



## Rising to the Challenge: when the Commonwealth is not a model litigant!

Presenter:

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## The Rule of Law

“ Our department has primary responsibility for supporting the Australian Government in protecting and promoting the rule of law.

The rule of law underpins the way Australian society is governed. Everyone — including citizens and the government — is bound by and entitled to the benefit of laws.

We support the Australian Government in being accountable for actions, making rational decisions and protecting human rights.”





## Our Story

- **Working for Peanuts! Australia's shame.**
- **A long and winding road - our journey through the legal system!**
- **Twelve years later.**
- **The Commonwealth as a belligerent litigant!**
- **Is there justice for All?**





## The History

### Australian Disability Enterprises (ADEs)

- What is an ADE?
- Who works in an ADE?
- How does the employer figure out how much to pay a supported employee working in an ADE?



### Structure of the Business Services Wage Assessment Tool (BSWAT)

- 50% Productivity
- 50% Competencies





## Summary of why BSWAT is discriminatory

- **BSWAT isn't based on a comparison of actual work at the award level. It includes an assessment of competencies irrelevant to the job.**
- **Workers with and without disability in open employment and in receipt of full award wages, do not have their wage discounted by reference to competencies.**
- **Workers without disability doing the same award level of work would not achieve on average, a 100% wage assessment if assessed by BSWAT.**
- **Understates the value of the actual work contribution of all employees with an intellectual disability.**
- **Competencies set the bar too high for supported employees.**

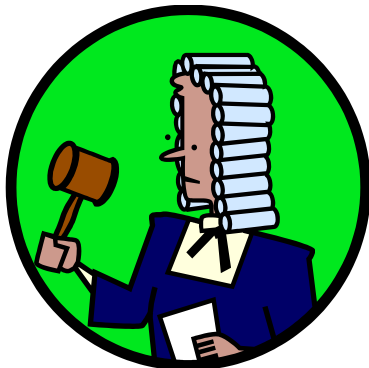




## Nojin and Prior (Full Court)

**“In my view, the criticism of BSWAT is compelling. I can see no answer to the proposition that an assessment which commences at an entry level wage, set at the absolute minimum, and then discounts the wage further by reference to the competency aspects built into BSWAT, is theoretical and artificial.”**

**Nojin –v – Commonwealth of Australia [2012] FCAFC 192,  
Justice Buchanan at [142]**





## Nojin and Prior (Full Court)

**“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. In my view, that approach is not reasonable.”**

**Nojin –v- Commonwealth of Australia [2012] FCAFC 192,  
Justice Buchanan at [148]**





## The Government Responds by making an Application for Special Leave to the High Court:

- The High Court of Australia rejected the application.

## The High Court decision

“The Full Court of the Federal Court, by a majority, concluded that the use of 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 BSWAT produced a differential effect for intellectually disabled person and reduced their score. We see no reasons to doubt the conclusions of the Full Court. Special leave is refused with costs.”

Commonwealth of Australia –v- Nojin and Prior

[2013] HCA Trans 101

Justice Crennan







## Post Decision

### The Government's actions (or lack of???)

- 👍 **A Vision for Supported Employment: Future Wage Setting Arrangements Discussion Paper.**
- 👍 **Consultations with the Disability Sector: Employer Groups (ADEs), Families, Advocacy Organisations, other Interested Parties and last of all the Employees themselves.**
- 👎 **Exemption Application to the Australian Human Rights Commission to continue using BSWAT for another 3 years.**
- 👎 **The Commonwealth does not consider BSWAT discriminatory per se.**
- 👎 **The decision only applies to the particular circumstances of Michael Nojin and Gordon Prior.**





## Representative Action

On 24 December 2013 - In light of the Commonwealth's refusal to accept liability or compensate for underpaying employees with an intellectual disability AED Legal Centre working with pro bono partners Maurice Blackburn Lawyers lodge an application for a representative action in the Federal Court. The legal action is on behalf of 10,500 employees with an intellectual disability who have either been assessed under BSWAT or should have been.



This legal action is seeking to recover all underpayments for the affected workers.

## The Government Retaliates

January 2014 – The Government moves into action by announcing plans for the Business Services Wages Assessment Tool Payment Scheme but there is a catch – employees have to waive their legal rights to be eligible.

