

## FEDERAL COURT OF AUSTRALIA

**Nojin v Commonwealth and Another**

[2012] FCAFC 192

Buchanan, Flick and Katzmann JJ

24-25 May, 21 December 2012

*Human Rights — Discrimination — Disability discrimination — Indirect discrimination — Intellectually disabled workers employed by Australian Disability Enterprises — Use of Business Services Wage Assessment Tool (BSWAT) to assess wages — Assessment of “competencies” that were knowledge-based, abstract concepts unrelated to work, were determined in part by interview, and were not required to be demonstrated by able-bodied workers — Whether a substantially higher proportion of disabled people without intellectual disabilities were able to comply — Whether requirement or condition not reasonable — Disability Discrimination Act 1992 (Cth), ss 6, 45.*

Pursuant to the relevant award, rates of pay for disabled workers employed at Australian Disability Enterprises (ADEs) were set at a percentage of the lowest rate applicable to Grade 1 employees thereunder, but were able to be adjusted after applying the Business Services Wage Assessment Tool (BSWAT). In addition to examining a worker's productivity, BSWAT assessed his or her core and industry “competencies”, which were measured in part by question and answer sessions, were generally knowledge-based, abstract concepts that were unrelated to the basic, process-oriented tasks required to be performed, and were not required to be demonstrated by Grade 1 employees. BSWAT had received considerable (although not universal) support from experts and consultants in the ADE sector.

The intellectually disabled appellants claimed that their ADE employers had discriminated against them contrary to s 15(2) of the *Disability Discrimination Act 1992* (Cth) (the Act) in applying BSWAT to assess their wages. In particular, the appellants claimed that the respondents had engaged in indirect discrimination within s 6 of the Act, by requiring them to comply with a requirement or condition: (a) with which a substantially higher proportion of persons without the disability were able to comply; (b) which was not reasonable having regard to the circumstances of the case; and (c) with which the appellants were not able to comply. The respondents denied such discrimination, and also argued that s 45 of the Act rendered their acts lawful, as those acts were reasonably intended to afford the appellants access to opportunities to meet their special needs in relation to employment.

*Held:* (1) By Buchanan and Katzmann JJ: The “requirement or condition” that requires consideration in this case is the imposition on the appellants of a wage assessment by BSWAT. [121]-[124], [232]

(2) By Buchanan and Katzmam JJ, Flick J not deciding: Disabled workers who are not intellectually disabled are more likely to achieve advantageous results on BSWAT than intellectually disabled workers, such that s 6(a) and (c) of the Act are satisfied. [127], [133], [199], [244]

*Hurst v Queensland* (2006) 151 FCR 562, followed.

(3) By Buchanan and Katzmam JJ, Flick J dissenting: Despite the widespread support for its use, the assessment of the appellants' wages using BSWAT is not reasonable. [134]-[140], [215], [265]

(4) By Buchanan J, Flick and Katzmam JJ agreeing: Section 45 of the Act does not render the respondents' acts lawful, as the appellants' employment does not depend on the use of BSWAT. [150]-[157], [216], [269]

Appeal from decision of Gray J, (2011) 283 ALR 800, allowed.

### Cases Cited

*Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165.

*Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424.

*Catholic Education Office v Clarke* (2004) 138 FCR 121.

*Colyer v Victoria* [1998] 3 VR 759.

*Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78.

*Foreign Affairs and Trade, Secretary, Department of v Styles* (1989) 23 FCR 251.

*Hurst v Queensland* (2006) 151 FCR 562.

*New South Wales v Amery* (2006) 230 CLR 174.

*Nojin v Commonwealth* (2011) 283 ALR 800.

*Richardson v Health and Community Care Service (ACT)* (2000) 100 FCR 1.

*Rogers v Whitaker* (1992) 175 CLR 479.

*Sievwright v Victoria* [2012] FCA 118.

*Victoria v Turner* (2009) 23 VR 110.

*Waters v Public Transport Corporation* (1991) 173 CLR 349.

### Appeal

*H Borenstein* SC with *Dr KP Hanscombe* SC and *LWL Armstrong*, for the appellants.

*D Mortimer* SC with *M Felman*, for the respondents.

*Cur adv vult*

21 December 2012

**Buchanan J.**

### Introduction

1 These cases were brought by or on behalf of two intellectually disabled men, Mr Michael Nojin and Mr Gordon Prior. Mr Nojin and Mr Prior each worked in an Australian Disability Enterprise ("ADE"). The proceedings concern complaints that, by using a particular tool to measure their work contribution, and ultimately to assess their wages, the ADEs in which Mr Nojin and Mr Prior worked discriminated against them in their employment, compared to other disabled persons who were not, as they are, intellectually disabled.

2 Mr Nojin suffers from cerebral palsy and has a moderate intellectual disability. He also has epilepsy. Mr Nojin worked in an ADE known as Coffs Harbour Challenge Inc (“Challenge”). Prior to the proceedings at first instance Mr Nojin had worked at Challenge for close to 25 years. Challenge is now in liquidation, but that does not affect the conduct of the proceedings as the Commonwealth of Australia, which is also a party to the proceedings, has agreed that if Challenge is liable for discrimination as alleged, the Commonwealth will bear the liability.

3 Mr Prior is classified as legally blind, although he has some vision. He also has a mild to moderate intellectual disability. Mr Prior worked in an ADE known as Stawell Intertwine Services Inc (“SIS”). Prior to the proceedings at first instance, Mr Prior had worked at SIS for about two years.

4 Whether the allegations of discrimination against Mr Nojin and Mr Prior should be accepted depends upon the operation of the *Disability Discrimination Act 1992* (Cth) (“the Act”), in the form it took between 2005 and 2008.

5 At that time s 15(2) of the Act provided:

- (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 or a disability of any of that employee’s associates:
- (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
  - ...
  - (d) by subjecting the employee to any other detriment.

6 Section 4 of the Act defined “disability” to mean:

- (a) total or partial loss of the person’s bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person’s body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

- (h) presently exists; or
- (i) previously existed, but no longer exists; or
- (j) may exist in the future; or
- (k) is imputed to a person.

7 Sections 5 and 6 of the Act supplied further legislative content to the phrase “on the ground of … disability” as used in s 15 of the Act. Section 5 provided that discrimination on the ground of a disability occurred where, because of his or her disability, a person was treated less favourably than someone without the

disability. This is generally known as direct discrimination. The present case does not concern direct discrimination. It concerns indirect discrimination.

8 Section 6 of the Act dealt with indirect discrimination. At the relevant time it provided:

6 For the purposes of this Act, a person (*discriminator*) discriminates against another person (*aggrieved person*) on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

- (a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and
- (b) which is not reasonable having regard to the circumstances of the case; and
- (c) with which the aggrieved person does not or is not able to comply.

9 This statutory test in s 6 had four components which require attention in the present case. First, it is necessary to identify the relevant “requirement or condition” with which the aggrieved person must comply. The authorities indicate that the requirement or condition must be identified with some precision (*Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 185; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 393, 406-407; *Catholic Education Office v Clarke* (2004) 138 FCR 121 at 143 (*Clarke*)). Secondly, in order to succeed, an aggrieved person must establish that “a substantially higher proportion of persons without the disability” were able to comply with the requirement or condition. Thirdly, an aggrieved person bears the onus of establishing that the requirement or condition was not reasonable in the circumstances. Finally, the aggrieved person must have in fact been unable to comply with the requirement or condition.

10 Rates of pay for disabled workers (including those with intellectual disabilities) employed at ADEs are fixed in accordance with an award made by the Australian Industrial Relations Commission (now Fair Work Australia). The award, at the relevant time, enabled employers to pay disabled workers rates of pay assessed as a percentage of the rate of pay fixed for a Grade 1 worker. The Grade 1 rate was the lowest rate of pay under the award. Other features of the award will be mentioned in due course.

11 The present case concerns the use of the Business Services Wage Assessment Tool (“BSWAT”) to determine the wage rates of both Mr Nojin and Mr Prior. BSWAT examined both a disabled worker’s “productivity” (by reference to work actually performed) and also the extent to which a disabled worker possessed identified “competencies”. An assessment of competencies (as the term is here used) does not relate necessarily, and often will not relate, to work actually carried out, or the way it is performed. Rather, an assessment of competencies tests more general knowledge, and perhaps aptitude. I shall, in the discussion which follows, refer to competencies as incorporated in BSWAT, but it will become clear from the later discussion that, in my view, the use of the term in this context refers to something that is more theoretical than practical.

12 Broadly speaking the challenge made in the present proceedings was that examination of competencies proceeded by reference to questions involving abstract concepts, which intellectually disabled persons would find more difficult to answer correctly or successfully than disabled persons who are not intellectually disabled. One difficulty for the appellants’ case was that the wage rates of all disabled persons at the two establishments in question were assessed

using BSWAT. In that sense Mr Nojin and Mr Prior were able to “comply” with any requirement or condition that their work contribution be assessed in accordance with BSWAT. Hence the focus of attention was placed on the idea that they (and other intellectually disabled persons) were less able than non-intellectually disabled persons to obtain “higher” results leading to higher pay. Formulated in this way the case faced some conceptual difficulties. However, this was the characterisation of “requirement or condition” which was necessary for the case to satisfy s 6(a) and (c) of the Act. I will return to examine this part of the case in more detail in due course.

13 In addition, it was necessary for the appellants to establish that use of BSWAT was “not reasonable having regard to the circumstances of the case” (s 6(b)). Examination of this issue will require some consideration of the circumstances in which BSWAT was introduced, the extent to which it is now applied in ADEs and elsewhere, and the significance of the fact that it assessed competencies as well as productivity.

14 The trial judge concluded that use of BSWAT was not indirectly discriminatory of Mr Nojin or Mr Prior. That conclusion proceeded from findings made by the trial judge that Mr Nojin and Mr Prior were not less able than other disabled people (not intellectually disabled) to comply with the relevant requirement or condition, and that, in any event, it was reasonable for their wages to be assessed using BSWAT.

### The key issues

15 The written submissions of the respondents identified the issues for resolution on the appeal, in a way accepted by the appellants, as follows:

1. In both proceedings, the Appellants' Notices of Appeal set out 21 grounds of appeal. Within these grounds, there are effectively two issues:
  - (a) Whether the trial judge erred in identifying the requirement or condition alleged to have been imposed by each of the Second Respondents (respectively, *Challenge* and *SIS*) and the extent to which each of the Appellants could comply with this requirement or condition, for the purposes of s. 6 of the *Disability Discrimination Act 1992* (Cth) (*the Act*) (Grounds 1-7); and
  - (b) Whether, to the extent that any condition or requirement was imposed on the Appellants by each of the Respondents (with which they could not comply), the trial judge erred in failing to determine that such a condition or requirement was not reasonable, for the purposes of s. 6 of the Act (Grounds 8-21).

16 A third issue was raised by a notice of contention filed by the respondents which challenged a finding by the trial judge that s 45 of the Act did not provide a good defence to the respondents if the appellants had been successful in establishing that use of BSWAT was indirectly discriminatory.

17 Section 45, so far as here relevant, provided:

45 This Part does not render it unlawful to do an act that is reasonably intended to:

...

- (b) afford persons who have a disability or a particular disability, goods or access to facilities, services or opportunities to meet their special needs in relation to:
  - (i) employment, ...; and
  - (ii) the provision of ... services ...; or

- ...
- (iv) the administration of Commonwealth laws and programs;
- ...
- (c) afford persons who have a disability or a particular disability, grants, benefits or programs, whether direct or indirect, to meet their special needs in relation to:
- (i) employment, ...; or
- (ii) the provision of ... services ...; or
- ...
- (iv) the administration of Commonwealth laws and programs; ...

### **Disabled employment**

- 18 Broadly speaking, there are two environments in which wage-earning employment opportunities are available for disabled people: open employment and employment with an ADE. In open employment settings a majority of the workforce consists of persons without disabilities; at ADEs workers with disabilities comprise a majority of the workforce.
- 19 The wages available to disabled people are generally well below those available to non-disabled people. ADEs grew out of what were previously known as sheltered workshops. Sheltered workshops were generally located in large segregated settings, and their purpose was to provide a “work-like” environment where people with disabilities could engage in activities outside their living environment. In more recent times, the purpose of ADEs has been to provide meaningful paid employment for people who, due to their disability, may find it difficult to obtain employment in the open labour market. Initially the provision of any form of remuneration for those supported by the sheltered workshop environment was very ad hoc. The task of arriving at a national and reasonably uniform approach to assessing wages, both in open employment and in ADEs, came into focus after the establishment by the federal government in 1988 of a “Disability Task Force”. The Disability Task Force was established to oversee implementation of income support measures in a “Disability Reform Package” introduced by the federal government. In that context, a Wages Subcommittee was established to advise the Disability Task Force.
- 20 The 1990/1991 federal budget provided for further consideration of the development of a supportive wage system for people with disabilities. To that end, in January 1992 a report authored by Mr Don Dunoon, a consultant with New Futures Pty Ltd, with the assistance of Ms Jennifer Green from the Australian Catholic University, Sydney, was provided to the Wages Subcommittee. The report recorded that “supported employment services” usually provided employment opportunities to individuals with an intellectual disability, although they might have other disabilities as well. It recorded that:
- Supported employment services have, since their establishment from the mid-1980s, provided real opportunities for people with significant disabilities, particularly of an intellectual nature, to gain access to jobs in open employment.
- 21 In addition, some employment opportunities were offered by sheltered workshops themselves. These various arrangements, as I said earlier, produced a variety of methods for addressing the question of remuneration for disabled people. The authors of the report stated:

In the view of the consultants, it is preferable to have the one system for all persons with disabilities, for reasons of simplicity and consistency. This is especially so in view of the fact that many people with disabilities have complex disabilities, perhaps including some combination of physical, intellectual, psychiatric and sensory disabilities. Obviously, any requirement for such people to be assessed through different systems should be avoided.

- 22 The authors of the report stated that a principle that must be recognised by all parties was that “the effects of a disability on job performance can only be determined in the context of a particular individual in a particular job and workplace environment”. However, the authors also considered that “an individual should preferably be assessed on at least three tasks/competencies”. They also said:

In considering the work value of ... jobs, the first point to note is that the concern is with the *worth of the job performed*, not the efficiency or productiveness of the worker with disability in comparison with co-workers.

(Emphasis in original.)

- 23 This approach appears to be the forerunner of a philosophy now reflected in BSWAT and in other tools which set out to measure both productivity in a particular job and competencies assessed more generally against “industry standards”. However, in terms of practical application, the idea of measuring or assessing competencies rather than, or in addition to, productivity was not immediately embraced, and still does not apply in open employment.

- 24 In October 1994 a Full Bench of the Australian Industrial Relations Commission approved a model clause to be inserted in various federal awards requiring the use of a nominated tool to assess the wages of disabled workers in open employment (“the SWS tool”). The SWS tool was, and remains, a productivity-based assessment tool.

- 25 It is important to note that the ultimate entitlement to wages for persons like Mr Nojin and Mr Prior, and others employed in ADEs, is now also founded upon a federal award. And as will be seen, use of BSWAT is now permitted in ADEs by the award, although not in open employment. One question which arises in the present case (after a number of others have been addressed) is whether use of BSWAT was reasonable in the case of Mr Nojin and Mr Prior, or whether a tool like the SWS tool should have been used, as it still is in open employment.

- 26 In June 1995 a “Supported Wage System Handbook” was published by the Supported Wage Management Unit of the Commonwealth Department of Human Services and Health. It commenced its description of the wage assessment process with the following statement:

A productivity-based wage essentially requires a standard to be set of the productivity needed for award-level pay; and then an assessment of the worker’s achievement against that standard.

- 27 Again, this basic principle is an important one to bear in mind in the discussion which follows. The comparison contemplated by this approach is between the tasks for which an award rate of pay is actually fixed and the work actually carried out by a (disabled) worker. As mentioned, consistently with this approach the SWS tool remains the only one which is approved for use in open employment.

- 28 In 2001 a new award was made which related directly to work done by

disabled people in the Business Services sector. The *Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001* ("the award") provided, by clause 14.1:

14.1 Upon appointment, an employee will be graded by the employer in one of the grades in Schedule A having regard to the employees skills, experience and qualifications.

and by clause 14.3:

14.3 Employees with a disability will be paid such percentage of the rate of the employees grade *as equals the skill level* of the employee assessed as a percentage of the skill of an employee who is not disabled.

(Emphasis added.)

29 Schedule A of the award identified work at the Grade 1 level in the following way:

#### SCHEDULE A

##### 1. CLASSIFICATIONS

###### 1.1 Grade 1

...

1.1.2 An employee at this level performs basic routine duties essentially of a manual nature and to their level of training. Persons at this level exercise minimal judgement and work under direct supervision whilst undergoing structure training to Grade 2.

1.1.3 Examples of duties at this Grade include basic cleaning within a kitchen or food preparation area including cleaning of dishes and utensils, labouring, sorting, packing, labeling, clipping, assembly document preparation and routine basic assembly tasks.

30 Having regard to the provisions of clause 14.3, the assessment of a wage for a disabled worker at this point in time involved a comparison of applied skills at a basic level of actual work. It involved the sort of assessment required by the SWS tool, which was used in open employment. It did not involve an assessment of the kind represented by the competency component of BSWAT.

31 However, notwithstanding the regime which was represented by the award, where wage outcomes were to be measured by a productivity comparison with work at a Grade 1 level, further reviews were underway in relation to the Business Services sector.

32 In 2000 a report was prepared by KPMG Consulting on behalf of the Department of Family and Community Services and ACROD (a disability services advocacy group). It addressed the Business Services sector in which the work previously carried out by sheltered workshops was continuing. It commenced:

The Business Services Review has established that Business Services have an important role to play in the provision of real employment options for people with disabilities. To achieve this end, it should be now formally recognised that Business Services are required to provide ongoing employment support while concurrently operating and maintaining commercially viable businesses.

The Business Service Review has identified, for the first time, the competing demands confronted by Business Services in meeting their dual objectives. These

demands are more complex than those confronted by any small business or for that instance, any other provider of disability support.

- 33 A matter of key importance in the report was the question of the commercial viability of enterprises in the Business Services sector. The following passages emphasise the dual role played by such enterprises:

#### A new paradigm for Business Services

The evolution of Business Services over time has led to an ambiguity about their role and function within the specialised employment system and within the broader labour market. Shifts in policy directions have exacerbated this ambiguity which has left many Business Services unclear about their core roles and functions.

Business Services must have at their core, a dual focus, the provision of supported employment and the operation of a commercially viable business. Their duality of focus demands that they balance two effectively competing requirements to achieve success.

As part of such a model the target population for Business Services appears best determined by individual choice and ability and willingness to participate in work activities. This ensures that, consistent with the Commonwealth's stated policy objectives for people with disabilities, opportunities for employment remain available not only to people with low support needs but also to those with high support needs who wish to be employed.

#### Provision of employment

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.

For Business Services industry, this pre-condition is difficult to achieve. Currently only 53% of the industry breaks even or is able to return a profit.

Financial performance has a direct impact on the ability of Business Services to meet the costs associated with the provision of comprehensive employment conditions.

So in order for Business Services to fulfil their obligations as an employer, financial viability must be addressed concurrently with the establishment of a consistent approach to industry-based employment conditions.

#### Linkages with the employment and income security system

As employers, Business Services have strong links with the labour market — they are subject to the similar pressures and demands as many employers and have many characteristics that are common to small businesses. Their fundamental difference however is their duality of focus.

- 34 On the present appeal, some emphasis was placed by the respondents on the fact that the Business Services sector is substantially underwritten by funding from the federal government and upon the idea, captured in the extracts above, that the "commercial" environment for many ADEs is challenging. Presumably, these matters are thought to suggest and justify careful management of scarce resources. So much may be accepted. The case for the appellants is not founded upon any suggestion that scarce resources should be squandered.

- 35 In the 2000 KPMG report, a number of recommendations were made. Recommendation 8 read:

*Recommendation 8:* That in employing people with disabilities with varying skill levels, that remuneration is linked to an individual's productivity and to an agreed industry-wide system for assessing general work competencies.

36 There was reference in the report to perceived difficulties with the use of the SWS tool as the sole measure for wage assessment. Reference was made to “concerns about the use of productivity as the sole determinant of wages”. It was said:

In recent times there has been a move towards wage systems that involve a mix of productivity assessment and competency assessment as a means of addressing fluctuating output. *Such an approach can also provide the means by which an individual's suitability for employment can also be assessed.* The introduction of competencies can enable the recognition of the skills an employee has attained as well as rewarding productivity.

(Emphasis added.)

37 The consideration I have emphasised in the passage above is not one which has any role to play in the present proceedings. Mr Nojin was a long-term employee of his ADE. There was no suggestion that the contribution of either Mr Nojin or Mr Prior to the commercial effort of their respective ADEs was inappropriate or that they were otherwise unsuitable for employment in that environment. The issues between the parties were contested in a broader context — namely, the suitability of BSWAT as a measure of work value. The last sentence in the extract above makes it clear that introducing competencies as a consideration provides an increased dimension to the achievement which would be recognised, and at the same time required, from a worker. This new requirement need not be related to work actually being done. However, as I have already said, it is important to appreciate also that this particular issue must be resolved in the further context set by the operation of the award. It is the award which states the legal entitlement to a payment. The issue in the present case is not being resolved in a regulatory vacuum filled only by competing theories and wage-fixing philosophies.

38 Around this time, the Department of Family and Community Services commissioned Health Outcomes International Ltd (“HOI”) to conduct a research project examining a range of different wage assessment tools, strategies and processes for people with a disability working in Business Services. In May 2001 HOI published a report entitled “A Guide to Good Practice Wage Determination”. The report recorded:

There has been a significant amount of research and development focused on the assessment and payment of “fair” wages for people with disabilities. Until relatively recently, this work concentrated on people with disabilities in open employment settings. Previously, Business Services had tended to pay wages to employees based on historical arrangements or ad hoc assessment processes.

