Submission on BSWAT Temporary Exemption Application

JOINT ACCREDITATION SYSTEM OF AUSTRALIA AND NEW ZEALAND

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BACKGROUND

Submission by the Joint Accreditation System of Australia and New Zealand in support of the Department of Families, Housing, Communities and Indigenous Affairs (FaHCSIA), now called the Department of Social Services, Application for temporary exemption under section 55 of the Disability Discrimination Act 1992 regarding the use of the Business Services Wage Assessment Tool (BSWAT)

The Joint Accreditation System of Australia and New Zealand (JAS-ANZ) was established under treaty between the governments of Australia and New Zealand as a peak trans-Tasman accreditation body which reports to the respective ministers in Australia and New Zealand.

JAS-ANZ is also an accrediting authority under section 6B of the *Disability Services Act 1986* and accredits certification bodies.

The primary function of JAS-ANZ in relation to disability employment services is to assess certification bodies and, where appropriate, to grant accreditation. Accreditation acknowledges the certifier's competence to conduct audits of Australian Disability Enterprises against the Disability Service Standards (DSS). The framework for this is set out in scheme documentation DEES Scheme (HS Scheme Part 3) - Additional requirements for bodies certifying Disability Employment and Enterprise Services.

The objective of the audit conducted by accredited certifiers is to establish whether an employment service (ADE), is meeting the disability employment standards determined by the Minister for Social Services. If a certification body is satisfied that an ADE meets the standards, it must give a certificate of compliance in respect of that ADE.

Following the decision in *Nojin v Commonwealth of Australia* [2012] 208 FCR 1, the accreditation and certification guidelines were re-examined and formal advice sought on the implications of the decision for the operation of accreditation and certification DSS.

An update to DEES Scheme (HS Scheme Part 3) - Additional requirements for bodies certifying Disability Employment and Enterprise Services was then issued on in August 2013.

SUBMISSION

1. Standard 9 of the Disability Service Standards (the Standards) specifies the standard for employment and relevantly states as follows:

> **Standard 9: Employment conditions**
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> Each person with a disability enjoys working conditions comparable to those of the general workforce.
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> KPI 9.1 The service provider ensures that people with a disability, placed in open or supported employment, receive wages according to the relevant Australian Pay and Classification Scale (APCS), special Federal Minimum Wage (SFMW), award, order or industrial agreement (if any). A wage must not have been reduced, or be reduced, because of award exemptions or incapacity to pay or similar reasons and, if a person is unable to work at full productive capacity due to a disability, the service provider is to ensure that a pro-rata wage based on the applicable special SFMW, APCS, award, order or industrial agreement is paid. This pro-rata wage must be determined through a transparent assessment tool or process, such as Supported Wage System (SWS), or tools that comply with the criteria referred to in the Guide to Good Practice Wage Determination including:
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> - compliance with relevant legislation;
> - validity;
> - reliability;
> - wage outcome; and
> - practical application of the tool.

2. Standard 9 thus requires that any pro-rata wages are to be determined through a transparent tool or process, such as Supported Wage System (SWS) or tools that comply with the criteria in the Guide to Good Practice Wage Determination. The Guide to Good Practice Wage Determination refers to the use of productivity based tools, competency based tools and hybrid tools which use both productivity and competency assessments. Standard 9 also requires that pro-rata wages must comply with relevant legislation, including the *Disability Discrimination Act 1992*.

3. In *Nojin v Commonwealth of Australia* [2012] 208 FCR 1, the Full Federal Court held that Messrs Nojin and Prior had been discriminated against by their respective employers, each of which was an ADE which used the Business Services Wage Assessment Tool (BSWAT) to determine their wage rates. The decision has raised some challenges for JAZ-ANZ and certification bodies in relation to the administration of Standard 9 of the Standards. The challenges arise from the difficulty of ascertaining whether a particular ADE is complying with Standard 9 in relation to the wage setting practices it uses for its employees, particularly in circumstances which were not expressly considered in the *Nojin* case.

4. Under the Disability Services Act, if a certification body that has given an ADE a certificate of compliance ceases to be satisfied that the ADE meets the Standards, the certification body

must revoke the ADE's certificate. Therefore, if the certification body forms the view that an ADE is not complying with the Disability Discrimination Act in conducting its wage assessments, the service concerned is issued with a notice of 'major non-conformity' with the standards and, if the non-conformity is not rectified, this will lead to the certification body revoking the service's certificate of compliance. This clearly has serious implications for the service concerned.

5. In these circumstances, it is important that JAS-ANZ is able to give guidance to certification bodies as to the approach to adopt in relation to determining whether wage setting in a particular ADE meets the Standards. However, because there are approximately 194 ADEs who are covered by different industrial instruments and many thousands of employees who would have different type of disabilities and perform different types of work, it is not possible to adopt a rigid approach that does not allow individual circumstances to be taken into account.