The Minister states that the Scheme is not to be taken as compensation.





## Decision by the Australian Human Rights Commission (AHRC)

- On 29 April 2014 the AHRC granted a Temporary Exemption allowing Australian Disability Enterprises (ADEs) to continue using BSWAT for a further 12 months – subject to some conditions.
- National Disability Services (NDS) – the peak body representing ADEs describes the decision as reprehensible and seeks a review of that decision in the Australian Administrative Tribunal.
- The AHRC decision foreshadows an end to BSWAT but would allow ADEs to continue to discriminate against employees with disability for another 12 months with mechanisms in place to phase out BSWAT requiring reports from DSS and the ADEs every three (3) months.
- In view of the Federal Court and High Court ruling serious issues arise about the authority of the Australian legal system.



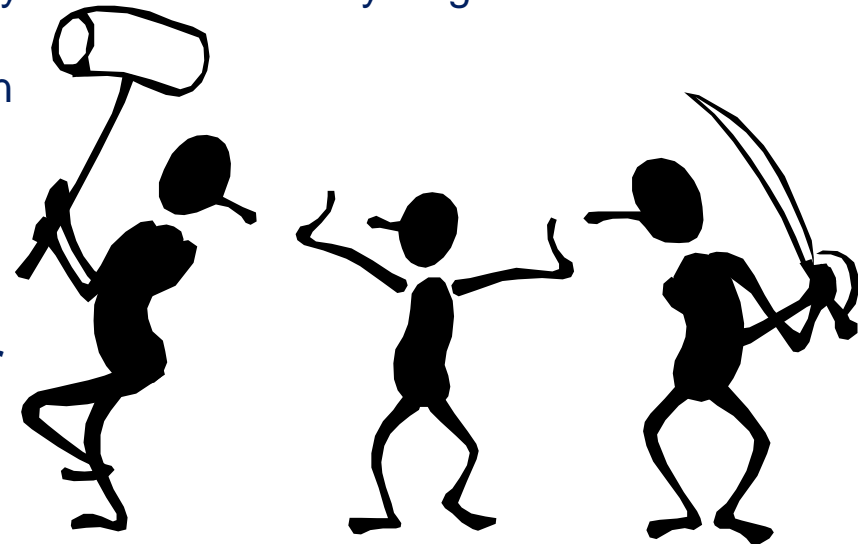


## Fair Work Commission

**Application by United Voice (UV) and HSU to vary the *Supported Employment Services Award (2010)*. AED Legal Centre, represented by Maurice Blackburn Lawyers, has sought leave to intervene and appear in the proceedings. The Application seeks the following effects:**

- (a) Denying employers access to wage assessment tools that contain discriminatory provisions of the kind identified by the Full Court in Nojin;
- (b) Providing for the Supported Wage System to be the only wage assessment tool permitted for the assessment of the wages of employees reliant upon the award.

The Commission has decided to attempt to narrow the issues of disagreement between the parties via a series of conferences beginning on **15 September 2014** before Vice-President Booth.





## **The Business Services Wage Assessment Tool Bill 2014**

### **House of Representatives**

**5 June 2014 – The Bill is introduced in the lower house and passed with the support of the ALP and the National Liberal Coalition. The only members voting “no” are Adam Bandt MP for Melbourne and Andrew Wilkie MP for Denison.**



### **The Senate**

**The Senate Community Affairs Committee refers the Bill to a Senate Inquiry and asks for submissions by 23 July 2013. The Committee will report to Parliament by 26 August 2014. Of the 21 submissions received by far the majority (with the exception of NDS and the Department of Social Services) are highly critical of the Bill as it is seen as eroding fundamental legal and human rights of people with disabilities.**

### **Public Hearing**

**On 24 July 2014, the Senate Inquiry held a Public Hearing in Melbourne. Again, with the exception of NDS and the Department of Social Services all represented organisations raised serious concerns about the Bill.**



## The Business Services Wage Assessment Tool Bill 2014

[Report by the Parliamentary Joint Committee on Human Rights](#)

“ The principal rights engaged by this bill are the right to an effective remedy, the right to just and favourable conditions of work and the right to equality and non discrimination including the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity.”

