or maintain the certificate of any ADE that uses BSWAT. There has been a Full Federal Court decision supported by the High Court of Australia which says that BSWAT is unlawful to determine the award wages of workers with intellectual disability.

Given the Court ruling and the history of unfairness in this industry, together with the vulnerability of the workforce, JAS-ANZ should at a minimum, be advising that the SWS be the only acceptable wage tool for compliance under the Standards until there is no doubt, none whatsoever, that other wage tools provide fair, equal or better wages than the SWS for workers with intellectual disability.

For NCID, and other peak representative organisations, we believe it is imperative that the Commonwealth deems the SWS as the single national pro-rata award wage assessment required to meet the Standards of the DSA. This eliminates any doubt and provides maximum protection for this vulnerable population and ensures the rights of workers with intellectual disability are upheld.

Appendix 4: Nojin v Commonwealth of Australia [2012] FCAFC 192

On 21 December 2012, the Full Court of the Federal Court of Australia ruled that two employers and the Commonwealth unlawfully discriminated against two employees with intellectual disability by requiring that their wage be determined by the Business Services Wage Assessment Tool (BSWAT)

On May 10, 2013, the High Court of Australia refused an application by the Commonwealth and the two employers to appeal the Federal Court decision. The High Court supported the decision of the Federal Court.

The High Court stated:

The Full Court of the Federal Court, by a majority, concluded that the use of the BSWAT disadvantaged intellectually disabled persons. Although it was widely used, it was not reasonable. One component of the BSWAT involves the assessment of a person's competencies in the workplace. The unchallenged expert evidence was that the BSWAT produced a differential effect for intellectually disabled persons and reduced their score. We see no reason to doubt the conclusions of the Full Court.

The purpose of this paper is to provide a summary of the Full Court of the Federal Court's decision, particularly its reasons why the BSWAT is unreasonable and disadvantages employees with intellectual disability. It is hoped that this summary will assist individuals, families and organisations understand why the Court decided that the BSWAT is unlawful. It is a working document intended to inform and create a discussion about the Federal Court's decision. We welcome feedback and critique.

A summary of the decision is an important basis for understanding what it is that is "wrong" and therefore what it is that is "right". This understanding is necessary as the Commonwealth is asking the community how we can ensure future wage assessments treat the Court's decision with respect and ensure employees with intellectual disability are paid fair award wages without disadvantage.

The reasons why BSWAT was found to be unlawful are set out in the Full Court of the Federal Court decision. The decision can be found online at <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2012/2012fcafc0192>

This summary assumes a basic understanding of the BSWAT. Information about the BSWAT can be found at http://www.crsaustralia.gov.au/about_the_business_services_wage_tool.htm

The Federal Court decision was a majority decision. Two of three judges ruled that the BSWAT was unlawful. Each judge wrote their own reasons for their judgement.

The two judges (Buchanan and Katzmann) that ruled that the BSWAT was unlawful concur and complement each other even though these are two different judgements.

This summary sets out each reason why the BSWAT was found to be unlawful and what wage principle this highlights for a wage assessment to be lawful.

Each reason is stated in our own words, and is set out with supporting excerpts from the decision.

Following the summary, a list of wage principles consistent with the Court's decision and the Supported Wage System is proposed.

Reason 1: The BSWAT isn't based on a comparison of actual work at the award level. It includes an assessment of matters (i.e. competencies) irrelevant to the job.

The BSWAT included an assessment of competencies that workers with intellectual disability were not required to do as part of their work.

a. First . . . In that comparison it was not, in my view, reasonable to introduce an examination or assessment of matters which play no part in the evident range of work for which a Grade 1 rate is fixed. Yet that is precisely what BSWAT does. Furthermore, the attempt to assess competencies distracts attention from the comparison required under the award and has the likely result (in the case of intellectually disabled workers) of penalising workers in an ADE in terms of the percentage score able to be achieved. The score is no longer based on a direct comparison of work done, skills used and results achieved. The score is based in significant part on other matters which play no part in the wage of a Grade 1 worker. [Buchanan 135]

b. The basic defect in the use of BSWAT is that it reduces wages to which intellectually disabled workers would otherwise be entitled by reference to considerations which do not bear upon the work that they actually do. [Buchanan 148]