There is a large number of wage assessment and payment strategies that have been developed for workers with disabilities. The content, structure and rationale for these processes have varied significantly. For example, some wage assessment processes are rigorously researched, tested and published as organisational policies, whereas other systems are much less sophisticated and structured. There is an identified need to develop wage assessment processes for people in Business Services that are fair, appropriate to the worker, industry and the employer, use valid assessment techniques and comply with relevant legislation and standards.

Given that all Business Services in Australia are funded under the same system, it seems both logical and appropriate to develop guidelines that promote a nationally consistent wage determination system. Such a system is likely to “borrow” from a range of current wage determination processes, but for some Business Services, is likely to represent a significant change in business operation.

39 The advantages and disadvantages of the SWS tool and other tools were discussed, as well as the general advantages and disadvantages of productivity models against competency-based assessment. The report also considered hybrid models which measure or assess both productivity and competencies. The conclusion was:

The research team concludes that a hybrid model represents the most appropriate method of wage determination in Business Services. However, the team is reluctant to recommend any of the existing assessment tools as the absolute best practice method of wage assessment for all services.

40 The report then said:

It is recognised that there is great variability in wage determination practice within the Business Service sector, and the research team was reluctant to recommend any single assessment process reviewed as suitable for application across the sector. It may be preferable, however, to design and implement a single assessment tool specifically for Business Services to enhance consistency in what is currently an extremely diverse sector.

41 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.

42 However worthwhile such an approach may or may not be in considering “work value” over a range of tasks of increasing importance, complexity or seniority, on one view the present case does not even enter that territory, at least so far as it applies in ordinary wage fixing terms. The present case is about the payment of a fraction only of the minimum possible wage rate in an award that is linked to the performance of the most basic of tasks.

43 That is not to gainsay the legitimacy, from a management perspective, of moving towards a more uniform mechanism for wage assessment which might allow the establishment of broad relativities across the Business Services sector. Obviously, such an endeavour is legitimate and probably worthwhile. However, it is not the issue presented by the current proceedings. In the current proceedings BSWAT was defended as directly applicable to the task of comparing the work value of an individual disabled worker in an ADE with that of an average Grade 1 worker, for the purpose of fixing a wage that was some fraction of the Grade 1 benchmark wage in the award. It is in that context that the matters at present in dispute must be resolved.

44 After presentation of its report in May 2001, HOI set about constructing a hybrid competencies and productivity wage assessment tool. In 2002 an early version of BSWAT was trialled. After the trial, revisions were made. They were made because the results in the initial trials suggested wage outcomes which were viewed by the authors as being too high. Trials of a revised BSWAT produced more modest results which were regarded as acceptable. In December 2002 HOI produced a final report entitled “Wage Tool for Business Services” which recommended the introduction of BSWAT. The HOI report

stated “that the [BSWAT] is suitable for application in both open and supported employment environments”. The report predicted that “[a]n overall increase in income will be achieved by the vast majority of workers”. As the evidence in the present case showed, this prediction seems not to have been well-founded. Moves began to achieve an award variation to permit the use of BSWAT and other hybrid tools.

- 45 In 2005 the award was varied. The new provisions permitted assessment of wages in Business Services by a range of tools, not just those which assessed productivity. Clause 14 (including clause 14.3) was removed. The relevant replacement provisions were:

#### 14. WAGE RATES

14.1 Upon appointment, an employee will be graded by the employer in one of the grades in Schedule A having regard to the employees skills, experience and qualifications.

...  
**14A. WAGE ASSESSMENT — EMPLOYEES WITH A DISABILITY**

14A.1.1 ... an employee with a disability will be paid such percentage of the rate of pay of the relevant Grade in clause 14.2 as assessed by a wage assessment tool nominated in clause 14A.4 chosen by a supported employment service.

...  
**14A.4 Wage Assessment Tools**

It is desirable that a wage assessment tool sought to be included in this award satisfy disability services standard 9 (*Standard 9*) and relevant key performance indicators as determined or approved under section 5A of the *Disability Services Act 1986* (DSA KPI's) as amended from time to time. The wage assessment tools described in this clause satisfy Standard 9 and the DSA KPI's.

The following wage assessment tools can be chosen by a supported employment service to assess an employee with a disability:

14A.4.1 The Business Services Wage Assessment Tool, as defined by reference to the material contained in Exhibit B2 in Australian Industrial Relations Commission proceedings number C2004/4617;

...  
14A.4.9 The Supported Wages System, as described in the decision of a Full Bench of the Australian Industrial Relations Commission, 10 October 1994, Print L5723; ...

- 46 In total 11 possible wage tools were mentioned. At the time of the proceedings at first instance the number had grown to 22. Most of the tools measure or assess competencies as well as productivity. In the present case there was evidence that BSWAT is the single most common wage assessment tool used in ADEs. In open employment only the SWS tool continues to be permitted.

- 47 In those ADEs which adopted BSWAT, in order for employees to gain a wage increase it was no longer enough for them to increase their productivity alone. It was necessary to achieve a total score which would result in a higher percentage of the Grade 1 rate of pay than their existing wage rate represented. The argument put for the appellants in the present case is that the nature of BSWAT made it more difficult for intellectually disabled people to do this than for

disabled workers who are not intellectually disabled. In particular, in the case of Mr Nojin and Mr Prior it has been contended that, in important ways, BSWAT did not measure their skill in their actual job.

48 Various reviews have been carried out since BSWAT was first approved for use. None recommended cessation of its use. Generally, use of BSWAT has been supported. However, it seems clear that no detailed or rigorous assessment of the use of BSWAT has been undertaken by reference to the particular concerns expressed in the present proceedings.

49 Importantly, in the 2005 version of the award, clause 14A.2.1 provided:

14A.2.1 No employee with a disability will have their rate of pay reduced as a result of a wage assessment made pursuant to clause 14A.1.1 as at 11 May 2008, or any variation of the award arising from the decision of the Commission in PR961607 [the award variation decision which permitted the use of BSWAT].

50 The effect of this provision was that existing employees, such as Mr Nojin and Mr Prior, could not have their wages reduced by the adoption or use of BSWAT. This has a particular significance for the way in which the appellants framed the requirement or condition which they alleged was indirectly discriminatory in the present case. I shall mention the issue again in that context.

51 In the judgment under appeal, the trial judge traced the development of BSWAT in detail. There seems no doubt that in the quarters charged with assessing how pay rates should be fixed for disabled persons, and amongst those charged with the development of an appropriate tool for that purpose, there was considerable (although by no means universal) support for the notion of a "hybrid" assessment involving measures of both productivity and competencies. The Australian Industrial Relations Commission appears to have been persuaded to acceptance of that philosophy, as does the union movement. Strikingly, representatives of intellectually disabled people represent the other side of the record.

52 The trial judge regarded the level of support for the use of BSWAT as very significant. He said at [86]:

86 A circumstance of great weight in the present cases is the history of the development of the BSWAT ... The BSWAT has been developed specifically for the purpose of assessing the wages of disabled persons employed in ADEs. It has the approval of the Commonwealth. It has been endorsed by both the AIRC and the AFPC. It has been found to comply with Standard 9 of the Disability Services Standards. It has also been found to be in conformity with the Guide to Good Practice Wage Determination. Further, the BSWAT has received these endorsements with the support of the trade union that has had the carriage of applications to formalise and improve the methods of fixing, and the rates of, wages for employees with disabilities, the LHMU. The BSWAT is also supported by the trade union movement generally through the ACTU, employers generally, and employers in ADEs through ACROD.

53 The trial judge went on to refer to the differences of opinion amongst the experts, with which I shall deal in more detail in due course. There was a detailed evaluation of the criticisms made of BSWAT. The trial judge's conclusions were expressed in the following paragraph:

98 In summary, the BSWAT has been developed as a tool for performing the

very task for which it was used in assessing the wage levels of Mr Nojin and Mr Prior. It is not possible to set aside the very considerable support the BSWAT has in the ADE sector, or the considered opinions of consultants who have been called upon to examine the BSWAT, or to prefer the equally legitimately-held views of those who disagree with that body of opinion. The determination of wage levels for employees in ADEs by a method involving assessment of competencies is appropriate. So is the assessment of those competencies by means of question and answer, as well as observation. The disadvantages of the BSWAT arising from the “all or nothing” approach to each competency and the subjective nature of the assessments do not outweigh these considerations to the point of making such requirements or conditions as the BSWAT imposes not reasonable. Section 6(b) of the Disability Discrimination Act does not call for perfection. A system less than perfect can nonetheless be reasonable in the circumstances of a case. I cannot find that the requirements or conditions said to be inherent in the application of the BSWAT in the present cases were not reasonable.

#### **Assessment of Mr Nojin and Mr Prior**

- 54 Challenge began to use BSWAT when it was introduced in mid-2004. All supported employees other than Mr Nojin were assessed at that time. Mr Nojin's representatives initially resisted a valuation of his work using BSWAT. Ultimately, an assessment was carried out in May 2005 and there was subsequently a further assessment on 12 August 2005. Prior to the first assessment Mr Nojin was being paid \$1.85 per hour. At his first assessment his wage was assessed at \$2.46 per hour, but in the subsequent assessment it was assessed at \$1.79. In those circumstances his wage was maintained at \$1.85.
- 55 One of the services offered by Challenge, in which Mr Nojin was employed, was secure document destruction. There were some other services also offered on a fairly small scale. As described by the trial judge, Mr Nojin was asked to perform three tasks during his BSWAT assessments:
- pamphlet collation, which involved inserting flyers into pamphlets, the flyers and pamphlets already being on hand; pen assembly, which involved fitting a ballpoint ink insert into a wooden pen casing, with the inserts and casings already on hand; and feeding one crate of pre-sorted documents through a mechanical shredder.
- 56 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.
- 57 SIS had 20 people in supported employment and another 75 people in day programs. One of the services that SIS offered with its employed workers was essentially a lawn mowing business. The employees were engaged in “whipper snipping, lawn mowing, raking and mowing and general maintenance work around people’s gardens”.
- 58 At the time of his first assessment, Mr Prior’s time was split evenly between mowing lawns and some other general gardening tasks. At the time of his second assessment, 90% of Mr Prior’s time was spent actually mowing lawns, and 10% of his time was spent raking and disposing of leaves. Mr Prior worked under direct supervision. His productive effort was measured by timing him. For example, Mr Prior took 14 minutes and 10 seconds on his first assessment to mow a 5 x 10 m area of lawn (with the catcher on correctly). The comparator,

his supervisor, took 9 minutes to mow a similar area. Again, in Mr Prior's case, the routine and relatively simple nature of the tasks he was required to perform may be seen.

59      Mr Prior left SIS on 9 August 2008 and now works in open employment at Stawell Dry Cleaners. He is regarded as an excellent employee in that position. He is earning about five times his assessed wage under BSWAT.

60      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.

61      So far as it measured competencies, BSWAT dealt with two areas of competencies: core competencies and industry competencies. There were four core competencies and four industry competencies. For each unit of competency questions were provided to the assessor, together with indicative areas of acceptable response. The details will be appreciated from a study of the relevant forms, which will be set out shortly.

62      All the questions and assessment criteria under each core competency were classified as "critical". The significance of this was that an incorrect response to any of those questions or criteria resulted in an assessment of "not yet competent" ("NYC") for that core competency. In other words, an incorrect response to a single question or criterion under any of the core competencies would result in a score of 0 for that competency, irrespective of how many of the remaining questions were answered correctly. This aspect of BSWAT was referred to in the evidence as "all or nothing". Having regard to the fact that there were eight competencies to be scored, and that the competency component comprised 50% of a worker's overall score, each competency carried a final value of 6.25%.

63      In relation to industry competencies, the position was more complicated. First, it was assumed that every job done by a disabled worker could be measured against at least four "industry" competencies. An industry competency could be applicable provided at least one person in the workplace was required to exercise it, whether or not the employee in question was required to do so. If four industry competencies could not be identified and tested in this way, any shortfall (ie 6.25% each time) was simply scored 0. Mr Nojin was assessed against only three identified industry competencies (losing 6.25% from his final score at the outset). Mr Prior was tested against only one identified industry competency (losing 18.75% from his final score at the outset).

64      The second complication was that not every question or assessment criterion under each industry competency was classified as "critical". Although most questions and criteria were regarded as critical, a number were classified as "non-critical". An assessment of NYC for a non-critical component would not prevent the worker from being assessed as "competent" ("C") overall for that unit of competency. Nevertheless, in order to score at all for an industry competency, it was necessary to be scored C on every "critical" element of an industry competency.

65      Using this approach Mr Nojin obtained a C score for one core competency (6.25%), NYC for three core competencies (0 each), NYC for three industry competencies (0 each) and 0 for the non-existent fourth industry competency. Mr Prior scored NYC for each of the four core competencies (0 each), NYC for

one industry competency (0) and 0 for three non-existent industry competencies. In Mr Prior's case, this meant that he scored 0 for competencies, with the result that his productivity score was effectively halved to reach his overall score.

*The core competencies*

- 66 Reproduced hereunder are the forms used when applying BSWAT to assess core competencies, as reproduced in the judgment of the trial judge.

<b>FOLLOW WORKPLACE HEALTH AND SAFETY PRACTICES</b>	
<b>WORKPLACE OBSERVATION</b>	
<b>Assessment criteria:</b>	<b>Scoring</b>
<i>Conduct Work Safely</i>	
<ul style="list-style-type: none"> <li>• Protective clothing or equipment is identified and used appropriately</li> <li>• Basic safety checks on equipment are undertaken prior to operation</li> <li>• Set up and organise work station in accordance with OH&amp;S standards</li> <li>• Follow safety instructions</li> <li>• Manual handling tasks are carried out accurately to recommended safe practice</li> <li>• Waste is disposed of safely in accordance with the requirements of the workplace and OH&amp;S legislation</li> </ul>	
<b>QUESTIONS</b>	
<b>Assessment criteria:</b>	<b>Scoring</b>
<b>What do you do if you or someone else hurts themselves at work?</b> <ul style="list-style-type: none"> <li>• Tell supervisor</li> <li>• Get help e.g. Nurse, ring ambulance, get first aid officer</li> <li>• Turn off machinery, remove from danger</li> </ul>	
<b>Why do you use/wear protective clothing or equipment?</b> <ul style="list-style-type: none"> <li>• noise</li> <li>• using machines</li> <li>• working with pesticides/chemicals</li> <li>• dust</li> <li>• sun</li> </ul>	
<b>What would make your workplace unsafe?</b> <ul style="list-style-type: none"> <li>• spills</li> <li>• faulty equipment</li> <li>• poor surfaces etc (refer to range of variables)</li> </ul>	
<b>What do you do when you notice something is unsafe at work?</b> <ul style="list-style-type: none"> <li>• remove the hazard</li> <li>• report to appropriate personnel</li> <li>• fill in relevant documentation</li> </ul>	
<b>What do you do if the fire alarm goes off?</b>	

<ul style="list-style-type: none"> <li>• <i>exit the workplace following evacuation procedures</i></li> <li>• <i>assemble in designated area</i></li> <li>• <i>wait for further instructions</i></li> </ul>	
<b>Why is it important to follow evacuation procedures?</b>	
<ul style="list-style-type: none"> <li>• <i>ensures orderly evacuation</i></li> <li>• <i>workplace can be assessed for safety</i></li> <li>• <i>all employees can be accounted for</i></li> </ul>	
<b>What are some of the ways you move objects in the workplace?</b>	
<ul style="list-style-type: none"> <li>• <i>manual lifting</i></li> <li>• <i>trolley</i></li> <li>• <i>pallet jack</i></li> <li>• <i>forklift</i></li> </ul>	
<b>ADDITIONAL QUESTIONS</b>	
Please record details of employer evidence and any additional questions asked	Scoring
<b>COMPETENCY:</b> <b>COMMENTS:</b>	

<b>COMMUNICATE IN THE WORKPLACE</b>	
<b>WORKPLACE OBSERVATION</b>	
<b>Assessment criteria:</b>	Scoring
<i>Gather and respond to information</i>	
<ul style="list-style-type: none"> <li>• Instructions are correctly interpreted</li> <li>• Clarification is sought from appropriate personnel when required</li> <li>• Workplace interactions are conducted in a constructive manner</li> </ul>	
<b>QUESTIONS</b>	
<b>Assessment criteria:</b>	Scoring
<b>What work have you been asked to do today?</b>	
<ul style="list-style-type: none"> <li>• <i>Clarify work requirements with supervisor</i></li> </ul>	
<b>In what order should the work be completed?</b>	
<ul style="list-style-type: none"> <li>• <i>Clarify work requirements with supervisor</i></li> </ul>	
<b>What do you do if you are unsure about what work needs to be done?</b>	
<ul style="list-style-type: none"> <li>• <i>Clarify with appropriate person</i></li> </ul>	
<b>What workplace meetings do you attend?</b>	
<ul style="list-style-type: none"> <li>• <i>OH&amp;S</i></li> <li>• <i>Work performance/review/Individual Employment Plan</i></li> <li>• <i>Work group/staff meetings</i></li> <li>• <i>Union meetings</i></li> </ul>	
<b>What are these meetings for?</b>	
<ul style="list-style-type: none"> <li>• <i>Worker to describe role and function of different meetings</i></li> </ul>	

<b>ADDITIONAL QUESTIONS</b>	
Please record details of employer evidence and any additional questions asked	Scoring
<b>COMPETENCY:</b>	
<b>COMMENTS:</b>	

<b>WORK WITH OTHERS</b>	
<b>WORKPLACE OBSERVATION</b>	
<b>Assessment criteria:</b>	Scoring
<i>Participate in group processes</i>	
<ul style="list-style-type: none"> <li>• Co-workers' individual differences are taken into account eg.           <ul style="list-style-type: none"> <li>• Respect for others' personal space and property,</li> <li>• Cultural, physical and/or cognitive differences are respected,</li> <li>• Tolerance of others in the workplace.</li> </ul> </li> <li>• Worker adapts to changing work roles (observe worker in different roles to confirm)</li> </ul>	
<b>QUESTIONS</b>	
<b>Assessment criteria:</b>	Scoring
<b>What are some other jobs that people do here?</b>	
<ul style="list-style-type: none"> <li>• <i>Has an understanding of what other workers do in the workplace</i></li> </ul>	
<b>How can you help others at work?</b>	
<ul style="list-style-type: none"> <li>• <i>Do own job well</i></li> <li>• <i>Be on time, keep area clean and tidy</i></li> <li>• <i>Help others when they require it (e.g. busy, complex work, etc)</i></li> <li>• <i>Make suggestions for improvement</i></li> </ul>	
<b>If you had a disagreement with someone in the workplace, what would you do?</b>	
<ul style="list-style-type: none"> <li>• <i>Discuss it with the person</i></li> <li>• <i>Ask for assistance from your supervisor</i></li> <li>• <i>Make a formal complaint</i></li> </ul>	
<b>ADDITIONAL QUESTIONS</b>	
Please record details of employer evidence and any additional questions asked	Scoring
<b>COMPETENCY:</b>	
<b>COMMENTS:</b>	

<b>APPLY QUALITY STANDARDS</b>	
<b>WORKPLACE OBSERVATION</b>	
<b>Assessment criteria:</b>	Scoring
<i>Assess quality of own work</i>	
<ul style="list-style-type: none"> <li>• Work instructions are followed and tasks performed in accordance with quality requirements</li> </ul>	

<ul style="list-style-type: none"> <li>Non compliant materials or products are identified and isolated</li> </ul>	
<b>QUESTIONS</b>	
<b>Assessment criteria:</b>	<b>Scoring</b>
<b>How do you know if a part/service is faulty?</b> <ul style="list-style-type: none"> <li><i>Can describe non-compliant products/services</i></li> </ul>	
<b>What do you do if the part/service is faulty?</b> <ul style="list-style-type: none"> <li><i>Isolate non-compliant part</i></li> <li><i>Report to supervisor</i></li> <li><i>Document, where necessary</i></li> <li><i>Identify causes and possible solutions</i></li> </ul>	
<b>Why is it important not to make too many mistakes?</b> <ul style="list-style-type: none"> <li><i>Waste materials</i></li> <li><i>Waste time</i></li> <li><i>Possibly damage equipment</i></li> <li><i>Poor customer service</i></li> </ul>	
<b>ADDITIONAL QUESTIONS</b>	
<b>Please record details of employer evidence and any additional questions asked</b>	<b>Scoring</b>
<b>COMPETENCY:</b>	
<b>COMMENTS:</b>	

67 In both his initial BSWAT assessment and his reassessment, Mr Nojin was assessed as competent for “Follow Workplace Health and Safety Practices”. For “Communicate in the Workplace” he was assessed as competent for each element except “What workplace meetings do you attend?” and “What are these meetings for?”. Accordingly he scored 0 for this competency. Evidence was given at the trial by Mr Ian Wade, who at the relevant time was the General Manager of Challenge, to the effect that Mr Nojin in fact attended and participated satisfactorily in such meetings. Mr Nojin’s failure to respond adequately to questions about the issue is apparently what told against him. In relation to “Work with others” Mr Nojin was scored C for every element except “What are some other jobs that people do here?”, a matter which is not self-evidently of much importance to his assigned tasks, in light of his satisfactory response to the other questions. He scored 0 for this competency as a result. Mr Nojin also scored 0 for “Apply quality standards” although he was observed to satisfactorily carry out his assigned tasks and satisfactorily answered the question “What do you do if the part/service is faulty?”.