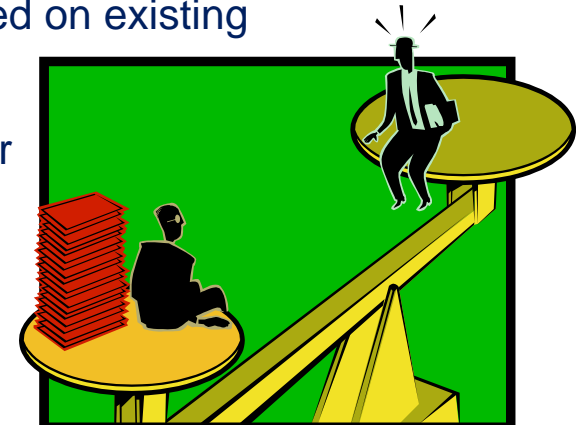
**Parliamentary Joint Committee on Human Rights, Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, Bills introduced 23 – 26 June 2014, Legislative Instruments received 7–20 June 2014, Ninth Report of the 44th Parliament, July 2014, p.2.**





## What is wrong with the Business Services Wage Assessment Tool Bill 2014 ?

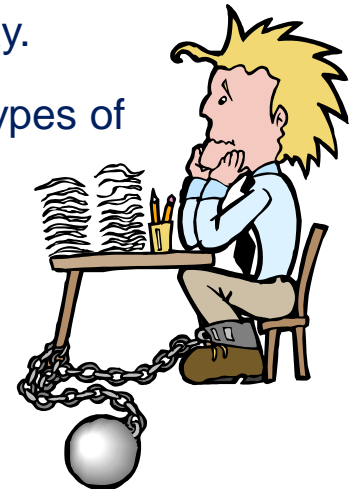
1. The payment amount under this Bill does not constitute an effective remedy it is only 50% of what people are entitled to. It also does not provide an effective remedy while affected individuals continue to be paid wages assessed by the use of BSWAT.
2. The release and indemnity provisions, absolving the Government and ADEs of any past and future liability and the characterisation of the scheme as not being 'compensatory in nature' are clearly intended to deny access to legal remedies to employees with a disability affected by the BSWAT. They are clear infringements of human and legal rights and in a very reprehensible way seek to defeat a legitimate representative court action that is based on existing decisions of the Federal Court and the High Court.
3. There is a lack of effective review mechanisms (internal or external) for persons excluded from the scheme due to having settled a claim previously with an 'alternative amount'.





## What is wrong with the Business Services Wage Assessment Tool Bill 2014 ?

4. The Bill contravenes the right to just and favourable conditions of work because it does not allow for the back-pay and full compensation of underpayments to employees with a disability affected by the BSWAT. The payment amount provided for in this Bill is only half of what an affected person would have been entitled to had their wages been assessed by a non-discriminatory method.
5. The scheme is restricted to those employees whose intellectual disability is listed as the primary disability. This would mean that even the original Applicants, Michael and Gordon would be ineligible for any back pay.
6. Those workers who were assessed under BSWAT but have other types of disability are also not eligible.







## Nominees

7. AED is seriously concerned that the provisions in this Bill for the appointment by the Secretary of nominees and the power of nominees to stand in the shoes of the employees has the potential of limiting rights to equality and non-discrimination
8. The Secretary has a clear conflict of interest as the Commonwealth is the Respondent in the current representative action in the Federal Court.
9. There is no restriction on who can be appointed as nominee – there is no exclusion of persons who may have a conflict of interest with the participant. Under these operational conditions it is highly likely that nominees will substitute rather than facilitate the choice and preferences of participants in this scheme.





## Why is the Commonwealth not acting as a model litigant ?

" It is questionable whether the creation of the payment scheme would effectively breach the spirit and content of the Commonwealth's own Model Litigant Guidelines

... The Commonwealth (or its agents) cannot be regarded as an ordinary civil litigant.

It is required to act in the public interest.

The Model Litigant Rules state that the Commonwealth (or its agents) should pay legitimate claims without litigation and that litigation should not be prolonged or generate additional costs by the selection of technical points.



