

Submission to FaHCSIA's Human Right's Commission application for temporary exemptions under the DDA 1992.

I wish to record my opposition to this exemption application.

First my credentials to do so.

I have worked in the Disability and Employment fields for 30 years, and have constantly opposed the government's use of taxpayers' dollars to fund an outmoded segregated model of employment service for people with disabilities.

From 1983-1987 I worked in the old Commonwealth Employment Service (CES) in Adelaide and Melbourne where I was a Disability Officer for 3 years. I watched with interest the early development of alternatives to sheltered employment like Work Preparation Centres and Open Employment Services.

From 1987-1990 I worked in Community Residential Units (CRUs), supported accommodation for young adults with disability moving into the community from institutional care, in Melbourne and Sydney. This job involved the fostering of a broad range on independent living skills as well as assisting with linkages into vocational training and open employment services. With a couple of residents who worked in sheltered workshops it also involved advocacy re wages and conditions.

From 1991-2001 I worked in and managed a Disability Employment Service in Melbourne, helping build it up from 3 to 18 staff. One of my mentors in my early days in this industry was the manager of Westwork Employment Service who, in the original spirit of the 1986 Disability Services Act, helped close a Wesley Mission sheltered workshop and transition all its employees into open employment. I also liaised with a local sheltered workshop to assist some employees move into integrated mainstream employment.

From 2001 I have been self-employed, trading as Maccess, which is a consultancy focusing on equity and access for workers with disability. I have offered a range of services from IR/HR advice, staff training for disability employment agencies, research and project work, and workplace assessments through DEEWR's National Panel of Assessors. I have been a Supported Wage Assessor since 1995, and now also conduct Ongoing Support Assessments (re allocation of support funding for Disability Employment Services in the open labour market) and Worksite Assessments under the Employment Assistance Fund (the old Workplace Modifications Scheme). In my role as an NPA assessor I have undertaken many SWS assessments in ADEs, the most progressive of which have been using the Supported Wage System for many years.

I also have post graduate qualifications in Industrial Relations and Human Resource Management from the Victorian University of Technology.

Throughout my career I have also closely followed the development of wage assessment tools for workers with disabilities.

In the late 1990s/early 2000s I was involved in an advocacy group, Coalition Action for Employment Equity (CAFEE), that wished to promote Sheltered Workshop reform including one wage assessment tool across all funded employment services in open and sheltered workplaces. I have attached a CAFEE position statement that I wrote in preparation for our participation in an inaugural (and as it turns out only) ACTU-sponsored conference on issues related to workers with disability held in late 2002. I delivered a paper at this conference on the first union DDA Action Plan that I assisted the ASU Victorian Services and Authorities Branch develop in my role as a union delegate and inaugural member of an internal ASU Disability Action Group.

I also supported the intervention of the NCID (National Council of Intellectual Disability) and DEAC (Disability Employment Action Centre) in the 2003 National Wage Case with a request that the Supported Wage System be introduced as the sole Wage Assessment Tool in all awards at a time when the Government, in cahoots with ACROD (now NDS), were arguing for a separate Wage Assessment Tool to be developed for sheltered workshops or Business Services as they were known then.

I also attach an article I wrote in 2002, "The Development of a Wage Assessment Tool for Business Services". It was published in DEAC's national journal, Access, along with other articles that I wrote about wage justice and the need for sheltered workshop reform. I do so as it presents a broad historical perspective on the policy origins of wage assessment tools for sheltered employees with disabilities, as well as canvassing the arguments against competency based or hybrid wage assessment approaches that have culminated in the recent historic BSWAT decision in the High Court.

Why I am opposed?

This request for temporary DDA exemption represents further procrastination on wage justice measures by FaCHSIA in league with NDS when a perfectly suitable wage assessment tool already exists that, as I have mentioned above, has already been used for years by the more progressive ADEs.

Indeed I know of one ADE that had been using the SWS for years and then 2-3 years ago made a decision to put all new employees through a BSWAT assessment as a deliberate tactic to lower their wages bill. This was a senior management decision, as the actual ADE manager felt the SWS was a fairer system. Just recently in the wake of the BSWAT decision this ADE has initiated SWS applications for the employees that were previously on BSWAT, so that now their entire ADE workforce will have their wages determined by the SWS. If this ADE can do it, why can't all of them?

