

Australian Federation of Disability Organisations
National Council on Intellectual Disability
AED Legal Centre

[Other organisations wishing to support this submission can have
their names added here]



Final Draft for Consultation (17 October 2013)

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Response to an application by the Department of Families, Housing, Communities
and Indigenous Affairs (FaHCSIA) for an exemption from the Disability
Discrimination Act in relation to the use of the Business Services Wage Assessment
Tool (BSWAT)

For the consideration of the Australian Human Rights Commission
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In honour of

Mr Michael Nojin,

Ms Elisabeth Nojin

and

Mr Gordon Prior

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Our line in the sand

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OUR LINE IN THE SAND

1. The Full Federal Court & High Court found the BSWAT competency assessment 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 the jobs of the innocent
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 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 concerns about alternative competency based wage assessments for employees with disability in any employment setting.
- The Commonwealth, in consultation with all interested parties, 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 to meet the increase in wage costs due to SWS assessments.
- This additional 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 transition to meeting 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 the required 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 many workers with disability in sheltered employment has remain unresolved for about three decades. See Appendix 2 for a potted history demonstrating the length of time that workers in ADEs have not received fair wages.

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 only 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 ADEs before the AHRC and the Courts. This demonstrates concern by other employees about the continued use of BSWAT and wanting this resolved immediately.

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 assessments 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 forcing 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 is but a promise 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 their lack of independent industrial advocacy, compared with the capacity and resources of ADEs which have been given \$4 million by the Commonwealth to access industrial relations advice.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 some 27 years ago (*DSA* 1986), and numerous unsuccessful attempts by the Commonwealth to address this discrimination, it is time to “call out” this systemic “avoidance behaviour” and demand that we get on with doing the “right thing”.

¹ The Hon. Amanda Rishworth MP, Parliamentary Secretary for Disabilities, June 13, 2013.

- 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, isn’t 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 real 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 non-discriminatory and lawful wages via the Supported Wage System 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 the *innocent* 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 assessment should not be seen as a way of cutting business costs. Business viability should be based on wage costs derived through lawful non-discriminatory practices.
 - 13.3. It must 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

³ In 2000 (13 years ago), 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 *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.

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

- 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
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

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

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.

- 21.5.1. 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. 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.
- 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: Other Matters Related to the Application

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 to 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 provided \$4 million dollars to the ADE employers to purchase industrial legal advice in response to the Court's decision. No legal resources or support has been provided to workers with intellectual disability to provide independent industrial advice.

It is of great concern to peak national disability representative organisations that FaHCSIA has been leading the consultation with ADEs, workers with disability, and other concerned individuals and groups. The published reports from FaHCSIA consultations held in July cannot be read as independent without bias.

FaHCSIA are comfortable with continuing the use of BSWAT for the next three years. This disregard for the equal rights of people with intellectual disability despite the availability of a fair pro-rata award wage assessment (SWS) should alarm the AHRC as much as it alarms the national peak bodies.

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

This statement by FaHCSIA that BSWAT *may still be lawful . . . in particular circumstances* is highly questionable and most likely contemptuous of the Court.

The expert evidence accepted by the Court indicated significant disadvantage through the impact of BSWAT competency assessment on the wages of people with intellectual disability. One of the observations made by Buchanan J was 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 deny individuals with intellectual disability currently paid wages based on BSWAT, and future workers in ADEs that use the BSWAT, in the next 3 years, from having their wage assessed by anything other than BSWAT. This would simply continue to impose an unlawful discrimination and disadvantage on many thousands of people with intellectual disability when a lawful and fair wage assessment is available.

FaHCSIA claim that BSWAT may be a reasonable measure of the actual capacity of an employee to perform the requirements of a job. 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 pre-determined industry training certificates. FaHCSIA's claim also fails to acknowledge the disadvantage, identified by the Court, through the use of the "all or nothing" assessment method, the fixed number of industry competencies, and the interview process.

FaHCSIA claim that there may be operational needs or demands of an ADE that justify the continued use of BSWAT. The Court ruled that BSWAT severely disadvantages workers with intellectual disability. There are no operational circumstances that distinguish BSWAT that could not be addressed through an assessment conducted by the Supported Wage System. FaHCSIA's application does not explain or provide any example, which demonstrates advantage in the use of BSWAT. In light of the Court's decision, and the lack of any valid evidence, FaHCSIA's claim should be given little, if any credibility.

FaHCSIA claim that an ADE may be required to use BSWAT by an enterprise agreement or other industrial agreement. The Supported Employment Services Award 2010 contain the SWS provisions. Any other industrial agreements can be amended. A temporary use of BSWAT productivity score would be appropriate in light of the Court decision. 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 of workers with intellectual disability 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 against 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 have 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 DSA standard of employment conditions has been an explicit requirement since 1993. Standards setting what is required to meet the principles and objectives of the Disability Services Act have been in place for 20 years. The requirement of ADEs to meet such a standard is not an *emerging* need, but rather an 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 decision. All of the actions taken by FaHCSIA have failed to provide 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 offensive.

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. What we are witnessing is the Commonwealth cringing, wiggling and contorting in variegated ways in an effort to avoid acceptance of the Court's decision. The *naked* discrimination of BSWAT was revealed by the Court, but FaHCSIA seem to be trying to create a 'cloak' of acceptability for the BSWAT.⁸

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.