68 Mr Prior’s responses to questions about the four core competencies are set out in the judgment under appeal at [20]-[27]. In both his first BSWAT assessment and his reassessment, Mr Prior was scored NYC on each one. For “Follow Workplace Health and Safety Practices” Mr Prior answered all questions satisfactorily but failed, in the observation of the assessors on each occasion, to carry out all the necessary safety checks and preparatory steps. Mr Prior is legally blind as well as intellectually disabled. His equipment is checked by a supervisor. He is not expected to check it himself. The respondents relied on the fact that the difficulty here did not relate to Mr Prior’s

intellectual disability but to his physical disability. Even if that proposition is accepted, it does little to instil confidence in the reliability and practicality of the assessment required under BSWAT.

69 As to the second core competency Mr Prior was assessed, by two assessors, to satisfy all elements except the observational criterion "Instructions are correctly interpreted". In each case Mr Prior was observed to require instructions to be repeated as he is forgetful or becomes confused. Evidently, as required, Mr Prior did deal capably with his intellectual disability by seeking clarification when required. His was a task that was, in any event, performed under supervision. This gap between reality and theory cost Mr Prior a further 6.25% in his final score.

70 It would be unproductive and unduly time consuming to simply replicate further the summary made by the trial judge. Some of Mr Prior's difficulties appeared to arise from his impaired eyesight; some arose from his intellectual disability. Those which arose from his impaired eyesight saw him marked down for things he was, in fact, not required to do. Those which arose from his intellectual disability penalised his inability to respond adequately to questions which did not affect the work he actually did, such as "How can you help others at work?", to which Mr Prior responded (apparently inappropriately) that he would try not to get involved. After some prompting Mr Prior said he would help them finish the job. This was apparently not regarded as an appropriate response either.

71 I accept that the issues in the present case may not be resolved by reference to any concern about the way in which the BSWAT assessment was actually carried out in Mr Prior's case. The concern I have is a more fundamental one than that. The assessment required by BSWAT explored matters with which, on the expert evidence to be referred to later, intellectually disabled people would struggle. Mr Prior's difficulties in this area cannot fairly be attributed to his blindness. The matters I have referred to are practical examples that give direct support to the criticisms made by the appellants of the use of BSWAT.

*Industry competencies for Mr Nojin*

72 Mr Nojin's three selected industry competencies were (and were assessed in his initial BSWAT assessment) as follows:

Industry Competency 1			
<b>Name of unit:</b> Manual production assembly <b>Code:</b> MEM3.1AA			
Assessment criteria	Critical	Non-Critical	N/A
<i>Read and understand job sheets</i>			
Job sheets and instructions understood and followed correctly Job sheets and/or instructions are obtained in accordance with workplace procedures. The tasks to be undertaken can be identified. The sequence in which the tasks are to be performed can be identified.	NYC		
<i>Select assembly equipment and components</i>			
Assembly equipment is selected and used in accordance with instructions or job sheets to standard operating procedures. The assembly equipment is selected in accordance with instructions or job sheets. The assembly equipment is used in accordance with standard operating procedures. The equipment to be used in the assembly process can be identified	NYC		
Components/sub-assemblies are obtained and arranged for assembly The correct components/sub-assemblies are obtained. The components/sub-assemblies are set out ready for assembly in accordance with standard operating. The components/sub-assemblies to be assembled can be identified The sources of the component/sub-assemblies can be identified.	NYC		
Equipment or tools are used in a safe manner The assembly equipment and/or tools are used safely in accordance with standard operating procedures. The safety precautions to be taken with assembly equipment and/or tools can be identified.	C		
<i>Assembles components</i>			
Assembly produced following correct sequence of operations using selected equipment as appropriate to standard operating procedures. The correct sequence of operations is followed during the assembly process. The selected assembly equipment is used in accordance with standard operating procedures.	C		
Records/inputs production data using standard operating procedure Assessor guide: observe that The production data is recorded in accordance with standard operating procedures. The production data to be recorded can be identified		NYC	
<i>Performs tests</i>			
Assembly tested/checked for compliance with job sheet requirements using standard operating procedures as required. The assembly is tested/checked for compliance with job sheet requirements in accordance with standard operating procedures. The tests/checks to be applied to the assembly can be identified. The action to be taken if an assembly does not comply with the job sheet requirement can be identified.	NYC		
<i>Protects assembly from damage</i>			
Components and/or assembly are handled and stored in a safe manner least likely to cause damage using standard operating procedure. The components and/or assembly are handled and stored in a safe manner in accordance with standard operating procedures. The safe handling and storage procedures applicable to components and/or assemblies can be identified. The damage that can be done to components and/or assemblies through the use of inappropriate handling and storage procedures can be identified.	C		

ADDITIONAL QUESTIONS		
Please record details of employer evidence and any additional questions asked	Competency	Not applicable

  

Summary of Results	
Record each element and code below and indicate result with a C, NYC or N/A.	Competency
1. Read and understand job sheets	NYC
2. Select assembly equipment and components	NYC
3. Assembles components	C
4. Performs tests	NYC
5. Protects assembly from damage	C

  

<b>COMPETENCY:</b> Not Yet Competent
<b>COMMENTS:</b> Comparator timings from previous assessment were used for this competency. The business service agreed to this. Supervisor agreed with overall assessment of this competency.

Industry Competency 2			
<b>Name of unit:</b> Set up and produce hand collated product <b>Code:</b> ICPCF45BA			
Assessment criteria	Critical	Non-Critical	N/A
<i>Read and interpret job requirements from job documentation or production control system</i>			
<b>Set up is carried out correctly in minimum time with minimum wastage</b>	C		
<i>Set up for hand collating / inserting</i>			
<b>Collating / inserting system is set up to suit job requirements</b>	NYC		
<i>Conduct sample run</i>			
<b>Material to be used for sample is organised correctly</b>	NYC		
<i>Collating system is set up and operated in accordance with OH&amp;S requirements and manufacturers and enterprise requirements to produce a specified sample</i>	NYC		
<i>Organise sample inspection and/or testing</i>			
<b>Sample is visually inspected and/or tested or laboratory testing organised in accordance with enterprise procedures</b>	NYC		
<i>Readjust collating system</i>			
<b>Results are interpreted to determine adjustment requirements</b>	NYC		
<b>Adjustment changes are carried out in accordance with product specifications</b>	NYC		
<i>Maintain basic hand collating (sheet / section) process</i>			
<b>Hand collating process is monitored and adjusted to ensure quality of product meets the standard of approved sample</b>	NYC		
<i>Maintain production process</i>			
<b>Production process is operated in association with fellow workers and in accordance with company specifications and planned daily schedule</b>	NYC		
<b>Production is maintained within OH&amp;S requirements and company and manufacturers specifications</b>	C		
<i>Performance is monitored and verified using the process control system in accordance with company procedures</i>	C		
<b>Production difficulties are anticipated and preventative action is taken to prevent occurrence by timely intervention</b>	NYC		
<b>Process adjustments to eliminate problems are reported in accordance with company procedures</b>	NYC		
<b>Waste is sorted according to enterprise procedures</b>	C		
<i>Liaise with customers</i>			
<b>Production is maintained or adjusted in consultation with customer to meet customer requirements</b>		NYC	
<i>Clean collator (sheet / section) at end of run</i>			
<b>Collating area is cleaned ready for next run</b>	C		
<b>Substrate waste is removed from operating area and recycled or disposed of, where required, in accordance with regulatory requirements and company procedures</b>	C		

<i>Complete records</i>			
Production records or other documentation are accurately completed where required by enterprise procedures		NYC	

<b>ADDITIONAL QUESTIONS</b>		
<b>Please record details of employer evidence and any additional questions asked</b>	<b>Competency</b>	<b>Not applicable</b>

<b>Summary of Results</b>	
<b>Record each element and code below and indicate result with a C, NYC or N/A.</b>	<b>Competency</b>
1. Read and interpret job requirements from job documentation or production control system	C
2. Set up for hand collating / inserting	NYC
3. Conduct sample run	NYC
4. Organise sample inspection and/or testing	NYC
5. Readjust collating system	NYC
6. Maintain basic hand collating (sheet / section) process	NYC
7. Maintain production process	NYC
8. Liaise with customers	NYC
9. Clean collator (sheet / section) at end of run	C
10. Complete records	NYC

**COMPETENCY:** Not Yet Competent  
**COMMENTS:** Comparator timings from a previous assessment were used for this competency. The business service agreed to this.  
Supervisor agreed with overall assessment.

Industry Competency 3			
<b>Name of unit: Destroy records</b> <b>Code: TDIT1098B</b>			
Assessment criteria	Critical	Non-Critical	N/A
<i>Collect records to be destroyed</i>			
a. Records for destruction are verified and assembled	NYC		
b. Confirmation of destruction requirement is sought and obtained	NYC		
c. Records are bundled, marked or labelled for destruction in line with organisational procedures	NYC		
d. Destruction mode is confirmed from workplace documents	NYC		
<i>Select destruction mode</i>			
a. Records are assembled and made ready for destruction	C		
b. Arrangements for records to be destroyed off site (where required) are undertaken in accordance with workplace procedures			N/A
c. Suitable controlled or secure environment is selected for handling/storage of documents to be destroyed	NYC		
<i>Destroy records</i>			
a. Confirmation of actions is obtained	C		
b. Bundles of documents are checked for identification			N/A
c. Selected destruction method is used maintaining security, personal safety and environmental protection	C		
d. Shredded and pulped records are collected for recycling	C		
e. Electronic recording systems are checked to confirm erasure of required documents			N/A
<i>Document procedures</i>			
a. Documentation of completed operations is completed	NYC		
b. Clients are notified of actions taken	NYC		
c. Workplace records are updated to reflect activities undertaken	NYC		
d. Off site destruction is confirmed with appropriate personnel			N/A
<b>ADDITIONAL QUESTIONS</b>			
Please record details of employer evidence and any additional questions asked	Competency	Not applicable	
Summary of Results			
Record each element and code below and indicate result with a C, NYC or N/A.	Competency		
1. Collect records to be destroyed	NYC		
2. Select destruction mode	NYC		
3. Destroy records	C		
4. Document procedures	NYC		
<b>COMPETENCY:</b> Not Yet Competent			
<b>COMMENTS:</b> supervisor agreed with overall assessment.			

73 Mr Nojin achieved identical industry competency scores in his reassessment. Mr Nojin was assessed NYC on all three competencies. 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.

74 On his first assessment Mr Nojin's tasks were: pamphlet collation (40%); pen assembly (10%); and document shredding (50%). On his second assessment his tasks were: pamphlet collation (40%); pen assembly (10%); preparing documents for shredding (30%); and document shredding (20%). The trial judge found that the increased complexity of the additional tasks "dragged down" Mr Nojin's productivity score from 27.48% to 16.54% (on the productivity side of the BSWAT assessment alone). It may be seen that, even on the productivity side, Mr Nojin struggled to approach anything near 100% of the productivity of an average Grade 1 worker. It does not seem surprising, in light of the fact that Mr Nojin's diminished productivity may be seen as the consequence of his intellectual disability, that he was also unable to present as universally competent in each of the "critical" aspects of the three "industry" competencies. Some of those elements appear to me to assume capacities that Mr Nojin self-evidently does not possess. If that is so he was condemned to failure by the very content and nature of the test, with the result that all opportunity to score above zero in the area of industry competencies was denied to him in advance of his actual assessment.

*Industry competencies for Mr Prior*

75 Mr Prior's single selected industry competency was (and was assessed in his initial BSWAT assessment) as follows:

Industry Competency 1			
<b>Name of unit:</b> Support gardening work <b>Code:</b> RTF1004A			
Assessment criteria	Critical	Non-Critical	N/A
<i>Prepare materials, tools and equipment for gardening work</i>			
The required materials, tools and equipment are identified according to lists provided and /or supervisor's instructions.	C		
Checks are conducted on all materials, tools and equipment with insufficient or faulty items reported to the supervisor.	NYC		
Techniques used when loading and unloading materials demonstrate correct manual handling and minimise damage to the load and the vehicle.	C		
Suitable personal protective equipment (PPE) is selected and checked prior to use.	C		
Gardening support is provided according to OHS requirements, and according to workplace information.	C		
OHS hazards are identified and reported to the supervisor.	C		
<i>Undertake gardening work as directed</i>			
Instructions and directions provided by supervisor are followed and clarification sought when necessary.	C		
Gardening work is undertaken in a safe and environmentally appropriate manner according to enterprise guidelines.	C		
Interactions with other staff and customers is carried out in a positive and professional manner.	C		
Enterprise policy and procedures in relation to workplace practices, handling and disposal of materials is observed.	C		
Problems or difficulties in completing work to required standards or timelines are reported to supervisor.	C		
<i>Handle materials and equipment</i>			
Waste material produced during gardening work is stored in a designated area according to supervisor's instructions.	C		
Materials, equipment and machinery are handled and transported according to supervisor's instructions and enterprise guidelines.	C		
A clean and safe work site is maintained while completing gardening activities.	C		
<i>Clear up on completion of gardening work</i>			
Materials are returned to store or disposed of according to supervisor's instructions.	C		
Tools and equipment are cleaned, maintained and stored according to manufacturers specifications and supervisor's instructions.	C		
Work outcomes are reported to the supervisor.	C		
ADDITIONAL QUESTIONS			
Please record details of employer evidence and any additional questions asked	Competency	Not applicable	

Summary of Results	
Record each element and code below and indicate result with a C, NYC or N/A.	Competency
1. Prepare materials, tools and equipment for gardening work	NYC
2. Undertake gardening work as directed	C
3. Handle materials and equipment	C
4. Clean up on completion of gardening work	C
<b>COMPETENCY:</b> Not Yet Competent	
<b>COMMENTS:</b>	

76 The result here is striking. Mr Prior scored 0 because he did not carry out checks. This seems fairly clearly to be the result of his physical handicap, as the respondents submitted. It also appears to be the same deficiency that told against him in relation to the first core competency. I accept that this may represent an example of BSWAT operating against the interests of a worker with a physical disability, but the issue in the present case does not turn on whether such workers are, in some circumstances, also disadvantaged by BSWAT. In both his initial BSWAT assessment and reassessment Mr Prior did not achieve a score on any competency, core or industry. Those failures are not all attributable to his physical disability. It is an aspect of BSWAT, in its application to Mr Prior, that his assessed productivity score of over 50% was halved due to Mr Prior scoring 0 on the competency side of his BSWAT assessment. As I conclude later, the very use of BSWAT, with those outcomes and consequences, must be assessed by reference to its impact on the capacity of intellectually disabled workers to respond effectively to it.

#### The expert evidence

77 The trial judge received expert evidence from four people. One expert witness was Ms Louise Boin, a neuropsychologist whose evidence was, in all relevant respects, accepted by the trial judge as unchallenged. I refer to it later. The other three experts gave evidence concurrently. They each provided a written report, they contributed to a joint document disclosing the extent of their agreement and disagreement, and they gave oral evidence concurrently.

78 Mr Richard Giles is a principal of Evolution Research and was engaged by HOI as a consultant at the outset of the project to develop a wage assessment tool for Business Services. He was one of the persons who developed, tested and refined BSWAT. He is a staunch supporter of BSWAT and of the notion embedded in it that it is legitimate, practical and relevant to assess competencies as well as productivity when fixing wages for disabled workers. The competencies included in BSWAT were developed by reference to "industry based competencies" drawn from a range of industry training packages. Mr Giles' written report said:

Competency based wage assessments focus on the abilities of the person being assessed without necessarily focusing on their productivity or the speed with which they undertake tasks. Competency based assessment is the foundation of industry led training programs and as such is seen as a critical component of wage assessment for the Business Services sector.

79 As I indicated earlier, during the development of BSWAT an initial trial of the draft wage tool in 19 Business Services sites produced results which were

regarded as yielding wage outcomes that were too high. The tool was revised. A number of changes were made. One change was to more closely align the competency-based component with a Certificate II level of competency rather than a Certificate I level, thus raising the standard to be satisfied. Mr Giles justified the changes in his written report in this way:

An initial trial of the draft wage tool in 19 Business Service sites in four different states showed that whilst the productivity element was appropriate, the competency element did require refinement. In effect, the competency based component was seen to be too rudimentary for operation in a number of the industry settings. This was effectively a change in the “pitch” of the competency based components and led to them being more closely aligned with a Certificate II level of competency rather than a Certificate I level. It was agreed by the project team and by the steering group that this was a more accurate reflection of a full wage earner in an open employment setting, and where their skills were expected to be.

80     The Australian Quality Training Framework (“AQTF”), which was referred to frequently in the expert evidence, is part of the National Training Framework. It was used, for example, in the TAFE (Technical and Further Education) systems. It assisted the construction of course curricula and training packages. AQTF is built into the Australian Qualifications Framework (“AQF”) which is a quality assured national framework of qualifications in the school, vocational education and training, and higher education sectors in Australia. The 10 level system spans the range from Certificate I to a doctoral degree (eg PhD). Certificates I and II levels refer to training for basic vocational skills and knowledge, post-secondary school. Assessment by reference to Certificate II levels rather than Certificate I therefore assumes, first, knowledge and competency transmitted usually by some post-secondary school training or experience, and achievement at least part way up the scale which the overall scheme reflects.

81     Evaluation of the standard of knowledge, understanding and ability to communicate that knowledge and understanding at a Certificate II level (ie a little under the level in some trade courses) was bound, on the expert evidence in the present case, to present a further disadvantage to intellectually disabled people. This is a matter to which some of the experts directed particular attention.

82     Mr Giles explained the units of competency which were chosen for BSWAT in the following way in his written report:

17. d. (i) ... the competency assessment component incorporates four core units of competency. They are occupational health and safety, working with others, communication in the workplace, and applying quality standards. During the design phase of the BSWAT it was found that these core units of competency (with different titles in different industry training packages) are common to all industries. As such, these were considered to reflect the range of skills and knowledge applicable to all workers in any setting.

*The core units of competency in the BSWAT therefore reflect an amalgamation of relevant performance criteria from a range of industry training packages.* Assessment of the core units of competency are made by a combination of direct observation, questioning and the review of third party evidence. In order to streamline the assessment process, the core units of competency include those performance criteria deemed most critical to the performance of duties in the Business Service environment.

As such, they are all deemed critical, and to achieve competency in each of these units all performance criteria must be achieved.

17. d. (ii) Up to four industry-specific units of competency are chosen in accordance with the tasks performed by the worker. It is recognised that not all workers perform a range of duties broad enough to allow for the selection of four industry-based competencies, but based on the review of industry expectations it was deemed that a worker in an open employment setting, (i.e. achieving a full award rate of pay) would be expected to perform at least four industry-specific competency duties.

(Emphasis added.)

- 83 Two matters might here be noted. First, development of core competencies using industry/training packages (if that is what in fact occurs) is not the same as expecting that, and assessing whether, such competencies are possessed by an individual who will only receive some fraction of the award wage rate for the lowest work grade contemplated by the award. The two concepts are not necessarily in the same field of examination. Secondly, any concept of "industry expectations" must be adjusted to the practical circumstance, already mentioned on a number of occasions, that what is required to be assessed is what percentage of a rate of pay at the minimum award level a disabled worker should receive for performing tasks that are, by their very nature, basic and routine.

- 84 Mr Paul Cain is the Director of Research and Strategy at the National Council on Intellectual Disability. In his report he recorded that the initial BSWAT trial involved 83 participants. In that trial, the average competency score was higher than the average productivity score (64%:46%). That provided an overall score of 54%, resulting in an average wage of \$6.11 per hour. In a revised trial involving 81 participants, after the adjustments referred to by Mr Giles, the average competency score dropped below the average productivity score (26%:43%) providing an overall score of 34% and a reduced average hourly wage of \$4.13. Data current to October 2008 showed that the ratio had declined again, with average competency as tested by BSWAT now well below average productivity (8%:38%), producing an average overall score of 23% and an average hourly wage of \$3.20. Mr Cain recorded that the actual average hourly wage of initial trial participants in 2002 was \$3.42 compared to \$3.20 for those assessed by BSWAT in 2008. That is, on a comparison of actual hourly wage data, average wages have actually fallen between 2002 and 2008 and are certainly much lower than the indicators given by either of the trials. Mr Cain made the following points in his written report:

118 There is incoherence between the BSWAT assessment scores of productivity and competency. The lack of correlation between BSWAT productivity and competence scores is concerning given the assumption that skill generates productivity. There should be a strong correlation between the competency scores and the productivity scores. The lack of such a correlation suggests that there is a flaw in the BSWAT design.

...  
122 *The competency component of the BSWAT bears little relationship to the productivity assessment and operates to diminish wages for employees with disability. The lack of relationship with the competency assessment to actual work tasks suggest that the BSWAT competency component is measuring skills and knowledge not directly relevant to the job tasks that employees are employed to perform.*

...

129 In my review of the employment literature for people with intellectual disability, I am unaware of any method where on-the-job competency or productivity of people with intellectual disability is measured by interview or via vocational assessments. The literature is invariably concerned with the training of discrete job tasks towards an employer agreed standard of quantity and quality. Performance data is collected during training to track outcomes and to assist a review of the effectiveness of instructional techniques. An interview is not evidence of competence or productivity in the completion of a job task. *People with intellectual disability will struggle with question and answer tests that require effective communication and comprehension.* Many people with intellectual disability will find a formal interview difficult and intimidating.

(Emphasis added.)

85 Mr Cain also pointed out that in research carried out by Mr Giles' own team, Evolution Research, it was revealed that the notion incorporated in BSWAT of a fixed four industry competency units did not accord with reality at the wage level taken as the starting point for assessment of pay in ADEs. Under BSWAT arrangements competencies must be identified which have a counterpart in industry. If four industry competencies against which a worker can be assessed cannot be identified, the worker's score is automatically discounted to reflect the absence of competency. This is despite the fact that in open employment non-disabled workers at the Grade 1 level were found to have, on average, only 2.8 competencies. Mr Cain pointed out:

101 If BSWAT were to be applied to comparable jobs in open employment, the average worker with 2.8 competencies would have their wages discounted below the award wage. The average workers would only be able to meet a maximum of 2 industry competencies. Workers would be given a "0" for two industry competencies as the BSWAT demands 4 industry competency units to be included in the wage calculation. The workers would have their award wage discounted by at least 12.5% ...