Concerns about the SWS minimum weekly wage (currently \$78 and tied to the income threshold for the Disability Support Pension) potentially disadvantaging those with low productivity are easily fixed. Amend the SWS model clause that is inserted in most Modern Awards and many enterprise agreements to exclude a guaranteed minimum wage. I have seen this impact negatively in open employment with employees with low productivity and part-time hours losing employment as employers were unwilling to pay more than was warranted and could not offer the extra hours to make it financially fair and viable. Easy, just get rid of the minimum.

Indeed this was suggested back in 2001 when FACS commissioned KPMG to review the SWS and its initial period of operation.

Recommendation 3 of this KPMG review (entitled Supported Wage System Evaluation) was "*that FACS modify the guidelines and associated mechanisms of the SWS to enable its adoption in section 13 Business Services*".

In the body of the report the following was also written (s 6.2.2 p 37) "*The SWS assessment process is seen to have relevance and application within business services while other elements of the system are seen to require modification before they could be applied within such a setting*".

An associated footnote outlined this necessary modification: "*The minimum wage rate, the means by which productivity links to an appropriate wage rate especially for those with a low productive capacity*".

Indeed successive governments for one reason or another have chosen to ignore most of the recommendations made in this excellent SWS Evaluation Report. But I would argue that it was the NDS's (then ACROD's) lobbying that led FACS to ignore the recommendation to extend the SWS into the Business Service environment and embark on the commissioning of a series of poor consultancy-based research reports that led to the creation and justification of a separate wage assessment tool, BSWAT.

The danger with much consultancy-based research is that it ends up providing the commissioning agency with exactly what it wants.

Health Outcomes International's 2001 report, "A Guide to Good Practice Wage Determination" relied primarily on the qualitative opinion of Business Services managers to discredit the SWS as inappropriate for extension into the segregated employment service environment when the reality is that it is a flexible tool that has and still is being used successfully in this environment. This led to the government putting out a tender to develop BSWAT.

BSWAT was developed by the same consultancy. First BSWAT was trialled and then the competency levels used were changed when the trial wage outcomes were too high. Thus a wage assessment tool was manufactured to ensure lower wage outcomes than SWS, and thereby perpetuate both financial viability and wage exploitation. This whole process was very clearly articulated by Paul Cain from NCID in the BSWAT case, and it's a point Justice Buchanan refers to on several occasions in his Federal Court Appeal ruling, for example (s.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. Indeed, it gives considerable support to the notion that the test is fixed (deliberately perhaps) at too high a level" (see also s. 142 in Buchanan's judgement)

Justice Flick also noted in his judgement (s.267) that *"it is difficult to disagree with Mr Cain's observation that the lack of correlation between BSWAT productivity and competence scores suggests a flaw in its design"*.

Once BSWAT was developed and it was clear not all ADEs would adopt it, FACS in 2006 hired another consultancy (Jenny Pearson Consultants) to compare the various assessment tools in operation in the sector. This piece of research, entitled "Analysis of Wage Assessment Used in Business Services", is seriously flawed by the complete failure to look at the whole issue of wage outcomes, and make wage comparisons between these other largely competency-based or hybrid tools and the SWS. If it had done so it would have seen that the SWS delivered wage outcomes at least double those delivered by BSWAT and the like. But nevertheless this report was used by the AIRC when it amended the relevant ALHMU Supported Employment Award, and to this day is referenced in the current Modern Award (MA000103) in the clause listing the 30 "approved wage assessment tools".

I have always been flabbergasted that while it took rigorous research, years of development involving consultation with disability experts and a full bench decision of the AIRC to create and sanction the SWS, BSWAT and a whole gamut of similar tools got through with some fairly dodgy research and mere administrative fiat.

Judge Buchanan has noted in the BSWAT decision that *“it seems clear that no detailed or rigorous assessment of the use of BSWAT has been undertaken by reference to the participant concerns expressed in the present proceedings”* (s.48)

I return to my 2002 article on the development of BSWAT (see attached) as I believe 2 quotes set the scene for further comments on why I oppose this exemption application.

Firstly a quote from the National Caucus of Disability Consumer Organisations, the predecessor to the current Australian Federation of Disability Organisations (AFDO), on the suitability of the SWS to be the nationally sanctioned wage assessment approach for all employees:

“Caucus believes that the SWS needs to be the national system that applies in both the IR and the Standards framework of the DSA....The advantages of the SWS speak loudly. It is independent, objective, has safeguards against exploitation, is linked to the award system of wages and the industrial relations framework, provides a minimum wage, has a accredited assessors, administrative and monitoring systems, was developed by experts in the IR sector, and is applicable on a national scale. Caucus supports the extension of SWS eligibility to all employees with disability who receive Commonwealth funded disability employment assistance”.