⁸ Hans Christian Anderson (1837). The story of the emperor with no clothes. A child shouts that the emperor has no clothes on. In the fairy tale, that is the end of the story. However, things do not work that way in the real world. In the real world, the emperor asks his retinue, "am I not properly dressed?" And no one dares to say no. They all assure him, "Yes Your Majesty, you are properly dressed." The emperor even seeks the opinion of somebody on the other side of the globe living in a white building, and the person says, "Yes Your Majesty, you are always properly dressed." This person is even prepared to assist the emperor in convincing others that the emperor is indeed decently attired. This is what has been happening with FaHCSIA's response to the Court's Decision with its continued support of BSWAT. JAS-ANZ is responsible for assuring that Certification Bodies correctly audit ADEs. But just like in the story, Certification Bodies have been certifying ADEs, which use BSWAT, as meeting the Standards. "Yes Your Majesty, your BSWAT is lawful". Truth must prevail at some time. If we permit truth to be recognised and acknowledged, everyone feels more comfortable because they are no longer forced to deny reality.

Employment services must meet the Standards in order to be certified and qualify for government funding. This is well known and has been the case since 2002. ADEs supported and signed up to these laws. It would appear from this application that FaHCSIA are less concerned with the equal rights of workers with intellectual disability than with ensuring services receive certification and funding. Is not the idea that Standards and rights of people with intellectual disability are *not negotiable*, and that any non-conformance would be independently assessed by the JAS-ANZ process of Quality Assurance and require immediate redress? The then Minister Amanda Vanstone in 2002 assured people with disability that the past practice of giving employment services an unending timeline to meet Standards would no longer be accepted by the Commonwealth. The quality assurance system is now being to put to the test. The clear indication is that when put to the test, the quality assurance system has thus far failed to deliver on its promise made to people with intellectual disability. Following the Court's ruling, JAS-ANZ certified organisations have not issued major non-conformances as a rule against ADEs using BSWAT. This makes a mockery of the protections against discrimination provided by the Disability Services Act and its Standards.

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?

Twelve percent of workers in ADEs are paid wages using the SWS without any known detriment on the viability of ADEs.

Some ADEs have publicly claimed substantial business health and viability. The Endeavour Foundation in Queensland, for example, officially opened a \$3.6 million food packaging facility in August 2013 that will employ 221 people with intellectual disability.

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 been yet conducted?

Further, what are the employment terms and conditions of support staff and executive staff at ADEs? Are their wages discounted due to viability considerations? Or is it just workers with intellectual disability that must incur discounted wages to maintain their employment?

FaHCSIA has not provided evidence on the current financial viability of 194 ADEs in their application. We are asked to simply accept that ADEs would close if they had to pay a simple productivity award based wages.

Should there not be evidence that supports this proposition? Is such a statement from a government department appropriate and justified given the fear and anxiety this generates amongst workers, families and others. Or is such a sweeping statement a deliberate strategy to scaremonger and cause fear amongst people who have had very little, if any, independent information or independent support since the Court's decision?

The converse argument can also be made. The implementation of lawful award wage assessments can provide workers with disability with dignified and positive financial impacts. It would also signal to all employers that lawful wage costs are integral to business practices under Australia law. This immediately addresses the Court's concern that ADE business practices are based on imposes a disadvantage to 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 in terms of speculation and fear 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.*

FaHCSIA consultations cannot be given independent credibility. 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, as if they are in a position to independently facilitate discussion or provide independent advice to government.

Many ADEs want a wage tool that minimises their wage costs, and this colours their perspective of what is fair and what is important in a wage tool.

Many workers and families will be worried about statements made about the viability of ADEs. This also colours the perspective of what a wage assessment tool should be, particular from being put in a position of fear. It is also a group that has been given FaHCSIA's interpretation of the Court Case, and FaHCSIA's interpretation of what courses of action are possible.

The Court's decision doesn't require the Commonwealth to collect views and perspectives. The Court decision requires that ADEs should stop the discrimination and provide immediate redress (i.e. fair assessment and payment of award wages).

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 offensive that FaHCSIA are claiming that continued use of BSWAT will only disadvantage "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. It is in essence simply a matter of words without any substantive responsive to a serious issue of continued unlawful discrimination, particularly when redress is available now.

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.*
-

FaHCSIA's plan is to continue unlawful discrimination, do more talking, give more money, and support and train in relation to some unknown wage assessment. This is not a plan to address unlawful discrimination, nor a plan that acknowledges the capacity to implement redress with available solutions.

Appendix 2: The Promise of Award Based Wages for Employees with Intellectual Disability - A potted 30 year history

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

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.

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 productive capacity of people with intellectual disability. The purpose of this effort is to keep wages low. Low wages means low business costs. Low wage costs mean that the viability of segregated business is set at a low bar. Discrimination is not out of the question.

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 imposed on many thousands of people with intellectual disability makes a mockery of the Disability Services Act and its principles and objectives.

The following is a timeline of events over 30 years, with excerpts from reports, which have repeatedly promised equal rights in employment.⁹

1983 -1985 Consultation. 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

⁹ 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, Don Dunoon, 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.

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.

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.