102 The BSWAT applies an industry competency assessment that is not comparable to standards of award based wages in open employment by expecting workers with disability to meet a higher number of industry specific competencies than people without disability.

86 Mr Phil Tuckerman is the Director of Jobsupport, an organisation that provides vocational training, placement and ongoing support services for people with an IQ less than 60. He has been closely involved in the development of wage assessment tools including the SWS tool, which is widely used for intellectually disabled persons and persons with other disabilities in open employment. His written report included the following:

35 The weighted productivity assessment used in the Supported Wage System [the SWS tool] is strictly productivity-based. Workers with a disability are assessed to compare their output relative to that of non-disabled co-workers on the tasks that make up their job. In the Supported Wage System there is no separate rating or discounting for "competency", or to reflect the fact that the range of tasks which the disabled worker is able to perform is likely to be more narrow than the range of tasks performed by a non-disabled co-worker. The Supported Wage System uses the lowest pay classification under the relevant award or agreement that contains all the tasks performed by the worker.

36 The Supported Wage System ensures that the employer pays a worker with

a disability exactly the same amount that a non-disabled co-worker on the same award or agreement classification would receive for producing the same volume of work.

37 I was a member of the reference group for the 2001 Supported Wage System Review. The review found that both employers and workers with a disability were satisfied with the Supported Wage System approach.

38 [Data current to October 2008 collected by the Department of Family and Community Services showed] BSWAT competency scores far lower than productivity scores. Surely if the competencies were relevant to the job they should have been trained to criteria prior to the BSWAT assessment. The low competency scores raise questions about the relevance of the competencies, the adequacy of the training services provided for their workers with a disability on the competencies and the methods used to assess the competencies.

87 Prior to giving oral evidence the three experts produced a joint document. The joint document identified areas of agreement and disagreement.

88 Mr Giles' views were referred to in the following terms:

*Richard Giles rejects that positions held by people with disability are only process oriented positions*, limited in their scope and can only be assessed by productivity. Many positions held by people with disability are positions where knowledge and skill is key. These positions offer diversity and interest to the person with disability and move away from the notion that positions filled by people with disability can only be process driven.

Assessment of productivity fails to identify and reward a person's level of skill, flexibility and worth to the organisation ...

...  
The BSWAT provides a balance that recognises the two fundamental aspects of work — competency and productivity. Competency is not a discounting of a person's wage unless there is an inherent expectation that a person with disability is not capable of achieving this. I find this perception difficult to accept, as I know of and can provide evidence of many people with disability who can achieve the level of competency outlined in the BSWAT. Having an intellectual disability does not automatically preclude a person from having the ability to achieve competency.

(Emphasis added.)

89 Mr Tuckerman and Mr Cain expressed their views quite differently:

Phil Tuckerman and Paul Cain believe their role, as expert witnesses, is to give evidence relevant to the claims raised by the applicants. *The applicants are people with intellectual disability performing process-based work. We have therefore confined our comments to matters relevant to this population and this type of work.* Issues such as how workers with disability are paid to perform knowledge-based jobs within a productivity based wage system are not relevant to this case.

Phil Tuckerman and Paul Cain argue that an Award rate of pay only requires employees to achieve the volume of productive output in terms of quantity and quality per job task as agreed by the employer.

The productive output required is determined by comparison to the volume of productive output achieved by an employee paid the full award rate for completing the same job task.

It is important that any sub-award wage calculation results in the person with disability receiving the same income for the same volume of work output that a co-worker without a disability on the same award level would receive. This is the basis of the Supported Wage System (SWS).

... We reject the notion of discounting wages for jobs with a narrow range of tasks. Jobs performed by people with and without disability in the regular labour market for award rates of pay contain a range of tasks from narrow to broad. A multi-skilled job, or a job with a broad range of tasks, is not an Award requirement or an employer standard.

... the AQTF system of competency is not a universal standard applied by employers as the BSWAT asserts. *Employers are most concerned with productive output rather than the meeting of competency assessments. We consider it unfair for a pro-rata award wage assessment to expect people with disability to meet standards not applied to all workers doing the same work at the same Award classification.*

Competency assessment has poor correlation with productive value and can distort wage outcomes to the detriment of employers and employees.

... The majority of the people whose wage is determined by pro-rata award wage assessment tools are people with intellectual disability. *Both applicants in this matter have intellectual disability. The majority of the jobs that this population perform are process jobs, not knowledge based jobs, due to the impact of their disability.*

(Emphasis added.)

90 These observations by Mr Giles, and by Messrs Tuckerman and Cain, raise an important point for the present case. The present case is about Mr Nojin and Mr Prior. In some respects their circumstances must remain in focus. However, any examination of whether it is reasonable to use BSWAT, even in their cases, cannot be undertaken without an appreciation of the more general context.

91 That said, in my view the differences between the experts reveal a more fundamental disagreement about how to evaluate work which must, under the award, be measured by reference to a known benchmark. That benchmark is process oriented. It involves minimal decision-making. It is not knowledge based. In my view, those circumstances require less weight to be given to Mr Giles' opinions than to the shared opinion of Mr Tuckerman and Mr Cain.

92 Disagreement about competency assessment is reflected in the following entries in the joint report:

#### 4.1. AQTF Industry Competency

There is disagreement about the use of industry competency assessment for the purposes of a pro-rata award based wage assessment.

Richard Giles submits that the AQTF industry competencies have been developed by industry to promote correct processes and safety within the workplace. BSWAT competencies are set at certificate level 2 and would be attainable by employees earning the full award rate in the open labour market. He also submits that this level of competency would be reflective of a base level expectation by employers for payment of a full award rate of pay.

... Paul Cain and Phil Tuckerman, as stated above, reject the AQTF industry competency assessment as a valid assessment of pro-rata award wages. The fact that employers do not apply AQTF industry competencies to all employees at entry and low award level jobs makes it inappropriate that this standard be uniformly applied to employees with disability to determine an award-based wage.

It is reasonable, however, to expect skills required by the employer, directly related to the job, to be trained with the assistance of an employment service provider.

#### 4.2 AQTF Core Competency

Richard Giles maintains that workers without disability, earning full award rates of pay, would be expected to, and able to, answer or demonstrate the criteria reflected in the core competency units. These competencies have been developed by industry representatives including employers, educators and union groups, and represents a fair and reasonable benchmark to expect employees with disability in any employment setting to meet to be paid full award wages.

Phil Tuckerman and Paul Cain, as stated above, reject the AQTF competency assessment as a valid assessment of pro-rata award wages. The AQTF system is not applied to employees without disability on a universal basis, particular [sic] at entry or low award level jobs.

- 93 The stark difference in views represented by the joint document continued during oral evidence when the three experts gave their evidence concurrently. Initially the experts discussed their areas of disagreement identified in the joint report, with the occasional intervention of the trial judge but without cross-examination at that point. Later there was an opportunity for cross-examination. In the initial exchanges, Mr Giles identified the fundamental underpinning of BSWAT in the following way:

The expectation of the wage tool was to compare to what a person in the general employment setting would be expected to do to earn the award rate of pay. So they were the fundamental — that's the fundamental underpinning of the development of the wage assessment tool.

- 94 It is evident that the other two experts regarded this approach as theoretical and artificial. Occasionally stronger language was used. They did not regard Mr Giles' approach or the construction of "quality training framework competencies" to be reflective of what actually happens in the workplace. Mr Tuckerman said, for example:

We place a lot of people with significant intellectual disabilities, similar to the two individuals here, into open employment, and they work in highly customised jobs, and there's no question from employers that the fact that they don't do the full range of duties is an issue. It's only their productivity on the duties they actually do that is the key issue. If they produce 100 widgets then they should get the same pay as someone without a disability that produces 100 widgets. That is the essence, I guess, of the approach of the supported wage users. So I guess I would argue that you don't need the full range of duties, but you don't need to meet any sort of national competency because in our experience across all 1500 placements, we have never been once asked to train against competencies, not once.

- 95 Mr Cain said:

For instance, the only reality testing that Richard Giles Consultancy did was do the modelling competency matching, and that was the only time that we really tested some of these assumptions, and I think it was very revealing to find out that on average in open employment jobs for comparative jobs, there was, for instance, only 2.8 competencies per job, which was not very much different from the business service jobs at 2.4, 2.5, which begs the question, if that's the only time we actually get some reality testing based on the assumptions being put forward, it begs the question, why did we have to have a wage assessment tool fixed at four competencies when not [sic] even people without disabilities in open employment, on average, have jobs of less than three?

So I'm thinking that the assumptions that have been put forward haven't been based on any hard evidence of what goes on in actual employer-employee relations, whereas I think the assumptions that have been made is by analysis of the training framework.

96 Mr Giles said:

In relation to the core competencies, I would say it's a realistic expectation that all employers do expect people to be able to communicate and perform the four core competencies if they're going to get a full award rate of pay.

but Mr Tuckerman responded:

I guess all I can say is that that is simply untrue. In the regular work place, people aren't required to know the full range of industry competencies. It's — at entry level jobs, they're expected to know the jobs that they do. Whether they have a disability or not a disability, they're expected to perform the tasks that they need to know. The notion that an employer will not want to pay someone without a disability the full award wage because they can't do the full range of duties in one of these competencies isn't correct, because some of them aren't relevant to particular workplaces. And they don't markdown their wages because they can't do something that isn't relevant in that workplace for that person's job.

It just isn't the reality. And we have worked with thousands of employers combined with Nova and Ability, it simply isn't the reality in the workplace. People who have designed these national competencies might like to believe that they have permeated the workplace to that extent, but the truth [at] lower level positions is that that just simply isn't so.

97 Mr Cain contributed:

I think what we're hearing is the core of the difference between the views of Phil Tuckerman and myself and Richard Giles is that Richard is putting a premium on things that employers report to say they like, like flexibility, multi-skilling. But I think that takes us away from an assessment of actual agreed job. That takes us into futures, future predictions, whether that person may or may not be needed to do some other task. I think that takes us into, sort of, a guessing game.

...

So I think what we're hearing is the core difference between actuality and hope, really — a hope for a workforce that some day has all this multi-skilling and flexibility, because that's really the hope that the early 90s and the scheme of the Australian training quality framework.

98 Mr Tuckerman said:

I guess all I would say is that this is an artificial construct that is being introduced here. Employers don't use these things.

99 Another criticism was expressed this way by Mr Cain:

... how can someone possibly be productive but have zero per cent competency? That's bizarre and strange.

100 Mr Tuckerman said:

I guess fundamentally I don't think competencies have any part in a wage assessment apart from attaching to different levels in an award. The notion of assessing people against a set of industry competencies that the employers themselves don't use as base grade, seems to me to be quite inappropriate.

...

... the whole notion of the inclusion of competency is a red herring. It should play no part in wages ...

101 Mr Cain echoed these comments:

... the whole issue of competency in productivity is a forced issue that doesn't have any sort of reality to it ...

102 As to assessment by interview Mr Tuckerman said:

All I would say is that where — the majority of people in ADEs have an intellectual disability. They are going to have, predictably, difficulties with comprehension and, predictably, difficulties with expressive language. They are going to have difficulties with any sort of complex or abstract question. I mean, that — that's really a given.

103 Mr Cain said:

It's hard to control my incredulity about this issue. We are talking about people who have been assessed as having an intellectual disability, less than 70 IQ, two standard deviations below the mean, inherently have great difficulties with language, communication, abstract notions. The whole history of training in employment for this group has been on a more of a [sic] physical nature, explicit instruction, one on one followed by demonstration using principles of applied behavioural analysis where you are constantly observing, monitoring the effects of your training over time. The — it's never in the literature — never discussed whether you would determine a person's competency or ability to do a task by interview. I really think that it is probably — of all the choices that you could make for this particular population, that it would be the worst choice.

...

... I — you know, if you were looking for something to do to make it more difficult for this group of people that have struggled to get award based wages for many years then I would choose this one.

104 Mr Giles' defence of his position in this discussion may be seen in the following statement:

MR GILES: You know, for a final comment, I would just say that, you know, using the BSWAT for a person, whether they're assessed in ADE or open employment, would deliver, you know, the same result, given the same task and the same industry. You know, it's the standardisation of and consistency across the board. So whether it's an ADE or whether it's open employment, it can be applied in both and you would get the same outcome.

HIS HONOUR: In respect of the same person.

MR GILES: In respect of the same person doing the same job.

105 However in cross-examination the following exchanges occurred:

DR HANSCOMBE: ... You have read the Marshall Consulting — what is it called, Modelling and Competency report, haven't you?

MR GILES: Yes.

DR HANSCOMBE: And you know that it says that non-disabled workers in open employment have an average of 2.8 industry competencies. Do you know that it says that?

MR GILES: Says that, that was based in our research.

DR HANSCOMBE: Yes, that is what it says, and it is the case, is it not?

MR GILES: On that research we did, yes, in this case.

DR HANSCOMBE: Well, since — I assume you assert your research to be correct.

MR GILES: Mm.

DR HANSCOMBE: *So it is the case that non-disabled workers in open employment have on average 2.8 industry competencies, is it not?*

MR GILES: Yes.

DR HANSCOMBE: *That means, does it not, that if you required the non-disabled worker to do the BSWAT, that their wage would be reduced.*

MR GILES: Yes.

...

DR HANSCOMBE: If the non-disabled worker performed three competencies, and had as a matter of fact about their training, three competencies, and they were assessed on the BSWAT, their wage would fall, would it not because they wouldn't be assessed against four industry competencies?

MR GILES: Yes.

DR HANSCOMBE: And if that person were the average worker, and in fact only had 2.8, so they only passed two, their wage would be again reduced, wouldn't it?

MR GILES: If that was the way it happened, yes.

DR HANSCOMBE: Well, that's how the BSWAT works, isn't it?

MR GILES: Yes.

...

DR HANSCOMBE: Now, you said the assessors are trained to simulate situations or demonstrate situations, they don't have to ask the questions as they're set out. That was your evidence, wasn't it?

MR GILES: Yes.

DR HANSCOMBE: Not all of those questions are capable of demonstration, though, are they?

MR GILES: I'm not sure — well, yes, I would say off the top of my head I would like to think that we could at least attempt most of them, maybe not all of them, I'm not sure.

DR HANSCOMBE: Well, most of them doesn't really matter, does it, because you have got to pass every question and every element of a competency to pass the competency, do you agree?

MR GILES: Yes.

DR HANSCOMBE: So if one question in a core competency can't be simulated or demonstrated, then inevitably a person who can't understand the question must fail.

MR GILES: Yes.

DR HANSCOMBE: Whether or not in fact they had the knowledge that question was designed to test.

MR GILES: Yes.

...

DR HANSCOMBE: But whether you have got the knowledge or not, if you can't understand the question as a question, some of them are incapable of demonstration that you have got the knowledge; that is so, isn't it?

MR GILES: Yes.

(Emphasis added.)

106

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. He consistently rejected any suggestion that competency had to be built in as a measure of "work value" different from output. As an example the following exchange occurred:

MR TUCKERMAN: I am talking on a general principle, yes. I mean, we're not talking quality of ideas here. We're talking about very, very routine tasks like sweeping and sorting.

MR BOURKE: Can you understand that even with routine tasks, there can be a big difference in the quality of the way they are performed?

MR TUCKERMAN: No, I can understand from all the workplaces I have been to that there is a minimum acceptable standard, and generally for very routine standard there isn't really any other standard that is set for jobs.

and:

MR BOURKE: Okay. Now, but would you agree that many jobs are not simply process based or knowledge based, but invariably are a cocktail of the two?

MR TUCKERMAN: No, I wouldn't.

MR BOURKE: I see.

MR TUCKERMAN: Not in the jobs that people with intellectual disability do. They're invariably process based. The reference to knowledge based jobs is a throwback to the supported wage evaluation where some people questioned how people in senior public service jobs who are paid to dream up new policies could be done on a productivity base wage. And I always thought it was a complete furphy. We're talking about people with significant intellectual disability doing very routine tasks and being paid to think through issues isn't relevant.

MR BOURKE: I see. So they're not required to think when they're working at - - -

MR TUCKERMAN: They're not required to make decisions.

MR BOURKE: Yes, I see.

MR TUCKERMAN: In fact, you would specifically avoid jobs where people were required to make difficult judgment decisions.

107     Doubt at this general level about the ability of intellectually disabled people to demonstrate their "work value" through BSWAT was confirmed, in my view, by reference to the actual situation of Mr Nojin and Mr Prior. It became clear that, in their cases at least, their actual circumstances were not being fairly assessed by the tests carried out. I have already referred to those assessments.

108     The passages which most clearly reflect the findings of the trial judge about the general acceptance of BSWAT, and his assessment of the effect of the expert evidence, in my view are the following:

86 A circumstance of great weight in the present cases is the history of the development of the BSWAT ... The BSWAT has been developed specifically for the purpose of assessing the wages of disabled persons employed in ADEs. It has the approval of the Commonwealth. It has been endorsed by both the AIRC and the AFPC. It has been found to comply with Standard 9 of the Disability Services Standards. It has also been found to be in conformity with the Guide to Good Practice Wage Determination. Further, the BSWAT has received these endorsements with the support of the trade union that has had the carriage of applications to formalise and improve the methods of fixing, and the rates of, wages for employees with disabilities, the LHMU. The BSWAT is also supported by the trade union movement generally through the ACTU, employers generally, and employers in ADEs through ACROD. Although, from time to time, some of those supporting the BSWAT have expressed reservations about aspects of it, their support has been consistent. Similarly, the opposition of advocates for the disabled to the BSWAT has been consistent. Informed opinion about the merits of the BSWAT is therefore

divided. Where the issue is the reasonableness of elements of the BSWAT, it is difficult to conclude that the considered view of one side of a genuine debate should be rejected altogether.

...  
89 It is fair to say that all three experts acknowledged that competency is a legitimate element in the determination of the value of a worker to an employer ...

...  
93 If a wage is intended to represent the value of an employee to an employer, then testing of competency is a legitimate element of assessing that value. ... The fact that the BSWAT involves assessment of competency as well as productivity is not a factor that leads to the conclusion that requiring an employee in an ADE to have his or her wages assessed by means of the BSWAT is to impose a requirement or condition that is not reasonable.

...  
98 In summary, the BSWAT has been developed as a tool for performing the very task for which it was used in assessing the wage levels of Mr Nojin and Mr Prior. It is not possible to set aside the very considerable support the BSWAT has in the ADE sector, or the considered opinions of consultants who have been called upon to examine the BSWAT, or to prefer the equally legitimately-held views of those who disagree with that body of opinion. The determination of wage levels for employees in ADEs by a method involving assessment of competencies is appropriate ...

109 I do not read the evidence of the expert witnesses as representing a uniform view that testing for competency using a test like BSWAT was a legitimate inquiry in the case of disabled workers like Mr Nojin and Mr Prior. On the contrary, in my view, Mr Cain and Mr Tuckerman rejected such an approach. Their evidence gives considerable support for the proposition that the supposed measure of competencies involved in BSWAT is theoretical, artificial and irrelevant to the practical circumstances of intellectually disabled workers like Mr Nojin and Mr Prior.

110 In the extracts set out above, apart from criticising the artificiality of an assessment of competencies in relation to process-based work, both Mr Cain and Mr Tuckerman referred to the difficulty presented to intellectually disabled workers, who inherently have problems comprehending abstract concepts and expressing themselves, by the need to respond to questions involving abstract concepts in a formal interview environment. Evidence to a similar effect was given by the fourth expert, Ms Louise Boin, a neuropsychologist. Ms Boin went through the questions administered by BSWAT and explained the difficulties which would arise and the source of those difficulties.

111 The trial judge accepted Ms Boin's evidence, saying (at [79]):

79 It is clear that persons with intellectual disabilities are more likely to have difficulty demonstrating understanding of competencies, for the purposes of the BSWAT, than persons without intellectual disabilities. The expert evidence of Louise Boin, a clinical neuropsychologist, to this effect was unchallenged.

### Other evidence

112 Ms Boin's evidence also received support from the senior administrators at Challenge and SIS.

113 Evidence was given by Mr Ian Wade who was, at the relevant time, the General Manager of Challenge. In cross-examination Mr Wade was asked about Mr Nojin's BSWAT assessments. In relation to the core competency of "Follow Workplace Health and Safety Practices", Mr Nojin was scored as competent. In relation to "Communicate in the Workplace", he was scored on all the observational criteria as competent but scored as not yet competent in relation to questions regarding meetings. Mr Wade's evidence was that Mr Nojin did in fact attend meetings and that his participation was satisfactory. The direct observation by Mr Wade that Mr Nojin participated satisfactorily in meetings was, he accepted, evidence that there was some inconsistency between his own observations and the assessment:

[DR HANSCOMBE:] But he was scored as not competent in relation to the questions about meetings, correct?---Yes, that's what it says, yes.

And yet on your evidence, he did in fact attend meetings and he did participate satisfactorily?---Yes.

...

DR HANSCOMBE: So if Michael Nojin is, as a matter of fact, able to attend and participate satisfactorily in the workplace meetings, how is it that he is not equally valuable as somebody who can do that and also answer questions about it? Can you explain why that would make him more valuable to you as an employer?---If it was only that he couldn't answer the questions, the thing would be questionable, that's right. The assessment was whether he participated properly in the meeting.

Yes. And your evidence before was that he did?---He did, yes.

So that means, does it not, that from your point of view as an employer, whatever value is represented by this core competency, Michael Nojin had?---Not according to the assessment.

According to you as an employer?---Yes.