More to the point, the CEO of one Business Service/ADE had this to say:

“The issue of fair wages is not a complicated problem. It needs resolve and commitment rather than great intellectual effort. The SWS or a similar pro-rate wage determination can easily be applied to Business Services. Indeed there are Business Services where this has been in place for a considerable time. The argument that Business Services cannot afford to pay pro-rata wages is fallacious. So long as worker output is properly assessed, unit labour costs in Business Services are the same as in any other business....Support costs for Business Services are met by government grants, so they are able to pay pro-rata wages and still compete with other businesses. Services that argue otherwise are either in bad businesses or are badly managed”.

So, another basis for my objection is that government over 10 years ago just plainly failed to listen to the reasonable criticisms and concerns of not only the disability advocate movement but also some ADE managers and the ACTU. Eventually the ACTU caved into the opinions of the ALHMU (now United Voice) as they were the union that had some ADE members (I think at that stage 6 ADEs were roped into the Supported Employment Services Award) and were concerned about job losses.

But on several occasions since BSWAT's introduction the ACTU have expressed concerns about its fairness. Justice Flick's judgement in the BSWAT federal court case summarises this quite nicely:

“The evidence was that the unions had in fact proposed the use of the SWS assessment process, not the BSWAT, to assess wage levels. Although they later did 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's 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 competence should only occur after the assessor identified if that competency is required at the classification level at which the employee is employed. BSWAT appears to miss this important step.’” (s. 263)

What I also find greatly objectionable is FAHSCIA's continued intransigence and non-acceptance of the full bench Federal Court decision that BSWAT is a flawed and inherently discriminatory system, not just for two individuals with intellectual disability but I would argue for all people with disability, a system that was deliberately engineered to lower the ADE wage bill. I have already referred to NCID's Paul Cain's expert evidence and the appeal judges comments.

In their exemption application it is explicitly stated that "FaCHSIA considers that it may still be lawful to use BSWAT (including paying wages assessed under BSWAT) in certain circumstances.". In a footnote they go on to disingenuously list such four circumstances where BSWAT would result in a more favourable outcome than other available tools, where BSWAT might accurately measure the actual capacity of an employee, where operational demands might justify BSWAT's use and where BSWAT's use is required by an EBA or other industrial instrument.

Indeed, in an article in The Australian (11/1/13) reporting this landmark legal case, the journalist Sussanah Moran noted that FaCHSIA did not respond to the criticisms of the BSWAT test made in the judgement and that a spokesperson had said "The BSWAT has been independently assessed as an appropriate and accurate way of measuring the competency and productivity of employees with disability."

Furthermore Paul Cain has noted on the NCID website that FaCHSIA in the post-BSWAT decision consultations have not only disagreed with the Federal Court's decision but also not fully explained it or indeed misrepresented it in this process. He argues that this is one reason for delegitimizing their right to conduct such consultations and overview the development of a suitable wage assessment process in ADEs:

"This raises the question about the legitimacy of the Commonwealth/FaCHSIA conducting such a consultation. The Commonwealth defended the BSWAT in the Court as a legitimate wage tool and also provides funding to the employers that use BSWAT. It appears that the Commonwealth is not fully accepting of the decision that the BSWAT is discriminatory".

I strongly concur. These consultations should have been organised and conducted by a neutral party, perhaps through the auspices of the Fair Work Ombudsman. After all it is an industrial relations issue.

In my 2002 article, I made reference to comments in the 1992 Dunoon Report (that spawned the SWS) about why the extension of SWS to ADEs was wrought with difficulties, foremost being the inability to pay award-based wages and the risk of closure. And this historically has been the reason why adequate reform in this area has stalled since 1986.

I would also argue that by implication, all hybrid or competency-based tools listed in the current Modern Award, the 2010 Supported Employment Services Award, are discriminatory and need to be removed when Modern Awards are next reviewed to ensure that there is a unitary one-assessment tool process, and that tool should be the one used in the SWS.

I agree with Paul Cain's comment in a recent tweet recorded on the NCID website: *"It is difficult to see why time, effort and resources would be put into adapting the BSWAT to be relevant to actual job tasks when there is already a wage tool and system that does this."*

This comment was written in the context of his reporting of how Australia fared at a United Nations review of the implementation of the Convention on the Rights of People with Disabilities. It is interesting what the United Nations had to say in this regard in their concluding comments on Australia's initial report. When discussing article 27 on the right to work, the UN noted:

“The committee is concerned that employees with disabilities in Australian Disability Enterprises (ADEs) are still being paid wages based on the BSWAT. The committee recommends that the State party: (a) immediately discontinues the use of BSWAT, and (b) ensures that the SWS is changed to secure the right assessment of the wages of persons in supported employment”.