In this situation, the Commonwealth is seeking to defeat the legitimate exercised rights of underpaid workers (who happen to suffer a disability through the implementation of legislation ".

**Source: Australian Lawyers Alliance, Redress and remedy: the BSWAT Payment Scheme is not the answer, Submission to the Standing Committee on Community Affairs, Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014, 23 July 2014, pp-6-7.**

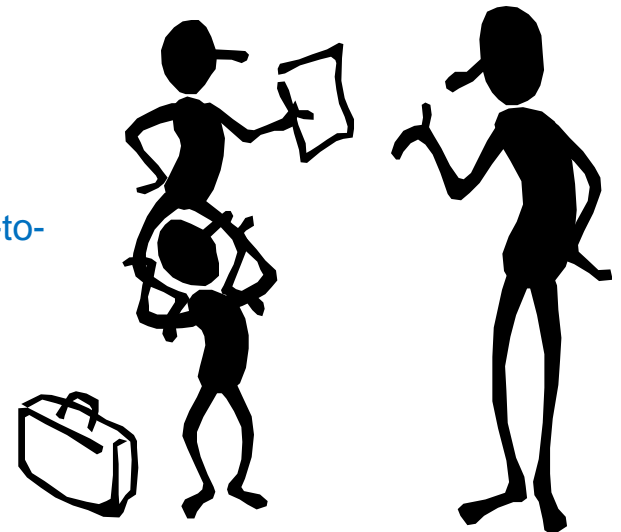


## In a nutshell – what's it all about ?

At its core, what is wrong with the Business Services Payment Scheme Bill 2014 was best described by Mr Josh Bornstein, Principal at Maurice Blackburn Lawyers, when he described the scheme as:

" a blatant attempt to coerce some of our most vulnerable workers into signing away their legal rights, for a sum of money that is just half of what they should be paid " .

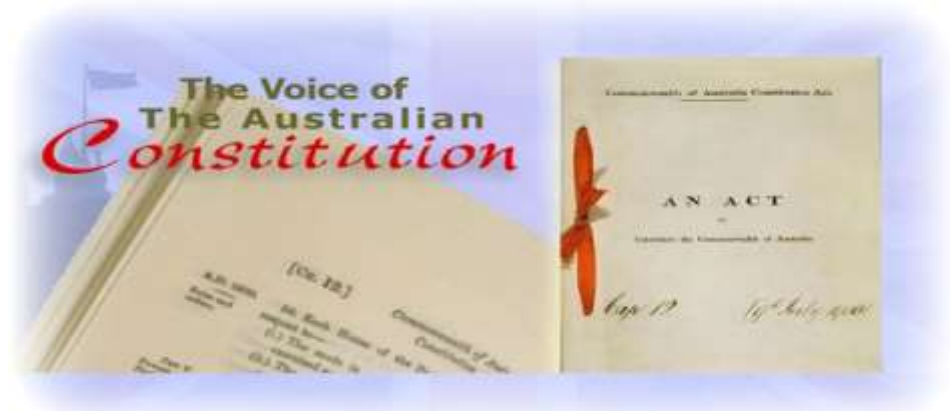
Source : <http://m.smh.com.au/comment/government-takes-fight-to-intellectually-disabled-20140625-zsl3w.html>





## Where does this leave us?

- ☹️ **Where does the Australian Constitution and Separation of Powers fit?**
- ☹️ **Is this an end to employment for this group of workers with ADEs returning to the Dark Ages?**
- ☹️ **Will the new tool continue the discrimination?**
- ☹️ **What is wrong with the SWS?**
- ☹️ **Despite the fight, employees with disability working in ADE's are still being short-changed!**
- ☹️ **Justice has not been served !**





## Conference resolution:

The National Association of Community Legal Centres shares the serious concerns of The Joint Parliamentary Committee on Human Rights and disability advocacy agencies across Australia regarding the Business Services Wage Assessment Tool Payment Scheme Bill 2014. The Joint Parliamentary Committee said that the scheme ***does not contain the requisite elements of an effective remedy to the unlawful discrimination found to have taken place*** by the Federal and High Court of Australia.





# ACCESS TO JUSTICE FOR PEOPLE WITH DISABILITY

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