114 With respect to the two other core competencies, Mr Nojin was assessed as competent using observational criteria, but failed to respond to questions regarding "Work with others" and "Apply quality standards" in a way that was regarded as adequate. Mr Wade's explanation of this inconsistency may be seen from the following exchange in cross-examination:

... the assessment for Michael Nojin is that all of the observational criteria was satisfied, isn't it?---Yes, it looks that way, yes.

Well, it is that way?---It is that way, yes.

So the difference in the example I'm positing to you is that the person can answer the questions. And what I want you to tell me is why he is more valuable. He can't work any faster. He is not observed to be any more competent. The difference is he can answer the questions?---Well, it assumes that he's also — in answering the questions he's clearly demonstrating an understanding that carries on to what he does. That would be the only reason.

That he understands what he does?---Yes.

115 This exchange reveals the disconnect between Mr Nojin's actual capacities and those revealed when it was necessary for him to comprehend questions, which were identified by Ms Boin as raising abstract concepts, and then formulating a response to those questions.

116 Evidence was given by Mr Bernard O'Connor, the Chief Executive Officer of SIS. Mr O'Connor's evidence included the following exchange in cross-examination:

People with intellectual disability will always be working — however their wage value is assessed, by whatever tool, they will always be working under controlled conditions?---Yes, with supported employment, definitely.

Whatever the wage assessment tool is?---Yes.

More than 70 per cent of people in supported employment have intellectual disability; correct?---I honestly don't know, but---

You don't know?---I honestly don't know.

More than half the people at Stawell have intellectual disability?---Yes, by a long way. More like 95 per cent.

Okay. But you have got some people who have physical disability and not intellectual disability?---Yes.

And you would agree, would you not, that it is easier — I withdraw that — that it is more likely that a person with a physical disability will be able to answer the assessment questions on BSWAT correctly than a person with an intellectual disability?---That's a pretty fair assumption, yes. I would agree with it.

Well, it's not just an assumption. I am putting it to you as a proposition. For instance, a person who is not intellectually disabled is more likely to be able to say what meetings do you go to than a person with an intellectual disability?---That's certainly my experience, yes.

...

... We have heard evidence from a neuropsychologist that it is more difficult for people with intellectual disability to answer abstract questions than concrete questions. That has been your experience too, has it not?---That has been my experience, certainly.

And it's more difficult for people with that kind of disability, intellectual disability, than physical disability to answer open-ended questions, such as, "How can you help others at work?"?---Yes, that's true.

And you have observed that over the years you have been in this sector?---Certainly.

117 One of Mr Prior's assessors was Ms S Nutting, who gave evidence before the trial judge. Her evidence included the following:

... how does a worker, who has the kind of communication difficulties that I have described, demonstrate how or why it is important not to make too many mistakes?---That is probably a question that may not be able to be represented that way.

And likewise, a worker who is not able to — or has the communication difficulties that we have been describing, would you expect them to be able to demonstrate how they take into account coworkers' individual differences?---At the level that you're describing, they may not be able to — we may not be able to ask them to demonstrate that. They may not be capable of doing so.

And so you would agree with me, Ms Nutting, that there are a number of elements of the competency component of the BSWAT assessment which workers who suffer from communication difficulties simply might not be able to communicate by any mechanism their understanding of what it is they're supposed to do?---That is possible.

And if that be the case, then notwithstanding that the worker might be observed in practice to respond appropriately to a given situation, the fact that they can't communicate the answer will result in an NYC rating for the question and answer component of that competency?---That is a possible outcome, yes.

...

And the [competency] standard which you selected [for the purpose of identifying the industry competencies against which Mr Prior should be assessed]

is the one which you identify in your report, which is the NTIS standard for support gardening work, with the code RTF1004A. Is that correct?---I believe so, yes.

...  
And you know from your experience in this area, that as a competency this is pitched at workers who are not suffering from intellectual disabilities, isn't it? It's not designed for people who suffer from intellectual disabilities?---It's written for open employment workers, yes.

...  
Would you agree that workers who suffer from the level of intellectual disability that might cause them to be employed in an ADE are more likely to find difficulty in being able to show that they are capable of discussing ideas and information about the job tasks and problems with other members of their work team? They're more likely to struggle than workers who don't suffer from intellectual disabilities?---Yes, I would agree with that.

And without me reading the second row [under the heading Key Competencies in the relevant NTIS standard] to you, would you agree that the same consequence follows there, workers with intellectual disabilities are more likely to find difficulty in locating, interpreting and applying instructions than workers who do not suffer from intellectual disabilities?---Yes.

And row 3 again refers to discussions, and you would agree again that workers with intellectual disabilities are more likely not to be able to demonstrate a capacity to have discussions than workers who do not suffer from intellectual disabilities?---As it reads for that part of the competency, yes.

Thank you. And if we can just go down the page:

Using mathematical ideas and techniques, for instance, demonstrating skills in counting, tallying and estimation when handling materials, tools and equipment.

That's the kind of thing which workers with intellectual disabilities of a kind that puts them into ADEs, are likely to struggle to demonstrate?---May be likely to struggle to demonstrate, yes.

More likely?---More likely.

Than non-intellectually disabled workers?---Yes.

...  
I asked you before about the components that were identified as key competencies in the NTIS RTF1004A support gardening work standard?---Yes.

And you agreed with me that it is likely that intellectually disabled workers will have more difficulty demonstrating those competencies than workers who are not intellectually disabled. Do you recall that answer?---Yes.

And it is also the case in conducting interviews with workers for the purposes of a BSWAT assessment, that workers who suffer from intellectual disabilities are more likely to struggle to give you the kind of answers to questions like how do you help others at work, than would workers who do not suffer from intellectual disabilities?---That's possible, yes.

And the combination of the observation component and the question and answer component, and the fact that an NYC on either of them creates a not yet competent rating for that unit, means therefore that an intellectually disabled worker is more likely to achieve a not yet competent rating for these competency units than a worker who does not suffer from an intellectual disability?---I'm not sure that I can draw that comparison.

Do you agree with me that if — you have agreed with me that intellectually disabled workers are more likely to struggle to give you the kind of answers that would win a not yet competent rating?---They can be more, yes.

And giving correct answers is imperative to get a competent rating for each of these competency units?---Mm.

...

... The answer was yes?---Yes.

Thank you. And you would agree with me, therefore, that given there is the question and answer component in each competency, intellectually disabled workers to that extent are more likely to not achieve a competent rating than workers who do not suffer intellectual disabilities?---Yes.

118 This evidence demonstrates, in my view, in a very practical way that, quite apart from his physical disabilities, Mr Prior was, by reason of his intellectual disability, disadvantaged by the requirements, content and nature of BSWAT when compared to a person who was not intellectually disabled.

119 This additional evidence provides direct experiential support for Ms Boin's expert opinion. In any event, as the trial judge said, Ms Boin's expert evidence was, in all relevant respects, unchallenged.

### The statutory provisions

120 I earlier set out the relevant provisions of the Act. In order to make out a case of indirect discrimination it was necessary for the appellants to first identify the requirement or condition which was imposed upon them, and with which they could not comply, but with which a "higher proportion" of those in a comparator group did comply, or were able to comply. In addition, it was necessary to show that imposition of the requirement or condition was not reasonable in the circumstances. Those statutory tests are addressed more directly hereunder.

#### *The requirement or condition*

121 On the appeal, the appellants sought a declaration in the following terms:

The Court declares that the Second Respondent unlawfully discriminated against the Appellant in contravention of s 15 of the *Disability Discrimination Act 1992* by imposing on the Appellant a requirement or condition that in order to secure a higher wage the Appellant undergo a wage assessment by the Business Services Wage Assessment Tool.

122 In the judgment under appeal the trial judge criticised a similar formulation of the requirement, saying:

77 It could be said that each of Mr Nojin and Mr Prior was required to comply with a requirement or condition that he have his level of wages assessed by means of BSWAT. This was not the way in which the case was pleaded, or argued ...

and (at [78]):

78 ... Nothing that Coffs Harbour Challenge or Stawell Intertwine did or failed to do imposed any requirement or condition on Mr Nojin or Mr Prior that they obtain higher levels of remuneration. They simply had their levels of remuneration assessed by means of the BSWAT ...

and (at [82]):

82 The only requirement or condition with which Mr Nojin and Mr Prior were required to comply is that their wage levels be determined by assessment using the BSWAT. They were able to comply with that requirement or condition.

123 In my respectful view, this does not adequately capture the essence of the argument advanced by the appellants. Mr Nojin and Mr Prior were each in receipt of a wage. They had each worked at their ADE for some time and in Mr Nojin's case for many years. Under the award, their rate of pay could not be reduced as a result of the use of BSWAT. Nor could they be compelled to agree to an assessment that used BSWAT. However, as each of Challenge and SIS had adopted BSWAT as the method by which it would consider whether any alteration (ie increase) to rates of pay was warranted, in my view, the requirement or condition identified by the appellants was, in fact, imposed on Mr Nojin and Mr Prior.

124 In those circumstances, I respectfully disagree with the trial judge's characterisation of the requirement or condition which required consideration. I consider that it was open to the appellants to identify the requirement or condition as they did, and that the requirement or condition was identified with sufficient precision.

*Compliance with the requirement or condition*

125 There are two strands to the issue of compliance, but they may be conveniently dealt with together. The two matters for consideration arise from s 6(a) and (c) of the Act.

126 As I earlier pointed out, the trial judge accepted unchallenged expert evidence that persons with intellectual difficulties would be disadvantaged by the use of BSWAT in comparison with persons without intellectual disabilities. Necessarily, this broad comparator group includes disabled persons without intellectual disabilities, which was the more narrowly defined comparator group relied on by the appellants. It includes people who, like the intellectually disabled, work in ADEs.

127 On the evidence to which I have referred, disabled people who are not intellectually disabled are more likely to achieve results on BSWAT to their advantage, than intellectually disabled people like Mr Nojin and Mr Prior. That is so in two senses. First, they are not at the same risk of having their productivity score effectively reduced through an inability to score at least as well on competencies. Secondly, they have the realistic possibility of enhancing their productivity score, if it is low due to a physical disability, by demonstrating knowledge and understanding which is not reflected in actual work performance. In either case, their prospects of achieving higher pay are enhanced. By contrast, as the evidence in this case (including the evidence about Mr Nojin and Mr Prior) clearly shows, the prospects for intellectually disabled people are worse because they cannot take advantage of either aspect available to disabled people without intellectual disabilities.

128 In my view, the case for the present appellants falls within the principles discussed in *Clarke and Hurst v Queensland* (2006) 151 FCR 562 (*Hurst*). Each of those cases considered a requirement that a deaf child receive education in a normal school environment without the assistance of an Auslan interpreter. It was possible for each to undertake their education in that way, but they suffered serious disadvantage as a result. In *Hurst* the Full Court referred to statements by Madgwick J, the primary judge in *Clarke*, as follows (at [119]):

119 ... Madgwick J found that Jacob could not meaningfully participate in

classroom instruction without Auslan interpreting support and would have faced serious disadvantages that his hearing peers would not face. His Honour dealt with this issue where he stated (at [49]):

The second submission, that Jacob could comply with the model, implicitly and, in my view, correctly concedes that compliance must not be at the cost of being thereby put in any substantial disadvantage in relation to the comparable base group. In my opinion, it is not realistic to say that Jacob could have complied with the model. In purportedly doing so, he would have faced serious disadvantages that his hearing classmates would not. These include: contemporaneous incomprehension of the teacher's words; substantially impaired ability to grasp the context of, or to appreciate the ambience within which, the teacher's remarks are made; learning in a written language without the additional richness which, for hearers, spoken and "body" language provides and which, for the deaf, Auslan (and for all I know, other sign languages) can provide, and the likely frustration of knowing, from his past experience in primary school, that there is a better and easier way of understanding the lesson, which is not being used. In substance, Jacob could not meaningfully "participate" in classroom instruction without Auslan interpreting support. He would have "received" confusion and frustration along with some handwritten notes. That is not meaningfully to receive classroom education.

129     The Full Court went on in *Hurst* to say (at [125]):

125 ... A hearing impaired child may well be able to keep up with the rest of the class, or "cope", without Auslan. However, that child may still be seriously disadvantaged if deprived of the opportunity to reach his or her full potential and, perhaps, to excel.

130     In the present cases, Mr Nojin and Mr Prior could certainly submit to an assessment which used BSWAT, but on the unchallenged, accepted, expert evidence their opportunity and ability to obtain a higher wage commensurate with their actual work, productivity and applied job skills was reduced by their intellectual disability. In my view, to adopt the language in *Hurst*, each was "deprived of the opportunity to reach his ... full potential".

131     In each case, the productivity scores obtained by Mr Nojin and Mr Prior were effectively reduced by taking into account their competency scores. It is not to the point that in Mr Nojin's reassessment there was only a modest difference between his productivity and competency scores. The fact that disabled workers without intellectual disabilities might enhance their overall scores by showing greater competency than productivity, whereas an intellectually disabled worker was unlikely to be able to do so, shows the disadvantage to which intellectually disabled workers were subject by the use of BSWAT.

132     In my view, this consequence is not ameliorated by the fact that over 75% of persons employed by ADEs have intellectual disabilities. 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.

133     In my view, the appellants have made out a case satisfying the requirements of s 6(a) and (c) of the Act. The remaining requirement is that in s 6(b), namely whether the requirement or condition imposed on Mr Prior and Mr Nojin was "not reasonable having regard to the circumstances of the case".

*Reasonableness*

- 134     This is a more difficult question. In the end, after considerable reflection, I have come to the view that, despite the widespread support for its use, assessment of the wages of Mr Nojin and Mr Prior using BSWAT was not reasonable. There are four principal reasons for my conclusion.
- 135     Firstly, the regime established by the award required a comparison to be made with the rate of pay for a Grade 1 worker under the award. That comparison could not leave out of account either the nature of the work for which the Grade 1 rate was fixed or the nature of the work being done by the person whose wage was being assessed. 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.
- 136     In my view it is no answer to these concerns to postulate that Grade 1 workers are assumed to have the necessary capacities or competencies, without which they would not have been employed at all. Similarly, those who work in ADEs must be assumed to be sufficiently suited to work in that environment. In the case of Mr Nojin and Mr Prior there was no attempt made to suggest that their contribution should be devalued or discounted because of any actual lack of capacity or competence to make an appropriate contribution, consistent with their disabilities. The introduction of some further measure to assess their contribution in some less direct way receives no support, in my view, from the proposition that BSWAT only assesses a basic level of competence in a work environment taken for granted in the case of a Grade 1 worker.
- 137     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 with which they are, on the expert evidence, more likely to have difficulty than other people, whether disabled or not. In my view, imposing such a requirement upon intellectually disabled workers in the ADE environment, when that subjects them to an accepted disadvantage, is another indication of lack of reasonableness.
- 138     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. Under the award, the comparison must commence with the Grade 1 rate of pay. The Grade 1 rate of pay cannot be divorced in this comparative exercise from the work (and the nature of that work) for which the rate of pay is fixed, and which is specifically identified by the award itself in Schedule A. The comparison should not begin with a less definite assumption about “core competencies” or “industry competencies” derived from training packages or so-called “industry” standards. 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. As the award states the essential characteristics for which the rate of pay is to be fixed (by referring to Grade 1 work) the choice of a measurement tool which addresses other issues must be adequately justified. 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.

139 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.

140 I would find that the appellants had made out a case to satisfy s 6(b) of the Act.

### **Conclusions to this point**

141 I accept that BSWAT is skewed against intellectually disabled workers. The preponderance of the evidence was to that effect. The findings of the trial judge are to that effect. That feature of BSWAT has the consequence, in my view, that intellectually disabled workers are disadvantaged by comparison with other disabled workers.

142 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. 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.

143 The award makes clear what the Grade 1 rate of pay is fixed for. The rate of pay for a disabled worker is to be fixed by reference to that rate and as a percentage of it. The Grade 1 tasks are, by definition, routine, basic, repetitive and involve minimal judgment. On the evidence, neither the Grade 1 rate, nor persons employed on that rate, are assessed by reference to any notion of competencies of the kind measured by BSWAT.

144 In the case of disabled workers, some basic threshold of suitability for employment has, it must be assumed, already been crossed. Accordingly, it has been accepted that the worker in question, whether disabled or not, whether

employed in an ADE or in open employment, can work in a suitably safe way and communicate in a fashion adequate for the tasks to be performed in the environment in which they are to be performed. In those circumstances, the very nature of the work to be done, even by a non-disabled worker seems to leave little room for theorising about some of the competencies examined in BSWAT. Mr Wade's evidence shows how there may easily be a disconnect between the BSWAT assessment and reality even in those areas. Mr Prior's circumstances demonstrate the inutility of a theoretical construct which is inappropriate to his actual circumstances and the work he actually does.

145     In my view there was no persuasive evidence that, in the case of either Mr Nojin or Mr Prior, testing for competencies added meaningfully to an examination of their output in their allotted tasks. At a more general level, testing for competencies at this level of employment faces many other questions. It is not used at all in open employment at this level. If used, it would suggest a wage reduction for non-disabled workers at the Grade 1 level. Both those matters raise real questions about whether it is a realistic assessment. The second, at least, suggests that it is not. Indeed, it gives considerable support to the notion that the test is fixed (deliberately perhaps) at too high a level.

146     There is no doubt that BSWAT has support at many levels. In my view, that is not sufficient to render reasonable the requirement imposed on Mr Nojin and Mr Prior that any increase in their wage rate could only occur through the use of BSWAT, and not by a more direct examination of their actual work. There seems to be no practical need to borrow from industry standards and training packages a range of competencies, core or otherwise, when making the assessment of whether a disabled worker should get all, or some lesser percentage, of the wage fixed for a worker at the lowest work grade in the award. Such workers are not themselves assessed that way. That is because it would be irrelevant to their real work value to do so. It was equally irrelevant to the real work value of Mr Nojin and Mr Prior. They were subjected to a process which produced an assessment score that did not fairly relate to what they actually did. The assessment made did not provide a comparison with a Grade 1 worker. It provided a comparison with a theoretical idea, which had been adjusted so as to be not too easily attained, rather than a straightforward comparison with the efforts and output of someone working at the Grade 1 level — ie a comparison which related to what the Grade 1 rate of pay was fixed for. Such a comparison occurs for disabled people in open employment. BSWAT, in my view, does not make such a comparison — it does something else.

147     It is not a sufficient answer to say that intellectually disabled people can do the test like everybody else, and may do their best. Intellectually disabled people are placed, at the outset, at a disadvantage which prevents effective compliance. They are not able to comply in substance, regardless of the outward form.

148     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. The wages are intended to represent a relationship to the wage of a Grade 1 worker. Having regard to the nature of the tasks for which the Grade 1 rate is fixed, 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. The practical consequence of BSWAT appears to be that wages are reduced below the level that would otherwise be applied. 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.

149 In my view that approach is not reasonable.

#### Notice of contention

150 I would not accept the defence advanced by the notice of contention.

151 In *Clarke, Sackville and Stone JJ* referred with approval to observations made by Finkelstein J in *Richardson v ACT Health and Community Care Service* (2000) 100 FCR 1 at [24] and said at [129]:

Section 45 is primarily designed to make lawful affirmative conduct, “reasonably intended” to provide services or facilities to disabled people that are not available to the general community or to provide benefits to particular classes of disabled persons to meet their special needs, even though the benefits are not made available to other disabled people: *Richardson v ACT Health Services* at [25].

152 In my view the use of BSWAT did not fall into this category. Nor was it something that was reasonably necessary to permit the employment of either Mr Nojin or Mr Prior in their respective ADEs. Indeed, Mr Nojin was employed before the use of BSWAT commenced and had earlier had the value of his work assessed in a different way. Use of BSWAT only commenced in 2004. Use of BSWAT represented a choice by each of Mr Nojin and Mr Prior's ADE employers from possible alternatives to measure remuneration in existing employment. There was no evidence that the employment of either Mr Nojin or Mr Prior in fact depended on the use of BSWAT.

153 To the contrary, there was evidence that Mr Nojin had initially declined to be assessed using BSWAT. That election did not affect his continued employment and there was no suggestion that it was thereby at risk. The consequence for him was that he had no opportunity to seek an increase in remuneration because his employer had decided that it was only through the use of BSWAT that an increase in remuneration could be justified and made available.

154 Under the relevant award arrangements that applied to the employment of Mr Nojin, Mr Prior and others in ADEs, a variety of possible methods were approved for measuring the work value of disabled employees. Use of an approved method was an important ingredient in securing support by way of Commonwealth funding, but there was no suggestion in the present case that either of the ADEs in question would lose funding, or that Mr Nojin or Mr Prior would lose their employment, if BSWAT was not used to measure their work value.

155 In the present case, the trial judge, after observing that it was not strictly necessary for him to deal with whether s 45 applied in light of his earlier conclusion that there had been no indirect discrimination, went on, appropriately, to make clear his view that s 45 did not apply in the present case. The trial judge concluded that 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.)

156 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.)

157 In my view these conclusions were correct, and the notice of contention should be dismissed.

#### Orders

158 At first instance both declarations and orders for compensation were sought, but on the appeal the relief sought was confined to declaratory relief.

159 I would uphold the appeal and make a declaration in the terms sought. Costs of the appeal should follow that event. The appellants also sought an order for their costs of the trial. I would make that order.

#### Flick J.

160 In February 2009 two separate amended claims under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) were filed. One claim was made by Mr Gordon Prior; the other was made by Ms Elizabeth Nojin "on behalf of Michael Nojin". Both claims alleged unlawful discrimination contrary to the *Disability Discrimination Act 1992* (Cth).

161 Mr Prior has a vision impairment which has resulted in him being classified as legally blind, although he retains some vision. He also has a mild to moderate intellectual disability. At the relevant time he was employed by Stawell Intertwine Services Inc. Mr Nojin suffers from cerebral palsy and has a moderate intellectual disability. He also has epilepsy causing frequent seizures of the kind known as "petit mal". At the relevant time he was employed by Coffs Harbour Challenge Inc.