“The right assessment of wages” should not include competency testing. Competency testing is something that happens during the selection process before someone is chosen for a job and slotted into an award job classification level and then during the performance appraisal process once they have obtained a job. It is used when people are promoted and moved to higher award job classification levels. Wages should be determined by productivity assessments alone within particular job classifications. Otherwise it amounts to a process of discriminatory wage discounting. This is something that was understood in the development of the SWS where an initial proposal to include a 10% competency-related wage discounting component was dropped as being discriminatory and against the whole EEO/affirmative action rationale of job redesign that so often has been and still is part of SWS job creation.

Indeed one of the architects of the SWS and pioneers of specialist open employment services in Australia, Phil Tuckerman, convincingly argued this point in his expert evidence in the BSWAT case:

“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 worker (s.86).... 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 wages 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 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 (Buchanan’s judgement, s.89)”

I also object to this temporary exemption application because further procrastination to develop another wage assessment tool rather than just using the SWS is really just delaying the inevitable.

Philosophically, demographically and economically, the ADE/segregated employment model is clearly outmoded. This model of employment service provision defies any reasonable definition of integration and social inclusion (though miraculously the national Disability Service Standards somehow exempt ADEs when they talk about inclusion!!!). It is also a fact that the average age of ADE employees is over 45 and it is increasingly unlikely that younger generations of people with disability (especially with the advent of the new NDIS funding approach) will opt for segregated options. Economically, many ADEs in their current shape are not financially viable; my memory of the Business Services Review in the mid 1990s was that a figure as high as 53% non-viable businesses was included in their final report. I would have thought that reverse integration into social firms/social enterprises would be one way to make them more productive and commercially viable; and I have argued this for many years.

Furthermore ADEs have had since 1986, the year that saw the introduction of the Disability Services Act, to get their house in order, with bucketloads of taxpayer’s dollars being spent on consultants to assist them reform. In the early 1990s there was the National Technical Assistance Unit giving them advice. Then in mid 2000s the Business Services Review spent more taxpayer dollars on consultants to advise on reform strategies. And now, more consultants have been hired in the wake of the

federal government's Vision for Supported Employment, "Inclusive Employment 2012-2022", to run training and give advice on transitioning into Social Firms. Though, I might add that they have watered down the definition of Social Firms to 50% of the workforce with disability. Most definitions I have previously seen (for example, that used by Social Firms Australia) would be closer to 25-30% which makes sense given statistics on the prevalence of disability in the community. But I digress.

Enough is enough. Indeed the implication in this Vision document is social firms paying fairly assessed wages are the way of the future. But the weakness of this document, and the reason that AFDO withdrew from the whole process of its development, is that this future change was too slow, and that words were being minced especially around the area of client choice and diversity of employment service models. The problem with this reform process is that at the moment the ADE transition to the social firm model is all voluntary.

Rather I am of the belief, and have been for many years, that a condition of ongoing ADE funding should be immediate reverse integration action, immediate transitioning of employees into retirement/recreational options/open employment workforce and immediate staggered movement to SWS wage assessments. Sure, timelines need to be set in this process. But definitely not through a 3 year process of DDA exemption for the BSWAT.

The time for procrastination and delay is over. The money that FaSCHIA is proposing to spend to developing another wage assessment tool when the SWS (with a minor change to remove the minimum wage provision) is perfectly useable would be better spent compensating the employees who have been ripped off since the introduction of BSWAT. Some might like to style it "stolen wage" compensation. That should be the priority, not further stalling wage justice and desegregation.

There is one paragraph in FaCHSIA's application that I find totally offensive but fully indicative of their ongoing contempt for the employment rights of ADE workers:

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

The use of "may" here is completely disingenuous, as the granting of a 3 year exemption *will* definitely serve to keep the wages of ADE employees low as was the whole intention of the now discredited BSWAT tool.

The well-meaning bureaucrats of FaSCHIA should be talking about the immediate introduction of SWS throughout the ADE sector and the payment of fair wages, the revision of the existing Supported Employment Services Award and the National Disability Service Standards to remove reference to all other wage assessment tools and, last not but least, wage compensation for years of underpayment to BSWAT-assessed ADE employees.

They should also be looking at the whole question of how assessed wages for workers with disability intersects with the social security system in the light of the UN Convention on the Rights of Persons with Disabilities and the right to an adequate income. But, that's another question.

Regards

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