c. Looking at the matter objectively, and giving due weight to all the relevant factors, like Buchanan J and for largely the same reasons, I am persuaded that it was unreasonable to use the "all or nothing" competency testing and the question and answer method of assessment for which the BSWAT provides to determine whether the appellants' wages should have been increased. Put another way, I am satisfied that the requirement or condition was not reasonable. In particular, it strikes me as manifestly unreasonable that the appellants' wages be determined (even in part) by their ability to undertake tasks they would never be called upon to perform, by a method of assessment that imposes real disadvantages on them because of their intellectual disabilities and which, as Buchanan J puts it, understates the value of their actual work contributions, and when they also have to fulfil criteria that non-disabled employees against whose wages their wages are to be measured need not fulfil. [Katzmann 265]

Reason 2: Workers with and without disability in open employment and in receipt of full award wages, do not have their wage discounted by reference to abstract matters (i.e. competencies).

Workers in open employment undertaking work at the same classification level of work do not have their wages referenced to competency assessments or industry training qualifications.

a. Secondly, disabled workers (whether intellectually disabled or not) in open employment are not subject to the risk that their wage might be reduced or discounted by reference to an assessment of abstract matters [Buchanan 137]

b. Secondly, the BSWAT assesses competencies according to the Australian Quality Training Framework (AQTF) against which the non-disabled are not evaluated. [Katzmann 260]

Reason 3: Workers without disability doing the same award level of work would not achieve, on average, a 100% wage assessment if assessed by BSWAT.

On average, workers earning full award wages would have their wages discounted if they were assessed by the BSWAT. This finding illustrates the harsh wage discount impact on people with intellectual disability subject to the BSWAT.

a. *Thirdly, the evidence was that, assessed in average terms, non-disabled workers on Grade 1 rates of pay would not, having regard to the nature of the work for which the rate of pay was fixed, achieve a 100% wage assessment if their wages were assessed using BSWAT. In my view this immediately betrays the theoretical and artificial foundations of BSWAT.* [Buchanan 138]

b. *Secondly, his Honour did not take into account the evidence that showed that the BSWAT competency assessment imposed a higher standard for disabled employees than was imposed on non-disabled employees against whose wages their wages were to be pro-rataed.* [Katzmann 258]

Reason 4: The BSWAT is discriminatory for all people with intellectual disability.

The Court's decision is relevant for up to 16,375 or 76.7% of workers with intellectual disability in ADEs in Australia (AIHW, 2013). Some of these workers have the benefit of the Supported Wage System to assess their wages. Many, however, are subject to the BSWAT and other competency based wage assessments. The Court states that as a class of people, people with intellectual disability have had a wage tool imposed on them that subjects them to a disadvantage.

a. *Fourthly, part of the reason why, in my view, use of BSWAT is not reasonable is because it is discriminatory in the wider and less technical sense of the term so far as intellectually disabled workers are concerned. Such persons make up the bulk of workers in ADEs. As a class of people they have had imposed on them a tool to measure their work contribution, compared to that of a Grade 1 worker, which does not measure like for like and which subjects them to a disadvantage. The likely result in most cases, and the actual result for Mr Nojin and Mr Prior, is a calculation which understates their actual contribution relative to the work for which the Grade 1 rate of pay is fixed. Understatement of the value of the actual work contribution of an intellectually disabled worker is, in my respectful view, neither necessary nor reasonable.* [Buchanan 139]

b. *I accept that BSWAT is skewed against intellectually disabled workers. The preponderance of the evidence was to that effect.* [Buchanan 141]

c. *Powerful evidence was given in these cases, however, that it was unfairly skewed against the intellectually disabled.* [Katzmann 268]

d. *In my view, the criticism of BSWAT is compelling.* [Buchanan 142]

Other Matters

The Federal Court decision contained important observations about equal rights, the nature of jobs in ADEs, the discriminatory nature of competency assessment, the sufficiency of a simple productivity measure, and the inappropriate use of discounting wages to manage business costs.