6. The Joint Peak and Advocacy submission criticises the approach JAS-ANZ has taken in its guidance to certification bodies. It takes the view that JAS-ANZ should, at a minimum, be advising that the SWS is the only acceptable wage tool for compliance under the Standards until there is no doubt that other wage tools provide fair, equal or better wages than the SWS for workers with intellectual disability. The submission states that certification bodies should refuse to certify or maintain the certificate of any ADE that uses BSWAT.

7. However, JAS-ANZ does not consider that such an approach is permitted under the Disability Services Act. Certification must be undertaken in accordance with the Standards, and the Standards do not require that the SWS be used in all cases, nor that the BSWAT cannot be used in any cases. A decision by a certification body to require an ADE to use the SWS in circumstances where the ADE could lawfully use another wage tool, or a decision that an ADE cannot use BSWAT when it is legally permitted to do so, would be inconsistent with the requirements of the Disability Services Act and would be liable to be overturned on review.

8. JAS-ANZ's goal in relation to this issue has been to provide advice to certification bodies which is both practical and reflects the legal position following the Full Court's decision, but which does not purport to impose on ADEs obligations beyond those which the law currently requires. It is apparent from the Joint Peak and Advocacy submission that there are differing interpretations as to the extent to which BSWAT may still be used. It would certainly be preferable from the point of view of conducting certification assessments that there be clear rules as to what wage setting tools may be used and in what circumstances.

9. Because the Full Federal Court decision applied to the particular circumstances of the two applicants, the Court did not find that the use of BSWAT in other circumstances is directly prohibited. The decision related to employees with intellectual disabilities, who were employed at the Grade 1 level under the Supported Employment Services Award 2010. The findings of the Full Court indicate that the use of BSWAT to set the wages of employees in similar circumstances is likely to be unlawful for the same reasons as applied in the decision. However, the precise boundaries are unclear. We have set out below some examples of areas where it appears BSWAT may still be used in some circumstances.

10. The Full Court did not find that the use of BSWAT to set the wages of employees who do not have intellectual disability is unlawful. Therefore, BSWAT may continue to be used to set the wages of employees with only physical disability.

11. The findings of the majority did not, in their terms, deal with the use of the BSWAT as a tool for assessing the wages of persons employed at other, higher employment classifications/Grades. In reaching their finding that the use of BSWAT was unreasonable, both Buchanan J and Katzmann J attached significance to the routine, basic, output-focussed nature of the duties performed by workers at the Grade 1 level. The decision did not rule out that use of BSWAT may be reasonable in respect of higher employment Grades (such as where employees are required to have greater conceptual, analytical, and/or interactive skills), if the competencies tested are in fact required for the type of work performed.

12. A further consideration is the industrial instrument under which an employee works. The Full Court found that use of BSWAT was not *required* under the Supported Employment Services Award 2010 – it was one of a number of wage assessment tools which was permitted. Consequently, s 47 of the Disability Discrimination Act did not apply. This contrasts with the position where an industrial instrument (such as a certified or enterprise agreement) mandates the use of BSWAT. If BSWAT is the only wage assessment tool permitted, its use could be considered to be in direct compliance with the instrument, and if so s 47 will apply.

13. If an industrial instrument provides for more than one wage assessment tool, but the outcome under BSWAT is more favourable than the other available tools, the use of BSWAT could be considered reasonable in those circumstances. This was not the case under the award considered by the Full Court, but may be the case for workers covered by other instruments.

14. Section 45(1) of the Disability Discrimination Act permits discrimination of an affirmative action kind - for example, it is not unlawful to do an act intended to afford persons who have a disability access to facilities, services or opportunities to meet their special needs in relation to employment. Section 45 was amended on 5 August 2009 to exclude special measures of an affirmative action kind in relation to rates of salary and wages. It cannot therefore apply to any use of the BSWAT to set rates of salary and wages after that date. However, s 45(1) could, potentially, have application in relation to the use of BSWAT to set wages prior to 9 August 2009. The Full Court found that s 45 did not apply in relation to Messrs Nojin and Prior because the employers' use of BSWAT was not reasonably intended to discriminate in favour of them in respect of their employment. The Court found that the use of the BSWAT by each ADE was not directed to providing the employees with employment (each of them was already employed when the BSWAT was introduced) or access to services, opportunities, benefits or programs in connection with their employment. Nevertheless, it cannot be assumed that this would be the case for all employees whose wages were set using BSWAT prior to 5 August 2009.

15. A further issue is the extent to which other wage assessment tools with a competency component may be used. JAS-ANZ has noted the possibility that such tools may also give rise to concerns about compliance with Standard 9 in its advice to certification bodies.

    Ideally, the legal position in relation to the future use of BSWAT, and other wage setting tools, should be clear so that there is no uncertainty as to whether an ADE is complying with the Standard. JAS-ANZ is seeking to give the best guidance it can to certifying bodies to

assist them to undertake their functions in accordance with the Disability Services Act and consistently with the Federal Court's decision in *Nojin*.

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