162 Claims of unlawful discrimination were made against their respective employers. Each Amended Application sought declaratory relief alleging unlawful discrimination in contravention of s 15(1)(c), (2)(a) and/or s 24 of the *Disability Discrimination Act*. The Commonwealth was alleged to have caused, induced or aided in the discrimination by (*inter alia*) approving the Business Services Wage Assessment Tool ("BSWAT") for use in determining the wages of disabled persons.

163 In very summary form, BSWAT has been described as a "hybrid tool" that measures a worker's competency and productivity in order to determine relative rates of pay for disabled workers. An initial draft of BSWAT was published in 2002. Further reports and assessments were carried out. Ultimately in August 2005, the Australian Industrial Relations Commission allowed a variation of what was (until that decision) known as the *Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001* to include BSWAT as an authorised wage assessment tool in business services.

164 Wage assessments for both Messrs Nojin and Prior were carried out in accordance with BSWAT.

165 The two proceedings were heard together. On 16 September 2011 the primary judge published his reasons and made orders dismissing both claims: *Nojin v Commonwealth* (2011) 283 ALR 800. On 25 November 2011, the primary judge further ordered that there be no order as to costs.

166 The Commonwealth of Australia was a respondent to both proceedings. The Commonwealth has agreed that if the employers are liable for discrimination it will bear the liability under s 122 of the *Disability Discrimination Act*.

167 Both Messrs Prior and Nojin now appeal.

168 The detailed and careful recitation of the facts giving rise to these appeals by the presiding judge renders it unnecessary to separately engage in that exercise: at [18]-[53]. The evolution of BSWAT has also been set forth in considerable detail in the reasons of the primary judge: *Nojin* at [40]-[73]. It need not be repeated here.

169 The presiding judge and her Honour Justice Katzmman are of the view that the appeals should be allowed. Concurrence cannot be expressed with that conclusion. Short reasons should be provided for this contrary position.

#### **The *Disability Discrimination Act***

170 The principal provisions of the *Disability Discrimination Act* of relevance to these appeals are ss 3, 6, 15 and 45.

171 The principles to be applied when considering these provisions were not put in issue. What was put in issue was the application of those principles to the facts.

172 Section 3 provided at the relevant time that the objects of the Act are (*inter alia*) “to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of … work”. The objects of the Act, in the context of appeals such as the present, assume importance. The “principle that requires that the particular provisions of the Act must be read in the light of the statutory objects”, it has been said, “is of particular significance in the case of legislation which protects or enforces human rights”: *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 per Mason CJ and Gaudron J.

173 Section 5 deals with what is commonly referred to as direct “disability discrimination” and s 6 deals with “indirect disability discrimination”. The “major difference” between the two forms of discrimination “is that in the case of direct discrimination the treatment is on its face less favourable, whereas in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable”: *Waters* at 392 per Dawson and Toohey JJ.

174 The appellants relied upon s 6 which provided at the relevant time as follows:

##### Indirect disability discrimination

For the purposes of this Act, a person (*discriminator*) discriminates against another person (*aggrieved person*) on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

- (a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and
- (b) which is not reasonable having regard to the circumstances of the case; and

(c) with which the aggrieved person does not or is not able to comply.

175 Split into its constituent elements, s 6 requires a person who claims “indirect discrimination” to:

- identify a “requirement or condition”

and to thereafter prove that the “requirement or condition” is one which:

- a “substantially higher proportion of persons without the disability comply or are able to comply”;
- is “not reasonable”; and
- the person “does not or is not able to comply” with.

176 The identification of the “requirement or condition” of which an aggrieved person complains is central to the resolution of any complaint of “indirect discrimination”. The phrase “requirement or condition” is one which should be construed broadly; but the “requirement or condition” alleged must nevertheless be identified with some degree of precision: cf *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165. Dawson J there said of a comparable phrase contained within s 24(3) of the *Anti-Discrimination Act 1977* (NSW) (at 185):

Section 24(3), which defines indirect discrimination, has a much wider application and covers discrimination which is revealed by the different impact upon the sexes of a requirement or condition. The starting point with s 24(3) must be the identification of the requirement or condition. Upon principle and having regard to the objects of the Act, it is clear that the words “requirement or condition” should be construed broadly so as to cover any form of qualification or prerequisite demanded by an employer of his employees ... Nevertheless, it is necessary in each particular instance to formulate the actual requirement or condition with some precision.

See: *Banovic* at 195-196 per McHugh J. See also: *Waters* at 406-407 per McHugh J; *Catholic Education Office v Clarke* (2004) 138 FCR 121 at [103] per Sackville and Stone JJ. Similarly, in *New South Wales v Amery* (2006) 230 CLR 174 at [128] Kirby J (albeit in dissent) noted in the context of the indirect discrimination provision contained in the *Anti-Discrimination Act* that “it is necessary to identify with precision what the relevant ‘requirement’ or ‘condition’ is”. See also: *Sievwright v Victoria* [2012] FCA 118 at [174] per Marshall J.

177 In *Waters*, Dawson and Toohey JJ also referred to the need for the “requirement or condition” to be formulated with “some precision”: at 393. Their Honours went on to further note that a party resisting a claim of discrimination cannot define the “requirement or condition” in such a manner as to permit it to “evade” liability: at 393-394. The claimants in that case claimed that the Public Transport Corporation had discriminated against them by removing conductors from some trams and introducing a system of “scratch tickets”. The disabilities of the claimants made it impossible or at least exceedingly difficult to use the scratch tickets. Indirect discrimination was claimed pursuant to s 17 of the *Equal Opportunity Act 1984* (Vic). The claims of discrimination were upheld. After referring to the earlier observations in *Australian Iron & Steel* Dawson and Toohey JJ went on to conclude (at 393-394):

We do not think that there can be any doubt that the introduction of the scratch ticket imposed a requirement or condition that it be used in order to travel on trams and indeed the contrary was not contended by the respondent before this Court. Nor do we think that it unduly strains the language of s. 17(5) to say that

the withdrawal of conductors from trams imposed a requirement or condition that passengers travel on trams without the assistance of a conductor. The Board so found and we think it was open to it to make those findings.

The respondent, however, contended that the service provided by it was driver-only trams and that there was, therefore, no relevant requirement or condition imposed with respect to the use of that service. It is true that for something to be a requirement or condition in relation to a matter it must be separate from that matter. However, whether such a requirement or condition is in fact separate from the matter to which it relates will clearly depend upon how the matter is described and how the requirement or condition is characterized. Given that the legislation should receive a generous construction, we do not think that the respondent can evade the implications of s. 17(5) by defining the service which it provides so as to incorporate as part of that service what would otherwise be a requirement or condition of the provision of that service. At all events the respondent ought not be allowed to do so where the service previously provided by it was continued, but with alterations which might be characterized as the imposition of different requirements. In any event the description of the service provided by the respondent and the characterization of the requirements or conditions on which the service is provided by the respondent are questions of fact to be determined by the Board and it was clearly open to the Board to define the service provided by the respondent as public transport and to characterize the removal of conductors from some trams as imposing on users of those trams a requirement or condition that they use them without the assistance of conductors.

- 178 When considering the comparable provision to s 6(b) of the *Disability Discrimination Act* which was in issue in *Waters* at 409, McHugh J observed:

... Whether “the requirement or condition is not reasonable” (s. 17(5)(c)) does not depend on the notion that the purpose of the term “reasonable” is to limit some general concept of discrimination which exists independently of s. 17(5). The reasonableness of the “requirement or condition” is itself part of the definition of discrimination in situations falling within s. 17(5) ...

In the context of s 5(2) of the *Sex Discrimination Act 1984* (Cth) (the counterpart indirect discrimination provision in that Act), Sackville J had observed that “the non-reasonableness of the requirement or condition is itself part of the definition of discrimination”: *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78 at 111. Section 6(b) of the *Disability Discrimination Act* should be construed in the same manner.

- 179 When considering s 6(b) in *Catholic Education Office*, Sackville and Stone JJ summarised the principles to be applied as follows:

[115] The appellants did not submit that the primary judge had erred in stating the principles to be applied when determining whether a requirement or condition is not reasonable having regard to the circumstances of the case ... As his Honour remarked, the principles are now well settled ... They include the following:

- (i) The person aggrieved bears the onus of establishing that the condition or requirement was not reasonable in the circumstances ...
- (ii) The test of reasonableness is an objective one, which requires the Court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the condition or requirement, on the other ... Since the test is

objective, the subjective preferences of the aggrieved person are not determinative, but may be relevant in assessing whether the requirement or condition is unreasonable ...

- (iii) The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience ... It follows that the question is not whether the decision to impose the requirement or condition was correct, but whether it has been shown not to be objectively reasonable having regard to the circumstances of the case ...; and
- (iv) The Court must weigh all relevant factors. While these may differ according to the circumstances of each case, they will usually include the reasons advanced in favour of the requirement or condition, the nature and effect of the requirement or condition, the financial burden on the alleged discriminator of accommodating the needs of the aggrieved person and the availability of alternative methods of achieving the alleged discriminator's objectives without recourse to the requirement condition ... However, the fact that there is a reasonable alternative that might accommodate the interests of the aggrieved person does not of itself establish that a requirement or condition is unreasonable ...

- [116] In addition to reminding himself of these principles, the primary judge acknowledged (at [53]), correctly, the need to act with "an appropriate degree of diffidence" in assessing the actions of an educational institution in respect of which there may be a division of opinion ...

In *Victoria v Turner* (2009) 23 VR 110 at [100] Kyrou J also summarised the principles to be applied when considering the comparable provisions in the *Equal Opportunity Act 1995* (Vic). On the question of what constituted the "circumstances of the case", his Honour there said:

- (d) The tribunal must consider all the circumstances of the case in determining the reasonableness of the condition. Those circumstances include:
  - (i) all the circumstances set out in s 9(2) of the EO Act, which are not exhaustive;
  - (ii) the position of the respondent as well as the complainant;
  - (iii) the financial or economic circumstances of the respondent, including the cost of imposing the condition and the cost of not imposing it;
  - (iv) the availability of an alternative condition which is equally efficacious, and its cost;
  - (v) the presence of a logical and understandable basis for the condition; and
  - (vi) where the respondent is a government or statutory body, policy objectives.

180      The identification of the "requirement or condition" is thus a question of fact; so too, is the question of whether a "requirement or condition" has been imposed. The question as to whether any "requirement or condition" is "reasonable" is also a question of fact. The onus of proving that a "requirement or condition" is "unreasonable" lies upon those making the claim of discrimination: *Waters* at 411 per McHugh J.

181      Section 15 of the *Disability Discrimination Act* deals with "discrimination in employment" and provided at the relevant time as follows:

**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 or disability or any of that other person's associates:
  - (a) in the arrangements made for the purpose of determining who should be offered employment; or
  - (b) 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 or a disability or any of that employee's associates:
  - (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.
- (3) Neither paragraph (1)(a) nor (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's disability, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.
- (4) Neither paragraph (1)(b) nor (2)(c) renders unlawful discrimination by an employer against a person on the ground of the person's disability, if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:
  - (a) would be unable to carry out the inherent requirements of the particular employment; or
  - (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer.

182      Section 45 of the *Disability Discrimination Act* provided at the relevant time as follows:

**Special measures**

This Part does not render it unlawful to do an act that is reasonably intended to:

- (a) ensure that persons who have a disability have equal opportunities with other persons in circumstances in relation to which a provision is made by this Act; or
- (b) afford persons who have a disability or a particular disability, goods or access to facilities, services or opportunities to meet their special needs in relation to:
  - (i) employment, education, accommodation, clubs or sport; and
  - (ii) the provision of goods, services, facilities or land; or
  - (iii) the making available of facilities; or
  - (iv) the administration of Commonwealth laws and programs; or
  - (v) their capacity to live independently; or

- (c) afford persons who have a disability or a particular disability, grants, benefits or programs, whether direct or indirect, to meet their special needs in relation to:
- (i) employment, education, accommodation, clubs or sport; or
  - (ii) the provision of goods, services, facilities or land; or
  - (iii) the making available of facilities; or
  - (iv) the administration of Commonwealth laws and programs; or
  - (v) their capacity to live independently.

183 When considering conduct which would otherwise be unlawful discriminatory conduct, care must be taken to ensure that s 45 is not applied in a manner which undermines the object and purposes of the *Disability Discrimination Act*. In *Richardson v ACT Health and Community Care Service* (2000) 100 FCR 1 Finkelstein J made the following general observations:

- [23] [I]t is as well to direct some comments to the approach that a court should adopt when dealing with legislation such as the *Discrimination Act*. This type of enactment is concerned with human rights and should be given a construction that furthers its fundamental purpose of eliminating discrimination and advancing equality. No strict construction is required. If the grammatical meaning of the words used does not further the objects of the enactment, then a strict approach to construction must be shunned.
- [24] As regards the exceptions, however, a different approach is desirable. An expansive interpretation is often likely to circumvent or threaten the underlying object of the legislation. It follows that a strict, and not a liberal, approach is usually required. This will ensure that the overall dominant purpose of the Act is put into effect.

Heerey J agreed with Finkelstein J. So much seems to have been also accepted by Sackville and Stone JJ in *Catholic Education Office*. Their Honours there observed in respect to s 45:

- [129] Two points should be made about s 45. The first is that the section should receive an interpretation consistent with the objectives of the legislation. As Finkelstein J observed in *Richardson v ACT Health and Community Care Services* (2000) 100 FCR 1 at [24], an expansive interpretation of an exemption in anti-discrimination legislation may well threaten the underlying object of the legislation. Section 45 is primarily designed to make lawful affirmative conduct, “reasonably intended” to provide services or facilities to disabled people that are not available to the general community or to provide benefits to particular classes of disabled persons to meet their special needs, even though the benefits are not made available to other disabled people: *Richardson v ACT Health Services* at [25].
- [130] The second point is that s 45 of the DD Act refers to an act that is “reasonably intended” to achieve certain objectives. In this respect, it differs, for example, from s 82(1) of the *Equal Opportunity Act 1995* (Vic), considered in *Colyer v Victoria* [1998] 3 VR 759, a case relied on by the appellants. Section 82(1) of the Victorian Act provided an exemption for certain conduct “designed” to meet the special needs of intellectually disabled people. It was held that “designed” refers to the subjective plan or intent of the decision-maker: see at 773-774, per Kenny JA, with whom Brooking and Callaway JJA agreed. However, Kenny JA noted (at 771) that s 45 of the DD Act incorporates an objective criterion, which requires the Court to assess the suitability of the measure

taken to achieve the specified objectives. See, too, *Richardson v ACT Health Services* at [26] (construing s 27 of the *Discrimination Act 1991* (ACT)).

184 Some reservation is expressed as to whether s 45 of the *Disability Discrimination Act* is properly characterised as an “exception” as opposed to but part of the legislative scheme. But no such reservation is expressed with the proposition that s 45 should be given an interpretation which promotes the objects and purposes of the Act. Section 45, it is respectfully considered, is a provision which should be construed according to its terms — and not with a predisposition to construing it “strictly” whilst construing provisions such as s 6 “broadly”.

#### **The requirement or condition — as pleaded**

185 For the purposes of s 6(a) of the *Disability Discrimination Act*, both Mr Prior and Mr Nojin identified in their respective Statements of Claim the “conditions” within BSWAT which were relied upon.

186 Notwithstanding the identification of the “requirement or condition” in each of the pleadings, there was debate as to what were in fact the “conditions” relied upon to form the basis of the indirect discrimination allegations. The written submissions of both parties exchanged competing views as to whether the so-called “conditions” relied upon had been sufficiently identified. Senior Counsel for the Commonwealth sought to draw comparisons between different formulations of the “conditions” advanced from time to time on behalf of the appellants. Whatever the “difficulty”, the case is to be resolved by reference to the “conditions” identified in the Statements of Claim.

187 Mr Prior’s Statement of Claim identified the “conditions” relied upon as follows:

At all material times, the conditions for higher assessments of productivity and competence of a worker under BSWAT included conditions that:

(a) the worker obtain a sufficiently high “Competency” assessment in respect of:

(i) four units of “core competency”; and

(ii) up to four units of “industry-specific competency” agreed between assessors and SIS;

and subject to a proviso or practice that if less than four industry-specific competencies were agreed then a nil score should be recorded to the extent of the shortfall (“the *First Condition*”); and

#### **Particulars**

The First Condition was set out in, and the practice is to be inferred from, the table titled “Competency Assessment Results” on page 14 of the Initial Assessment and the Reassessment referred to below.

(b) the worker obtain a sufficiently high “Competency” assessment by recording correct answers to every question in any Competency unit in order to obtain a “Competent” rating in respect of that unit, and otherwise that a “Not Yet Competent” rating be recorded in respect of that unit (“the *Second Condition*”).

#### **Particulars**

The Second Condition was set out in, and the practice is to be inferred from, the four “core competency checklists” on page 14 of the Initial Assessment and the Reassessment.

188 Mr Nojin relied upon conditions in substantially identical terms and also upon a third “condition” which was articulated as requiring:

- (c) the worker achieve a sufficiently high “Productivity” assessment, where Productivity was assessed by measuring:
  - (i) the number of units the worker could produce in a set time, benchmarked against the number of units a non-disabled co-worker, supervisor, or another worker with a disability could produce in the same time; or
  - (ii) the time it took the worker to produce a given number of units or complete the task (or up to five of the tasks) which the worker performed in the employment, benchmarked against the time taken by a non-disabled co-worker, supervisor, or another worker with a disability who was able to produce the units or perform the particular task to the expected standard; (“the *Third Condition*”).

Particulars

The Third Condition is described in the Pearson Report at p.4.5-10. It was applied during Michael’s BSWAT assessment as described below.

189 In order to obtain higher wage rates, both Mr Prior and Mr Nojin were required to satisfy the conditions for higher assessments of productivity and competence under BSWAT.

190 In the case of Mr Prior it was alleged that he was not able to comply with the First Condition. His case was that he was unable to achieve a higher score in his Competency assessment because his limited work capacity meant that four industry-specific competencies were not identified for the purposes of his assessment. A “nil” score was thus entered in respect of these competencies — lowering his score overall. He also maintained that a substantially higher proportion of persons with his disabilities would not be able to comply with the Second Condition because those disabilities prevented him from understanding the questions put and thus prevented him from demonstrating his competence in respect of those matters.

191 In the case of Mr Nojin it was alleged that he could not comply with the First Condition on the same basis that Mr Prior could not — his limited work capacity meant that four industry-specific competencies were not identified for his assessment. With respect to the Second Condition it was argued that his intellectual disability rendered him unable to demonstrate his competence regarding the matters he was questioned on. It was said that “[t]he circumstances of the questioning aggravated his poor social and communication skills and he was impaired in his ability to respond appropriately to the questions”. He similarly maintained that he was unable to comply with the Third Condition because the circumstances of his assessment caused him to be “stressed” and “his motor skills, in particular his fine motor skills, were detrimentally affected”.

**Compliance with section 6(a)?**

192 The primary judge concluded that for the purposes of s 6(a) of the *Disability Discrimination Act* both Mr Prior and Mr Nojin were able to comply with the requirement or conditions imposed by BSWAT. Their complaint, according to the primary judge, was that the results of applying the conditions were disadvantageous to them if compared to a different method of assessment. The primary judge reached this conclusion as follows:

[81] The possibility that the definition in s 6 of the Disability Discrimination Act can be applicable beyond the realm of general requirements or conditions imposed on an entire class of persons, with and without disabilities, must be approached with caution. If a disabled person is the only person required to comply with a particular requirement or condition, because it is not applied to any other person, there is no real comparator group, only a notional one. Similarly, if the only people required to comply with a particular requirement or condition are people all of whom are disabled, there is no real comparator group for the purpose of s 6(a). In the present case, the allegation is that the requirement or condition is applicable to all disabled people, not to non-disabled people. The BSWAT is used only for the assessment of wages of disabled employees. A comparison with non-disabled people would therefore be theoretical only, because non-disabled people are not required to comply with any requirement or condition that is part of the BSWAT. The suggested comparator group is therefore said to be disabled people without intellectual disabilities. In their written submissions, counsel for Mr Nojin and Mr Prior characterised the “competency” requirements of the BSWAT as operating “to the disadvantage of supported employees with intellectual disabilities, relative to supported employees who are not intellectually disabled”. This proposition can be accepted, but it is difficult to treat as a requirement or condition something selected from the BSWAT, without regard to the impact of the BSWAT as a whole. A person who is physically disabled might score well in relation to competencies, but be comparatively unproductive, because of his or her physical disability. The comparison simply on the basis of competencies is an unreal comparison, in circumstances where the very purpose of the BSWAT as a whole is to determine wage relativities among disabled employees with physical, intellectual and other disabilities, or various combinations of disabilities. The analysis does not lead to the conclusion that testing for competencies, testing by question and answer, and “all or nothing” evaluation involved any requirement or condition.

[82] The only requirement or condition with which Mr Nojin and Mr Prior were required to comply is that their wage levels be determined by assessment using the BSWAT. They were able to comply with that requirement or condition. If the results were disadvantageous to them, when compared with people who did not have their disabilities, or when compared with what they might have achieved using a different method of assessment, this did not involve any failure of theirs to comply with any requirement or condition. The elements of paras (a) and (c) of the definition of “disability” in s 6 of the Disability Discrimination Act have not been established in these cases, because it has not been established that there was any requirement to comply with any requirement or condition.

Contrary to the decision of the primary judge, it is respectfully considered that the “element” identified in s 6(a) may well have been satisfied by both Messrs Nojin and Prior. But it is unnecessary to reach a final conclusion.