Basic rights

Workers with intellectual disability have a basic right to an Award wage the same as any other Australian citizen.

a. . . . *The basic entitlement to a rate of pay fairly fixed is no less compelling in the case of an intellectually disabled worker than in the case of any other worker.* . . . [Buchanan:138]

Simple job tasks

The Court's decision acknowledges the 'simple' nature of the work performed by people with intellectual disability in ADEs. Many of the jobs are basic award level positions organised around a number of routine and basic tasks.

a. *The tasks were simple, repetitive and involved no element of decision-making. There was no need to apply abstract concepts to the work that was being done. The work was, in each case, work that involved simple physical manipulation of limited items.* [Buchanan 56]

b. *Again, in Mr Prior's case, the routine and relatively simple nature of the tasks he was required to perform may be seen.* [Buchanan 58]

c. *The expectations inherent in these assumed competencies may readily enough be compared with the three simple and repetitive tasks that Mr Nojin was actually required to do, and which were measured in the productivity side of the BSWAT assessment.* [Buchanan 73]

d. *In his cross-examination Mr Tuckerman repeatedly made the point that in entry level jobs for which the Grade 1 rate of pay is offered, and upon which wage assessment in ADEs takes place, the work is process-based involving very routine and simple tasks.* [Buchanan 106]

Competency based wages assessment is discriminatory

The criticism of BSWAT was specifically directed at the use of competency based wage assessment. In the view of Buchanan this criticism was “compelling”. In the view of the High Court of Australia the expert evidence on how competency testing disadvantaged employees with intellectual disability was “unchallenged”.

a. *In my view, the criticism of BSWAT is compelling. I can see no answer to the proposition that an assessment which commences with an entry level wage, set at the absolute minimum, and then discounts that wage further by reference to the competency aspects built into BSWAT, is theoretical and artificial. In practice, on the evidence, those elements of BSWAT have the effect of discounting even more severely, than would otherwise be the case, the remuneration of intellectually disabled workers to whom the tool is applied. The result is that such persons generally suffer not only the difficulty that they cannot match the output expected of a Grade 1 worker in the routine tasks assigned to them, but their contribution is discounted further because they are unable, because of their intellectual disability, to articulate concepts in response to a theoretical construct borrowed from training standards which have no application to them.* [Buchanan 142]

b. *The Full Court of the Federal Court, by a majority, concluded that the use of the BSWAT disadvantaged intellectually disabled persons. Although it was widely used, it was not reasonable. One component of the BSWAT involves the assessment of a person's competencies in the workplace. The unchallenged expert evidence was that the BSWAT produced a differential effect for intellectually disabled persons and reduced their score. We see no reason to doubt the conclusions of the Full Court.* [HCA Crennan 306]

Competency is implicit in the productivity of actual job tasks.

The Court explains that competency assessment related to industry training is very different from measuring competency in a given task. The Court states that competency may be expected to be reflected in some aspect of, or conclusion about, productivity. ‘Competency’ is something which is implicit in a productivity based wage assessment.

A productivity test is concerned with the completion of a task according to a standard of quantity and quality. A worker must be trained to perform a job task before a productivity test. The productivity test determines the level of output compared to the output of a worker being paid the full award wage.

The relevance of ‘competency’ for workers with intellectual disability is the training of actual job tasks before a productivity based wage assessment. On the job training is best practice support for people with intellectual disability to learn how to perform jobs. A wage assessment, however, determines the output for each job task in comparison to the award output standard.

It might be noted at this point that testing for, measuring or assessing competencies is not the same thing as testing for, measuring or assessing competency in a given task. The latter endeavour relates to skills, and the application of those skills. It may be expected to be reflected in some aspect of, or conclusion about, productivity. The former endeavour borrows from “industry standards”, so-called, usually found in training matrices or packages designed to provide increased recognition or avenues to higher pay. The idea of this kind of assessment is that an employee may be more “valuable” to an employer than a crude measure of productivity might suggest. [Buchanan 41]

Discounting the wages of workers is not an appropriate funding or business strategy

The Commonwealth emphasised to the Court that ADEs are substantially underwritten by funding from the Federal government. The Court however was clear that difficulty in Commonwealth budgeting or ADE viability should not be solved by imposing a wage assessment that disadvantages workers with intellectual disability. Discriminating against workers with disability is not a lawful employment or business strategy.

. . . The overall economic outcome of the use of BSWAT might assist ADEs in the (doubtless) difficult job of budgeting, but that benefit comes only at the price of imposing a comparative disadvantage on the intellectually disabled. [Buchanan132]

Principles of Fair Pro-rata Award Wage Assessment

It is clear that a pro-rata award wage must be directly related to the productive output of the actual job tasks of an employee with intellectual disability. To measure a pro-rata award wage the output of a worker with intellectual disability should be compared with the output of a worker performing the same job tasks and who is in receipt of the full award wage. This is the core principle of a fair pro-rata award wage measure.