193      For the purposes of s 6(a), the “condition[s]” relied upon are those which were pleaded.

194      It may also be accepted that there can be little doubt that the restricted vision possessed by Mr Prior affected any assessment which required him to read; there can also be little doubt that the intellectual disabilities suffered by both Messrs Prior and Nojin affected any assessment which required comprehension and/or abstract thought.

195 People with other disabilities, but without the disabilities of Messrs Prior and Nojin, may well score better when assessed against the “conditions” which impacted adversely upon Messrs Nojin and Prior.

196 Although it may be accepted that BSWAT was devised as a means of assessing people with a variety of disabilities, the language of s 6(a) is clear.

197 Section 6(a) directs attention to a “requirement or condition”. When the conditions identified in the Statements of Claim are applied to Messrs Nojin and Prior, they may well score less favourably than “a substantially higher proportion of persons” without their disabilities.

198 Contrary to the conclusion of the primary judge, such an approach does not involve any “artificiality”. The primary judge was obviously alive to the fact that any claim of indirect discrimination would have failed had Messrs Nojin and Prior alleged that the “requirement or condition” was the requirement to undergo BSWAT itself in order to have their wage levels assessed. The primary judge thus reasoned in part as follows:

[77] It could be said that each of Mr Nojin and Mr Prior was required to comply with a requirement or condition that he have his level of wages assessed by means of BSWAT. This was not the way in which the case was pleaded, or argued. The probable reason for this is that it could be demonstrated easily that each of Mr Nojin and Mr Prior was able to comply, and did comply, with that requirement or condition. Each underwent the assessment. Indeed, that requirement or condition is one with which any person in respect of whom a wage level needed to be determined could comply. Even if the end result were a very low percentage, the requirement or condition that there be an assessment would have been complied with. Because the purpose of the BSWAT is to distinguish between employees on the basis of their levels and kinds of disabilities, it must follow that compliance with a requirement or condition that the assessment take place is possible for every employee. The BSWAT is not in the nature of a test, with a pass mark or level that a person must attain in order to gain some benefit. It cannot be said that there is any particular level that a person must achieve in order to comply.

[78] No doubt for this reason, each of the cases is pleaded on the basis that there were two requirements or conditions, the assessment of competency and the use of question and answer to assess it (coupled with the requirement to give a correct answer to each element of a competency in order to be rated as competent for that competency), and that each of these was a requirement or condition “for higher assessments of productivity and competence”. Putting the case in this way has an air of artificiality. Compare *New South Wales v Amery* (2006) 230 CLR 174; 226 ALR 196; [2006] HCA 14, especially at [63]-[70] and [79]-[82] per Gummow, Hayne and Crennan JJ. Of course, achieving a higher score in the BSWAT assessment is a necessary step to attaining a higher level of remuneration. Nothing that Coffs Harbour Challenge or Stawell Intertwine did or failed to do imposed any requirement or condition on Mr Nojin or Mr Prior that they obtain higher levels of remuneration. They simply had their levels of remuneration assessed by means of the BSWAT. To treat the necessity of obtaining a higher score for that purpose as a requirement or condition of obtaining a higher score is to undermine the implicit assumption on which the case is based, that a system under which different levels of remuneration are applied to different employees, in accordance with the nature and severity of their respective disabilities.

[79] It is clear that persons with intellectual disabilities are more likely to have

difficulty demonstrating understanding of competencies, for the purposes of the BSWAT, than persons without intellectual disabilities. The expert evidence of Louise Boin, a clinical neuropsychologist, to this effect was unchallenged. It can also be accepted that each of Mr Nojin and Mr Prior could have achieved higher levels of wages if they had been assessed using a different method. If their productivity scores had been given 100% weighting, so that they were not dragged down by a low score, or a failure to score, in relation to competencies, the result would have been a higher percentage. Mr Prior was assessed in respect of productivity only, using the SWS, to determine his wage level, when he was employed by Stawell Dry Cleaners. The actual percentage he achieved is not a reliable guide to what he might have achieved if the SWS had been applied to him to determine his wage level at Stawell Intertwine, but it is clear that he had the capacity to achieve a higher percentage when tested on productivity only than when tested on productivity and competency. When their wage levels were assessed using the BSWAT, Mr Nojin and Mr Prior were given opportunities to demonstrate what they did not achieve on that method of assessment. It is incorrect to characterise what they did not achieve as a failure or inability to comply with a requirement or condition of attaining higher remuneration. The offer of an opportunity that may be considered inadequate is not necessarily the imposition of a requirement or condition. This proposition is supported by the amendments made to s 6 of the *Disability Discrimination Act* after the wage assessments of Mr Nojin and Mr Prior had been conducted, which extend the concept of inability to comply with a requirement or condition to inability to comply without “reasonable adjustments” being made for that purpose.

There is, with respect, nothing “artificial” in identifying particular requirements or conditions and determining the effect which those requirements or conditions have on persons who do not suffer the disabilities that Messrs Nojin and Prior experience. The “conditions” formed part of BSWAT; but their inclusion within BSWAT does not mean that they do not have the character of “conditions” for the purposes of s 6.

- 199 The application of the “conditions” relied upon by Messrs Nojin and Prior may well have resulted in each of them receiving a less favourable assessment than “a substantially higher proportion of persons” without their disabilities could obtain by reason of their ability to comply. It is possible that both Messrs Nojin and Prior could bring themselves within s 6(a).

#### **Not reasonable — section 6(b)**

- 200 But irrespective of whether or not Messrs Nojin and Prior could bring themselves within s 6(a), they failed to bring themselves within s 6(b)

- 201 The fact that a particular “requirement or condition” may “discriminate” against a complainant is obviously not sufficient to constitute “indirect discrimination” within the meaning of s 6. To fall within s 6 the “requirement or condition” must also be one which is “not reasonable having regard to the circumstances of the case”: s 6(b). In assessing whether a “requirement or condition” is “reasonable”, one of the “circumstances” which may be taken into account is the discriminatory effect of that “requirement or condition” — but that discriminatory effect is not sufficient in itself to bring a case within s 6.

- 202 In addition to the principles summarised by Sackville and Stone JJ in *Catholic Education Office*, it should be recalled that when considering whether a “requirement or condition” is “reasonable in the circumstances”:

- the term “reasonable” is a term which should be construed in a manner which promotes the object and purposes of the *Disability Discrimination Act*;
- in determining whether a “requirement or condition” is “reasonable”, it is for the Court itself to determine “reasonableness” — the views of experts and those who participated in the development of assessment tools (including BSWAT) may inform the conclusion, but those views are no substitute for the Court itself making up its own mind (cf *Rogers v Whitaker* (1992) 175 CLR 479 at 487-489 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ); and
- little guidance is provided as to how the “reasonableness” of a “requirement or condition” is to be assessed — other than the licence given by the legislature to have “regard to the circumstances of the case”. The reference to “the circumstances of the case” necessarily directs attention to the manner in which a “requirement or condition” operates in “the circumstances” of an individual case rather than a more abstract consideration of the reasonableness of the “requirement or condition” divorced from the particular context in which it is being applied. Whether this is a different approach to that adopted by Kyrou J in *Turner* was not addressed in the submissions of either the appellants or the respondent.

Presumably the construction of the term “reasonable” must recognise that:

- the manner in which the “requirement or condition” itself operates may include some matters which are favourable or unfavourable to a particular claimant and favourable or unfavourable to others subjected to the “requirement or condition”; and
- the “circumstances of the case” may give rise to matters which indicate that not only one conclusion is available — different people may well reach different conclusions.

The term “reasonable” accommodates the prospect that there may well be competing factors — each pulling an ultimate conclusion on the issue in different directions.

203     The primary judge expressed a similar approach to the interpretation of s 6(b): *Nojin* at [83]. The primary judge concluded that Messrs Nojin and Prior failed to establish that the “conditions” relied upon were “not reasonable” for the purposes of s 6(b). In so concluding the primary judge reasoned (in part) as follows:

[86] A circumstance of great weight in the present cases is the history of the development of the BSWAT, summarised in [40]-[73] above. The BSWAT has been developed specifically for the purpose of assessing the wages of disabled persons employed in ADEs. It has the approval of the Commonwealth. It has been endorsed by both the AIRC and the AFPC. It has been found to comply with Standard 9 of the Disability Services Standards. It has also been found to be in conformity with the Guide to Good Practice Wage Determination. Further, the BSWAT has received these endorsements with the support of the trade union that has had the carriage of applications to formalise and improve the methods of fixing, and the rates of, wages for employees with disabilities, the LHMU. The BSWAT is also supported by the trade union movement generally through the ACTU, employers generally, and employers in ADEs through ACROD. Although, from time to time, some of those supporting the BSWAT have

expressed reservations about aspects of it, their support has been consistent. Similarly, the opposition of advocates for the disabled to the BSWAT has been consistent. Informed opinion about the merits of the BSWAT is therefore divided. Where the issue is the reasonableness of elements of the BSWAT, it is difficult to conclude that the considered view of one side of a genuine debate should be rejected altogether.

- [87] Another important factor is the weight of opinion of consultants who have been involved in the development of the BSWAT. While it might be said that those who are principally responsible for the creation and refinement of the BSWAT have a vested interest in its continuance, and their views must be discounted accordingly, this criticism cannot be applied to the independent consultants Marshall and Pearson. Those consultants have given their approval to the BSWAT. Again, there have been reservations expressed about some aspects of it, but their support is given overall. In the case of independent consultants, there has been no expression of an opinion adverse to the BSWAT.

His Honour then went on to address particular aspects of the evidence and summarised his views as follows:

- [98] In summary, the BSWAT has been developed as a tool for performing the very task for which it was used in assessing the wage levels of Mr Nojin and Mr Prior. It is not possible to set aside the very considerable support the BSWAT has in the ADE sector, or the considered opinions of consultants who have been called upon to examine the BSWAT, or to prefer the equally legitimately-held views of those who disagree with that body of opinion. The determination of wage levels for employees in ADEs by a method involving assessment of competencies is appropriate. So is the assessment of those competencies by means of question and answer, as well as observation. The disadvantages of the BSWAT arising from the "all or nothing" approach to each competency and the subjective nature of the assessments do not outweigh these considerations to the point of making such requirements or conditions as the BSWAT imposes not reasonable. Section 6(b) of the *Disability Discrimination Act* does not call for perfection. A system less than perfect can nonetheless be reasonable in the circumstances of a case. I cannot find that the requirements or conditions said to be inherent in the application of the BSWAT in the present cases were not reasonable.

- 204        No appealable error is discernible in the primary judge's analysis of s 6(b).  
205        Little is to be gained by repeating the evolution of BSWAT. But some reference to its evolution is perhaps prudent as a means of underlining the intense research and consideration which has led to it being accepted as a means of assessing wage relativities amongst those with disabilities.  
206        Without being exhaustive, a number of reports (spanning a significant period of time) have addressed wage assessment methods for those with disabilities. One of those reports was a joint report published in 2000 by the Department of Family and Community Services and the Australian Council for the Rights of the Disabled. Recommendation 8 within that report was as follows:

That in employing people with disabilities with varying skill levels, that remuneration is linked to an individual's productivity and to an agreed industry-wide system for assessing general work competencies.

Another report, the *Business Services Wage Assessment Tool Post Implementation Review Consultation Paper* published in 2005, stated that BSWAT had been developed because "the Australian Government has encouraged Business

Services to adopt transparent and fair methods to pay award-based wages to employees who due to their disability cannot earn a full award wage". Reference was made to "separate trials [that] refined features of the BSWAT before its release". The original version of BSWAT apparently assessed "5 core competencies and 3 industry-specific competencies".

207 Further analysis of "wage assessment tools" was undertaken. A "Final Report" prepared by consultants for the Department of Family and Community Services was published in February 2005 and a further "Final Report" was also published by the same consultants in April 2006. The April 2006 report analysed a number of "wage assessment tools" and reported:

Information from the owners/developers and some users of nine wage assessment tools is documented in this report. Of the wage assessment tools identified, the most frequently used (based on owner estimates) are:

- BSWAT (used by 111 Business Services);
- Greenacres Association Competency Based Wages System (40 Business Services);
- Skillsmaster Wage Assessment Tool (20 Business Services);
- FWS Wage Assessment Tool (15 Business Services); and
- Yumaro Wage Assessment Tool (15 Business Services).

Clearly enough, there was no "wage assessment tool" which was universally employed. Also, clearly enough, it was recognised that each of the "wage assessment tools" were different from one another with respect to what was assessed and how those assessments took place. The report included the following table of comparisons (without alteration):

<b>Wage Assessment Tool</b>	<b>Key Difference or Similarity with the BSWAT (as identified by the tools' owners)</b>
<b>Civic Industries Supported Employees Wage Assessment Tool</b>	Higher emphasis on competency than productivity when compared with the BSWAT
<b>Elouera Association Wage Assessment Tool</b>	Uses the same calculation formula, Task Areas and Core Competencies as the BSWAT, although the competency items and questions are different. More similar to the earlier version of the BSWAT than the final version. Weightings for the Task Areas in the Elouera tool can be adjusted if required depending on the business, while those of the BSWAT are all weighted at 25%
<b>FWS Wage Assessment Tool</b>	The FWS tool multiplies competency and productivity scores compared with the BSWAT which adds them
<b>Greenacres Association Competency Based Wages System</b>	Higher emphasis on competency than productivity when compared with the BSWAT. Productivity measured against an average of peers, whereas the BSWAT uses able-bodied comparisons.
<b>Hunter Contracts Wage Assessment Tool</b>	Competency-based assessment. A key difference from the BSWAT is that productivity is not measured in the Hunter Contracts tool.
<b>Phoenix Society Wage Assessment Tool</b>	Competency-based assessment. A key difference from the BSWAT is that productivity is not measured.

<b>Wage Assessment Tool</b>	<b>Key Difference or Similarity with the BSWAT (as identified by the tools' owners)</b>
	Phoenix wage assessment is completed jointly by the employee, parent/ advocate, trainer and supervisor, whereas BSWAT is completed by external assessor.
<b>PHT Wage Assessment Tool</b>	PHT only measures productivity, whereas the BSWAT also measures some competencies.
<b>Yumaro Wage Assessment Tool</b>	Higher emphasis is on competency than productivity when compared with the BSWAT BSWAT assessment process appears more cumbersome and less cost effective than the Yumaro model but produces only minor differences in wage outcome.

Part one of the April 2006 report concluded as follows (without alteration):

#### 14. Conclusions

The wage assessment tools reviewed for this project all appear to satisfy the *Good Practice Guide to Wage Determination* Criteria when implemented according to the documented procedures for each tool. The *degree* to which each criteria is satisfied may vary from tool to tool.

Some of the tools have been developed in close consultation with unions and all have satisfied industrial relations requirements. Most also have documented evidence of compliance with Disability Service Standard 9.

Although we have been unable to obtain a consistent and reliable measure of wage outcome across agencies, quality audit reports, anecdotal information and the limited wage data that is available suggest that these alternative tools are delivering fair wage outcomes.

A defining feature of most of the reviewed wage assessment tools, when compared to the BSWAT, is an increased focus on competency assessment. In many cases, the Business Services using these tools have identified reasons why they consider the BSWAT would not be appropriate for their business and/or their employees.

Perhaps the most important conclusion from this research is that some flexibility is required to accommodate the diverse nature of the types of products and services produced by Business Services and the range in types of disabilities and support needs of their workforce populations. In other words, a single wage assessment tool, from those currently available, is not likely to meet the needs of all Business Services.

It is important that employees' rights to a fair and equitable wage are upheld and that the wage assessment processes used to determine wage outcomes are of a high standard. To this end, a requirement that such processes satisfy the *Good Practice Guide to Wage Determination* criteria is recommended. The documentation of specific performance indicators for each of these good practice criteria would assist in determining this compliance.

208 When considering the terms of s 6(b) of the *Disability Discrimination Act*, reference may also be made to the September 2004 application to the Australian Industrial Relations Commission to vary the *Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001*. One of the grounds of that application was:

To give effect to the Business Services Wage Assessment Tool which reflects the

effects of a disability on the productive capacity of employees engaged under the Award and objectively and transparently assess employees' wages accordingly.

The application was made by the Liquor, Hospitality and Miscellaneous Union. A hearing took place later in September 2004. The Disability Employment Action Centre participated in the hearing and expressed "a number of concerns" in respect to BSWAT. In approving the variation on 19 August 2005 the Commission, constituted by Commissioner Gay, recorded:

[3] By the amended application the Award is sought to be varied to include a range of wage assessment tools presently in operation and including the Business Services Wage Assessment Tool (BSWAT). The BSWAT is a result of several years work by the Department of Family and Community Services (the Department) and following trialling and much discussion within a development group which included the LHMU, the Australian Council of Trade Unions (ACTU) and stakeholder groups within the disability sector. All the tools set out in the award as varied have been approved by the Department as satisfying the relevant standards set for the sector. The undertaking from the LHMU to not unreasonably withhold consent in relation to a tool proposed to be added to the list has been reflected in the order ...

209 In light of the consideration which has been given to BSWAT, and the evolution of that assessment tool, it is difficult (with respect) to conclude that the decision of the primary judge was anything other than clearly correct.

210 The submissions on behalf of Messrs Nojin and Prior, at least at one stage, proceeded upon the basis that the comparison to be made for the purposes of s 6(a) was a comparison between the manner in which the identified "conditions":

- affected Messrs Nojin and Prior as compared to:
- other disabled persons who were not affected by the same disabilities as Messrs Nojin and Prior.

Once that comparison is accepted as the one to be applied, it was difficult for Messrs Nojin and Prior to establish that those "conditions" were anything other than "reasonable" for the purposes of s 6(b). At least at one point during oral submissions, Senior Counsel for the Commonwealth also accepted that this was the appropriate comparison.

211 Some aspects of BSWAT, and indeed the conditions in issue, worked to the "advantage" of some persons with particular disabilities and to the "disadvantage" of others. Even when applied to the same person, a person may score well on some aspects and poorly on others. The application of those "conditions" and the fact that uneven treatment or results occurred did not render the "conditions" relied upon "not reasonable". When compared to other disabled persons, albeit not persons who suffered the same disabilities, Messrs Nojin and Prior could not select those aspects of the test in respect to which they could expect to score well on and disregard the rest. Nor could other disabled persons pick and choose the criteria by reference to what they would like to have been assessed. When applied to all disabled persons neither the conditions relied upon — nor BSWAT as a whole — could be regarded as being "not reasonable".

212 The parties accepted that the "circumstances of the case" against which the

“conditions” were to be assessed included the fact that the assessment had to take place against the background of the “conditions” applying to all disabled persons.

213 But there was, with respect, a degree of “advocate’s flexibility” being deployed to the comparison to be made. At one point, Senior Counsel for the appellants suggested that a comparison was not to be made to other disabled persons, albeit not having the disabilities of Messrs Nojin and Prior, but may have been to “the able-bodied person under the award”. Senior Counsel for the Commonwealth suggested that it may not be as “simple” as comparing Messrs Nojin and Prior to other persons with different disabilities “because, as these two applicants demonstrate, many of these workers have a combination of physical and intellectual disabilities”. She did, however, accept that the comparison to be made was to “another person with one or more disabilities ... working in the same environment and being assessed under the same tool”. She further correctly submitted that the onus remained on the appellants to satisfy s 6(b) and that onus had not been discharged.

214 The “four principal reasons” relied upon by the presiding judge (at [134]-[140]), with great respect, have occasioned considerable reservation in reaching a contrary conclusion. Each of those reasons forms part of “the circumstances of the case” for the purposes of s 6(b). But they are just some of those “circumstances”. They do not dictate the conclusion that the “conditions” were “not reasonable” or that the primary judge erred. To a very large extent those four reasons are the inevitable consequence of applying BSWAT across the board to a variety of people who suffer from one or more disabilities.

215 For the purposes of s 6(b) of the *Disability Discrimination Act* it is thus concluded that no relevant appealable error is discernible in the reasons of the primary judge and, moreover, that the application of the two “conditions” to Messrs Nojin and Prior was “reasonable having regard to the circumstances”, those circumstances including:

- the evolution of BSWAT, and the extensive consideration given to the development of appropriate means to assess those with disabilities;
- the making by the Minister for Family and Community Services of a disability standard (particularly Standard 9: Employment conditions) in June 2002 and the approval of BSWAT as complying with the Disability Standard No 9 (see *Nojin* at [86]); and
- the approval of the variation to the *Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001* to include BSWAT in August 2005 by the Australian Industrial Relations Commission.

The fact that another assessment tool may have been used, it is considered, does not render the use of BSWAT “not reasonable”. And the fact that another assessment tool may have resulted in Messrs Nojin and Prior being assessed more favourably does not lead to a conclusion that the use of BSWAT was “not reasonable”.

#### **Section 45**

216 It is unnecessary to resolve the Commonwealth’s Notice of Contention relying upon s 45. But the argument can be briefly dealt with and rejected.

217 Senior Counsel for the Commonwealth in her written outline of submissions started from the proposition that “the Court must determine the actual intention

of the decision maker in engaging in the conduct constituting the discrimination ... Once the intention of the decision-maker is established, the Court must then assess whether the act was reasonably intended to provide the benefits referred to in s. 45".

218 If that starting point is accepted, the primary judge was correct in concluding that the evidence did not "justify findings that Coffs Harbour Challenge and Stawell Intertwine used the BSWAT with any intention of the kind required by s 45": *Nojin* at [101]. 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": at [100].

### Conclusions

219 It is thus concluded that the appeal should be dismissed. Irrespective of whether or not Messrs Nojin and Prior made out their claims pursuant to s 6(a) or (c), they failed to establish that the "requirements or conditions" relied upon were "not reasonable" for the purposes of s 6(b).

220 It is unnecessary to resolve the Commonwealth's Notice of Contention. Had it been necessary to do so, the Notice of Contention would have been rejected.

### Katzmann J.

221 This is a case about indirect discrimination on the ground of disability said to contravene the *Disability Discrimination Act 1992* (Cth) ("the Act"). To make out such a case it was necessary for the appellants to bring themselves within the terms of s 6 of the Act. This meant that they first had to prove that they were subjected to a requirement or condition with which a substantially higher proportion of people without the disability comply or are able to comply and with which they did not or could not comply. They also had to prove that subjecting them to such a requirement was not reasonable in the circumstances of the case.

222 The appellants are both intellectually and physically disabled. At the relevant times they were lowly paid workers employed in Australian disability enterprises ("ADEs") (formerly known as business services or sheltered workshops). They claimed, amongst other things, that their employers had discriminated against them on the ground of their intellectual disability in the terms or conditions of employment afforded to them, by denying or limiting their access to certain benefits associated with their employment and/or by subjecting them to a detriment, contrary to s 15(2) of the Act.

223 Their grievances are the same. They relate to the use by their employers of the Business Services Wage Assessment Tool ("BSWAT") to determine the percentage of the basic award rate that should be paid to them. At the general level their case is that the effect of using the tool is that, in comparison with disabled people without intellectual disabilities, people with intellectual disabilities will invariably fare worse, with the result that they will always recover lower wages than those in the comparator group. At the particular level they argue that the effect or impact of subjecting them to this method of assessment was that they were denied a wage increase. The requirement or condition with which a substantially higher proportion of people without an intellectual disability comply or are able to comply was identified in the

pleadings as a requirement or condition that in order to receive higher wages they had to satisfy the conditions for higher assessments of productivity and competence under the BSWAT.

224 The appellants alleged that the Commonwealth was “involved” in the discrimination because it caused, induced or aided their employers to discriminate unlawfully against the appellants (see s 122) by approving the BSWAT, distributing information about it, making available to ADEs free wage assessments, and conducting the assessments. The Commonwealth accepts that if the employers are liable, it is also liable, and it will bear the liability.

225 The primary judge rejected the two applications.

226 The appeal is in the nature of a rehearing but error must still be shown (*Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [25]). Consequently, the starting point must be the primary judge’s reasons.

227 The primary judge thought there was little doubt that the BSWAT is a discriminatory method of assessment within a discriminatory scheme. But his Honour held that the appellants could not bring themselves within s 6 (and therefore not s 15) as nothing the employers did or failed to do imposed any requirement or condition on them that they obtain higher levels of remuneration. They simply had their levels of remuneration assessed by means of the BSWAT. His Honour appeared to accept that that was a requirement or condition but he said that the appellants were able to comply with it. In any event, he was not satisfied that the requirement was unreasonable.

228 In substance, the appeals raise the following questions:

- (a) Whether the primary judge erred in identifying the requirement or condition they alleged their employers had imposed on them and the extent to which each of them could comply with that requirement or condition for the purposes of s 6 of the Act; and
- (b) Whether, if any condition or requirement was imposed on the appellants by their employers (with which they could not comply), the primary judge erred in failing to find that the requirement or condition was not reasonable in the circumstances of the case; and,
- (c) If so, whether the respondents have made out a defence under s 45 of the Act.

229 In my view the answers to these questions are:

- (a) Yes;
- (b) Yes; and
- (c) No.

230 I therefore agree with Buchanan J that the appeal should be allowed and I agree with the orders his Honour proposes. I shall shortly explain why.

231 I am indebted to Buchanan J for his detailed discussion of the evidence. It is unnecessary for me to repeat the exercise. Nor is it necessary for me to extract the relevant statutory provisions. They are set out in detail in the reasons of Flick J.

#### **The identification of the requirement or condition**

232 I agree with Buchanan J that the primary judge wrongly identified the requirement or condition. In my opinion his Honour took too narrow a view of the meaning of the words in the Act.

233 Indirect discrimination (as defined in s 6 and the comparable provisions in other anti-discrimination legislation) is concerned with conduct that is fair in

form (facially neutral) but unfair in practice. Its focus is on the impact or outcome of the conduct. The terms “requirement” and “condition” take their colour from their statutory context. See *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 at 257-258 (*Styles*) per Bowen CJ and Gummow J. No narrow or technical construction is to be given to them (*New South Wales v Amery* (2006) 230 CLR 174 at 195 per Gummow, Hayne and Crennan JJ). Rather, they are to be interpreted broadly or liberally so as to further the objects of the Act (*Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 185 per Dawson J and at 195-197 per McHugh J; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 393-394 per Dawson and Toohey JJ and 406-407 per McHugh J). The objects of the Act, which are set out in s 3, include the elimination as far as possible of discrimination against persons on the ground of disability in the area of work.

- 234 Albeit that the requirement or condition must be identified with some precision, any form of qualification or prerequisite demanded of an employee by an employer will suffice, even where, as here, the requirement or condition is not made explicit: *Banovic* at 185 per Dawson J; *Waters* at 360 per Mason CJ and Gaudron J, at 407 per McHugh J. In *Banovic* an employer’s decision to retrench employees in the reverse order in which they had been hired (“last on first off”) was held to amount to a requirement that for an employee to remain in employment he or she must have started work before a certain date and was therefore a “requirement or condition” within the meaning of s 24(3) of the *Anti-Discrimination Act 1977* (NSW). In *Styles* the Department’s preference for appointing to an overseas post an applicant who already held a position at the same Australian Public Service level was held to be a requirement or condition within the meaning of s 5(2) of the *Sex Discrimination Act 1984* (Cth), even though an inability to fulfil the preferred criterion was not an absolute bar to selection.
- 235 In *Styles* Bowen CJ and Gummow J held (at 258) that a “requirement or condition” means a stipulation which must be satisfied if there is to be a practical, rather than a merely theoretical chance of selection.
- 236 In *Waters* McHugh J explained (at 407) that, in the context of providing goods or services, a person should be regarded as imposing a requirement or condition where that person “intimates, expressly or inferentially, that some stipulation or set of circumstances must be obeyed or endured if those goods or services are to be acquired, used or enjoyed”.
- 237 It is obvious that the employers did not impose a requirement or condition on the appellants that they obtain higher wages, as his Honour pointed out (at [78]). That, however, was hardly to the point as the appellants were not complaining of direct discrimination. But the employers did impose a requirement or condition that, to do so, they submit to a particular method of assessment. For there to be a practical chance of achieving higher wages, the appellants had to be able understand and respond to certain questions and achieve certain results. In one area of testing — testing for competencies — the stipulation was that to be marked competent, they had to be assessed as competent in all categories and sub-categories. It was, with respect, too simplistic to say that the only requirement or condition with which the appellants had to comply was that their wage levels be determined by assessment using the BSWAT. As the appellants argued, that merely masks the allegedly discriminatory effect.
- 238 I respectfully disagree with his Honour’s statement (at [77]) that the BSWAT

was not in the nature of a test, with a pass mark or level that must be attained before a benefit could be gained. For the reasons given by Buchanan J that is precisely its effect. In this case it was also its purpose. As both Mr Nojin and Mr Prior were already employees of Coffs Harbour Challenge and Stawell Intertwine respectively, the only purpose these companies could have had to invoke the BSWAT was to see whether their wages should be adjusted. As the award prevented them from being adjusted downwards as a result of the use of the BSWAT (see cl 14.1, 14A.4.1 and 14A.2.1 extracted in the reasons of Buchanan J at [45] and [49]), the only utility in carrying out the assessment on the appellants was to see whether their wages should be increased. If they did not attain a certain level, their wages could not be increased. One reason they did not is that their intellectual disabilities precluded them from understanding many of the abstract concepts inherent in many of the questions asked of them and from verbally communicating their understanding when they did. Louise Boin, a neuropsychologist who assessed the two appellants, and whose evidence was not challenged, showed what impact the interrogation had on their ability to demonstrate their competencies. She said that Mr Nojin, for example, had a very poor ability to communicate his understanding of tasks because of his intellectual disability. His “verbal fluency” was found to be “extremely weak”, which Ms Boin said was indicative of difficulty in finding the right words to describe things. This was powerfully illustrated by Mr Nojin’s inability to respond correctly to the question in the BSWAT about what workplace meetings he attended, resulting in him being given a “not yet competent score” for this question, despite the fact that the evidence from Mr Wade, the Chief Executive Officer of Coffs Harbour Challenge (his employer) was that he attended a variety of workplace meetings (safety meetings, meetings to review the disability service standards and social club meetings).

239

As Ms Boin explained:

Questions in the assessment report require generation of ideas to answer them; e.g. the question “What workplace meetings do you attend?” means that the person has to first understand what is meant by the term “workplace meeting”, then filter out other experiences that one has in the workplace, to precipitate an imagery of those experiences that comply with the definition of a workplace meeting, then generate the words to describe these experiences. Michael’s test results revealed that he is not able to perform the thinking processes required to complete this sequence in his mind.

240

Similarly, Ms Boin said that Mr Prior would only understand straightforward, concrete questions put in everyday language, whereas much of the language in which the questions were cast require higher order, abstract thinking. She advised that Mr Prior lacked many of the necessary cognitive processes for answering open questions.

241

Sarah-Jane Nutting, now a senior rehabilitation consultant in the national wage assessment team of Commonwealth Rehabilitation Service Australia, who conducted the second BSWAT assessment of Mr Prior, conceded that intellectually disabled employees will have greater difficulty demonstrating certain competencies than employees who are not intellectually disabled. She also conceded that it was possible that, in conducting interviews for the purposes of a BSWAT assessment, employees with intellectual disabilities are more likely to struggle to give answers to questions Ms Boin characterised as abstract, such as “how do you help others at work?”. It does not matter for the

purposes of a BSWAT assessment that the employees may be able to demonstrate a capacity to do this. What matters is that they answer the question correctly. Ms Nutting agreed that, given the question and answer component in each competency, intellectually disabled employees are “to that extent” more likely to not achieve a competent rating than workers without such disabilities.

242 As Buchanan J points out at [131], the BSWAT enables disabled employees without intellectual disabilities to enhance their overall scores by showing greater competency than productivity but intellectually disabled employees are unlikely to be able to do so. Thus, the appellants were plainly at a disadvantage in comparison with the comparator group by reason of their intellectual disabilities. The primary judge accepted as much, observing (at [79]) that:

[i]t is clear that persons with intellectual difficulties are more likely to have difficulty demonstrating understanding of competencies, for the purposes of the BSWAT, than persons without intellectual disabilities.

243 Given the uncontradicted evidence from Ms Boin, that was possibly an understatement.

244 Wages are a condition of employment. A wage increase is a benefit associated with employment. There was no dispute that if the use of the BSWAT amounted to discrimination on the ground of intellectual disability, the employer’s conduct would fall within the terms of s 15(2). Thus, subject to the answers to the next two questions, the conduct of the two employers was unlawful.

#### The question of unreasonableness

245 Like Buchanan J, I have found this question difficult, not least because (quite apart from the ordinary advantages enjoyed by a trial judge) there is scope for legitimate differences of opinion about an issue such as this.

246 The parties accepted that the question of whether or not the requirement or condition was not reasonable should be resolved in the manner Sackville and Stone JJ indicated in *Catholic Education Office v Clarke* (2004) 138 FCR 121 in the extract appearing in the judgment of Flick J at [179].

247 The primary judge said (at [83]) that the effect of s 6(b) is that a requirement or condition is not discriminatory if it is reasonable and concluded that to hold that a particular requirement or condition is not reasonable because it is discriminatory would be inconsistent with the purpose of the section. That is true as far as it goes but it does not mean that the discriminatory effect of imposing the requirement or condition is irrelevant to determining whether it was not reasonable. The Full Court makes this clear in *Clarke*. The nature and extent of its discriminatory effect must be weighed against the reasons advanced in favour of it (see *Clarke* at [115]).

248 The primary judge appears to have approached the matter in the correct manner. He put the appellants to proof. His analysis was careful and considered. He closely examined the process of testing competencies, noting variations in the competence of the assessors and the intrusion of subjectivity, as well as the “all or nothing” approach to the assessment of competencies. Contrary to the appellants’ contention, he took into account the availability of an alternative method of assessing wages (the SWS), which did not involve the impugned requirement or condition, whilst noting that that was not conclusive. He also took into account a range of matters that were obviously relevant to his inquiry. He gave great weight to the history of the development of the BSWAT, and its support from employers and unions alike but also noted the consistent

opposition to it from advocates for the disabled. He said that the weight of opinions of consultants involved in the development of the BSWAT was important, particularly the opinions of the independent consultants, noting that none had expressed an opinion adverse to it.

249 His Honour also referred to the division of expert opinion in this case, while noting that all accepted that competency was a legitimate element in the determination of the value of a worker to an employer. He acknowledged the difficulty with the method of assessment by question and answer but said that the appellants had not proposed an alternative. The appellants submitted this was wrong, pointing to "SWS and other tools which ... measure productivity alone", once the worker has been shown, by observation, to behave "appropriately within and around the work environment". His Honour was speaking, however, of the assessment of competencies, not productivity, and he rejected as potentially unsafe and unfeasible assessment entirely by observation. The appellants submitted that there was no basis to conclude that there were feasibility problems, arguing that Mr Tuckerman's evidence concerning visual assessment upon which they relied below was not challenged. But Mr Giles's evidence provided the evidentiary basis for his Honour's conclusions.

250 His Honour did not ignore the discriminatory impact of using the BSWAT but he rejected the proposition that assessment by question and answer was unreasonable on the bases that each of the appellants was able to answer some questions relating to competencies and that not all people with intellectual disabilities will be unable to cope.

251 He also considered that consistency and uniformity in relation to wage assessment in an ADE were desirable and their absence might generate resentment amongst employees and their families where the use of one tool was perceived to lead to higher wages than another.

252 Generally speaking I am not persuaded that any of these conclusions gives rise to appealable error. I do, however, have trouble with the proposition that merely because the appellants were able to answer some questions, the assessment process was not unreasonable. And for the following reasons I am not satisfied that his Honour properly weighed the nature and extent of the discriminatory effect against the reasons advanced in favour of the BSWAT method of assessment.

253 There are two significant features of the BSWAT to which his Honour did not refer. I accept, of course, that there is a difference between not referring to something and not taking it into account and that a judge is not required to refer to every piece of evidence or every legal argument. But these matters were important aspects of the appellants' case. The proper inference is that his Honour did not take them into account. His failure to do so, in my opinion, led to appealable error. They were part of the circumstances of the case against which the question of unreasonableness should have been evaluated.

254 The first feature of the BSWAT to which his Honour did not refer is the fact that for the purpose of determining competencies and skills within particular competencies the employees are assessed on their understanding of tasks they were unlikely ever to undertake. As the appellants put it in their submissions to the primary judge where it was broadly described as the first relative disadvantage:

the competency elements of BSWAT involved assessing the workers by reference to tasks which it was not part of their employment to perform, and which their

intellectual disabilities meant they were unlikely ever to be required to perform. Their wages were discounted for failure to do things not required of them.

255 This was a basic feature of the BSWAT assessment of competencies. The BSWAT Assessor's Guide stipulates that:

The absence of a duty from a worker's role does not necessarily indicate that the element is not applicable. If the duty is performed by another worker in the workplace (even if not by the individual being assessed), it should be applicable.

It is the role of the assessor to establish the scoring system using the existing performance criteria to determine competency for each element. The assessor must take into account critical and non-critical performance criteria and score accordingly.

...

A performance criterion is only not applicable if:

- the work piece of equipment or product is not undertaken or used in the workplace.

...

A performance criterion will be **critical** unless:

- the task is not the responsibility of any worker or immediate supervisor.

To be rated as competent for an *element*, a worker must achieve competency against all critical performance criteria.

(Emphasis in original.)

256 This meant that Mr Nojin was assessed on the basis that he would be required to read and understand job sheets and prepare written reports of his daily activities although it was not in dispute that he was not expected to read and his intellectual disability is such that he will never be able to do so. Despite this, the task was rated "critical", and for being assessed as "not yet competent" his overall score was reduced, depriving him of 6.25% of the Grade 1 award rate. Mr Prior is both intellectually disabled and legally blind. No employer would have him perform safety checks on a lawnmower before using it. Yet, he failed multiple competency modules because he was observed not to do the checks.

257 In my opinion, his Honour erred by failing to take into account this feature of the BSWAT assessment. It plainly bears on the question of whether the impugned requirement or condition was not reasonable. It should have been considered in the balancing exercise his Honour was required to undertake.

258 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.

259 The evidence of this emerged most starkly in the cross-examination of Mr Giles:

DR HANSCOMBE: You have read the Marshall Consulting — what is it called, Modelling and Competency report, haven't you?

MR GILES: Yes.

DR HANSCOMBE: And you know that it says that non-disabled workers in open employment have an average of 2.8 industry competencies. Do you know that it says that?

MR GILES: Says that, that was based in our research.

DR HANSCOMBE: Yes, that is what it says, and it is the case, is it not?

MR GILES: On that research we did, yes, in this case.

DR HANSCOMBE: Well, since — I assume you assert your research to be correct.

MR GILES: Mm.

DR HANSCOMBE: So it is the case that non-disabled workers in open employment have on average 2.8 industry competencies, is it not?

MR GILES: Yes.

DR HANSCOMBE: That means, does it not, that if you required the non-disabled worker to do the BSWAT, that their wage would be reduced.

MR GILES: Yes.

...

DR HANSCOMBE: If the non-disabled worker performed three competencies, and had as a matter of fact about their training, three competencies, and they were assessed on the BSWAT, their wage would fall, would it not, because they wouldn't be assessed against four industry competencies?

MR GILES: Yes.

DR HANSCOMBE: And if that person were the average worker, and in fact only had 2.8, so they only passed two, their wage would be again reduced, wouldn't it?

MR GILES: If that was the way it happened, yes.

DR HANSCOMBE: Well, that's how the BSWAT works, isn't it?

MR GILES: Yes.

260 Mr Giles attempted to justify the differential treatment on the basis that non-disabled employees are assumed to have a certain level of competence, but there are at least two difficulties with that assumption. First, it self-evidently will not always be well-founded. Secondly, the BSWAT assesses competencies according to the Australian Quality Training Framework (AQTF) against which the non-disabled are not evaluated. Yet, in his supplementary report Mr Giles stated that the BSWAT was developed on the premise that it would not contain components against which a “regular” employee was not formally or informally assessed. The other expert witnesses, Mr Tuckerman and Mr Cain, considered that the fact that employers do not apply AQTF competencies to all employees for entry and low award level jobs makes it inappropriate that the standard be applied to the appellants in the determination of their pro-rata award wage. I agree.

261 As I indicated, the primary judge put substantial weight on the “overall support” for the BSWAT from independent consultants (referring to Marshall Consulting and Jenny Pearson & Associates) involved in its development and review. I do not think it deserves such weight. It is not apparent that any attention was given in the consultants’ reports to the specific disadvantages faced by intellectually disabled employees in a BSWAT assessment, which were the focus of this case. The Pearson reports recognised the need for some flexibility in the use of wage assessment tools to accommodate the range in types of disabilities and support needs of the ADE workforce. It was described as “perhaps the most important conclusion from the research”. Otherwise disabled employees appear to have been treated as a single, homogenous group. Given Ms Pearson’s concern for flexibility in the use of the tools (which his Honour did not mention), her opinion could scarcely be read as an unqualified endorsement of the use of the BSWAT to determine the wages of intellectually disabled employees.

262 His Honour also emphasised the support for the BSWAT from the union movement generally, including the ACTU and the Australian Liquor, Hospitality

and Miscellaneous Union (“LHMU”), the union with the carriage of applications to formalise and improve the methods of fixing, and the rates of, wages for disabled employees. He mentioned that some supporters had expressed reservations about aspects of it but maintained that their support had been consistent. Without further qualifications, these statements were potentially misleading.

263 The evidence was that the unions had in fact proposed the use of the SWS (Supported Wage System) assessment process, not the BSWAT, to assess wage levels. Although they did later endorse the BSWAT, they also reserved the right to comment on it after a period of operation, and they repeatedly raised concerns about the way in which it tested competency, the matter that lay at the heart of the appellants’ complaints. In a submission by the ACTU and the LHMU in December 2005 the organisations were critical of the aspect of scoring people against “not critical” elements of their job, describing it as “incongruous”. In a letter written in August 2009 the President of the ACTU noted the union’s “long-standing concerns” about the BSWAT and its implementation, and in particular, the union’s “ongoing concerns with the design of the BSWAT” relating to the assessment of competency. She stated:

The BSWAT separate assessment of core competencies is inconsistent with the revised national training framework. BSWAT assessment of every employee with disability against four industry based units of competency bears little relationship to Australian employment generally and is a major design fault of BSWAT. Qualifications or specific units of competency are directly related to classification level. Under BSWAT, selection of units of competency should only occur after the assessors identified if that competency is required at the classification level at which the employee is employed. BSWAT appears to miss this important step.

264 She called for a comprehensive review of wage assessment tools.

265 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.

266 Furthermore, there was evidence of a substantial disparity between competency and productivity scores in both trials of the BSWAT and in this case. Mr Prior scored zero on each competency unit while at the same time achieving productivity scores of over 50% on his two BSWAT assessments. Mr Nojin managed to achieve an overall competency score of 12.5%, although his productivity scores were far lower than Mr Prior’s. It is difficult to disagree with Mr Cain’s observation that the lack of correlation between the BSWAT productivity and competence scores suggests a flaw in its design.

267 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)).

268 The BSWAT may be fair in its application to some disabled employees. Powerful evidence was given in these cases, however, that it was unfairly skewed against the intellectually disabled. If competencies must be measured independently of productivity, consistently with the objects of the Act that should be done in such a way as to eliminate as far as possible its inequitable aspects.

#### **Section 45**

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

*Orders accordingly*

Solicitors for the appellants: *Holding Redlich*.

Solicitors for the respondents: Australian Government Solicitor.

SARAH SOMERSET