The wage which is, under the award, to be assigned to an intellectually disabled worker is not, in my view, intended to represent the value of the employee to an employer measured in some abstract or theoretical way. . . . that relationship should be one which is reasonable having regard to the output of the disabled worker compared with the output of the non-disabled worker. The introduction and overlay of other theoretical considerations should not, in my view, be permitted to distract attention from this fundamental entitlement. [Buchanan 148]

The following pro-rata award wage principles are drawn from the Federal Court decision and the principles of the Supported Wage System. These principles are what should guide the Commonwealth response to the Court’s decision. Adopting the Supported Wage System as the single national pro-rata award wage assessment across all employment settings would be the most efficient and effective response to the Court’s decision to ensure the equal rights of all employees with intellectual disability.

Principles

1. The fact that a person has a(n) (intellectual) disability must not of itself imply that a worker is not entitled to a full award wage.

2. Some workers, because of their disability, may be unable to meet the productivity standard for full award wages. In such instance, this is a basis for conducting a pro-rata award wage assessment.
3. On the job training must be provided to a worker to learn the actual job tasks prior to a pro-rata award wage assessment.
4. A pro-rata award wage may only be determined by assessment of the performance of a particular individual in a particular job.
5. Workers must be assessed (only) on the actual tasks that make up the job.
6. The assessment must use the relevant pay classification under the relevant award or agreement that contain the job tasks performed by the worker.
7. There must be no fixed or predetermined number of job tasks for assessment.
8. The benchmark award wage output is determined by the volume of output achieved by an employee paid the full award rate for completing the same job tasks.
9. A pro-rata award wage assessment must result in the employee with disability receiving the same wage for the same volume of work output that a co-worker on the same award level would receive.

Appendix 5: Who we are

Australian Federation of Disability Organisations (afdo.org.au)

The Australian Federation of Disability Organisations (AFDO) has been established as the primary national voice to Government that fully represents the interests of all people with disability across Australia. The mission of AFDO is to champion the rights of people with disability in Australia and help them participate fully in Australian life.

National Council on Intellectual Disability (ncid.org.au)

NCID is the recognised national peak body with the single focus on intellectual disability, ie, our actions and priorities centre on issues that affect the lives of people with intellectual disability and their families. NCID's mission is to work to make the Australian community one in which people with intellectual disability are involved and accepted as equal participating members.

AED Legal Centre (aed.org.au)

The Centre provides legal advocacy to people with a disability in the areas of employment, education and training. Our main objective is to protect and advance the rights of people with a disability who experience difficulties and/or discrimination in employment or education because of their disability.

Disability Advocacy Network Australia (dana.org.au)

DANA is the national representative body for almost 70 disability advocacy agencies across Australia. DANA's vision is of a nation that includes and values people with disabilities and respects human rights for all. DANA's mission is to strengthen and support disability advocacy organisations across Australia.

People with Disabilities Australia (pwd.org.au)

People with Disability Australia Incorporated (PWDA) is a national peak disability rights and advocacy organisation. Our primary membership is made up of people with disability and organisations primarily constituted by people with disability. We also have a large associate membership of other individuals and organisations committed to the disability rights movement.

Down Syndrome Australia (downsyndrome.org.au)

Down Syndrome Australia is made up of eight State and Territory associations providing support, information and resources to people with Down syndrome and their families across the country. The associations have come together to represent and progress the needs, interests and aspirations of people with Down syndrome and those that support them.

Physical Disability Australia (pda.org.au)

Physical Disability Australia exists to convince governments to mandate laws and rules that enable the full participation of people with physical disability in all areas of society.

Family Advocacy (family-advocacy.com)

Family Advocacy is an independent, disability advocacy organisation which works across New South Wales, Australia. The organisation works with families in which there is a child or an adult with developmental disability.

Side by Side Advocacy (sidebyside.org.au)

Side By Side Advocacy is a community based, not-for-profit organisation. We are based in West Ryde, NSW. We promote and uphold the rights, needs and interests of people with intellectual disability. We do this through advocacy.