

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 6/10/2014 4:27:53 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
File Number:	VID1367/2013
File Title:	Tyson Duval-Comrie (by his Litigation Representative Claudine Duval) v Commonwealth of Australia
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 6/10/2014 4:52:12 PM AEDT

A handwritten signature in blue ink, which appears to read "Warwick Soden".

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 33

Rule 16.32

**Defence**

**FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: VICTORIA  
DIVISION: GENERAL**

**NO VID 1367 OF 2013**

**TYSON DUVAL-COMRIE (BY HIS LITIGATION  
REPRESENTATIVE CLAUDINE DUVAL)**

Applicant

**COMMONWEALTH OF AUSTRALIA**

Respondent

**AMENDED DEFENCE OF THE RESPONDENT**

(Amended in accordance with the orders made by Justice Davies on 12 September 2014)

To the Applicant's Further Amended Statement of Claim dated 6 May 2014 (**FASOC**), the Respondent says as follows:

**Note:** In this defence, the Respondent responds to the material allegations made against it in the FASOC and does not plead to the matters stated under the heading "Particulars" in the FASOC.

1. The Respondent does not plead to paragraph 1 as it makes no allegation against the Respondent.
2. In answer to paragraph 2, the Respondent says as follows:
  - 2.1. The Respondent admits the allegations that:

- 2.1.1. the Applicant was employed in an Australian Disability Enterprise (**ADE**) as at 22 October 2013; and
    - 2.1.2. the Applicant is an intellectually disabled worker (but not the extent of the Applicant's intellectual disability until the Respondent has had an opportunity to review the Applicant's assessment made on 10 April 2014 by the clinical neuropsychologist; and to have the Applicant examined).

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Filed on behalf of the Respondent

File ref: 13139365

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- 2.2. The Respondent admits that the Applicant's wage had been, as at 22 October 2013, assessed using the Business Services Wage Assessment Tool (**BSWAT**).
- 2.3. The Respondent denies that any persons alleged to qualify as group members do so qualify by reason of intellectual disability, until the Respondent has had the opportunity to have those persons examined.
- 2.4. The Respondent otherwise does not admit the allegations in paragraph 2.
- 2A. The Respondent does not plead to paragraph 2A as it makes no allegation against the Respondent.

### **BSWAT**

- 3. The Respondent admits the allegations in paragraph 3.
- 4. In answer to paragraph 4, the Respondent says as follows:
  - 4.1. The Respondent reserves the right to raise additional matters regarding group members employed by ADEs, following:
    - 4.1.1. the identification of the common issues of law and fact to be determined at trial; and
    - 4.1.2. the determination of those common issues of law and fact; by way of response to the allegations in paragraph 4.
  - 4.2. The Respondent otherwise admits the allegations in paragraph 4.
- 5. In answer to paragraph 5, the Respondent says as follows:
  - 5.1. In relation to the employment of the Applicant:
    - 5.1.1. High Point Industries is and was at all relevant times a division of, and an ADE operated by, Scope (Vic) Ltd (Scope).
    - 5.1.2. On or around 13 December 2008, Scope offered employment to the Applicant at High Point Industries. It was a condition of the offer of employment that the Applicant's wages would be assessed using the BSWAT. On 2 February 2009, the Applicant accepted employment with Scope on that condition.

### **Particulars**

- (a) The offer of employment is in writing and dated 13 December 2008.
- (b) The Applicant's acceptance of employment is in writing and dated 2 February 2009.

- (c) The offer of employment and acceptance of employment may be inspected at the offices of the Respondent's solicitor by appointment.

5.2. In relation to the allegations regarding the employment of group members by ADEs:

5.2.1. The allegations do not give rise to any issue of law or fact common to the claims of the Applicant and the group members (the **Common Issues Objection**).

5.2.2. Under cover of the Common Issues Objection, the Respondent denies the allegations and reserves the right to raise additional matters regarding group members employed by ADEs, following:

(a) the identification of the common issues of law and fact to be determined at trial; and

(b) the determination of those common issues of law and fact; by way of response to the allegations.

5.3. The Respondent otherwise denies the allegations in paragraph 5.

6. In answer to paragraph 6, the Respondent says as follows:

6.1. The Respondent admits the allegations in paragraphs 6(a), 6(d), 6(h), 6(i), 6(j) and 6(l).

6.2. The Respondent further says:

6.2.1. There are 2 components to an assessment under the BSWAT, one being a competency component and the other a productivity component. Each component comprises 50% of the assessment under the BSWAT.

6.2.2. The competency component assesses an employee against 4 units of core competency (the core competency units) and 4 units of industry competency (the industry competency units).

### **Particulars**

(a) The core competency units that are common to all BSWAT assessments are:

- (i) work health and safety practices;
- (ii) communication in the workplace;
- (iii) working with others; and

- (iv) applying quality standards.
  - (b) The industry competency units are selected from the national units of competency having regard to the duties performed by the employee in his or her particular employment. The national units of competency are obtained from [training.gov.au](http://training.gov.au) (formerly the National Training Information at [www.ntis.gov.au](http://www.ntis.gov.au)).
- 6.2.3. Each of the core competency units and industry competency units comprises 12.5% of the competency component (or 6.25% of the overall assessment under the BSWAT).
- 6.2.4. Where the employee uses less than 4 industry competency units in his or her employment, the employee:
- (a) is assessed on the industry competency units that the employee uses in his or her employment; and
  - (b) is marked “not yet competent” (**NYC**) (and receives 0% towards the employee’s overall assessment under the BSWAT) for each industry competency unit that cannot be identified out of the maximum 4 industry competency units.
- 6.2.5. To achieve overall competency in each unit of core competency or each unit of industry competency, an employee must demonstrate competency in:
- (a) all applicable performance criteria for the unit of competency that are critical; and
  - (b) at least 50% of all applicable performance criteria that are non-critical;

#### **Particulars**

- (a) A performance criterion is not applicable if the work, piece of equipment or product is not undertaken or used in the workplace.
    - (b) A performance criterion is critical unless the task is not the responsibility of any worker or immediate supervisor.
    - (c) A performance criterion is non-critical if the task is not the responsibility of any worker or immediate supervisor.
- 6.2.6. A trained assessor from CRS Australia (the **assessor**) conducted the assessments under the BSWAT.

### **Particulars**

- (a) The assessors held professional assessor qualifications including:
  - (i) successful completion of a BSWAT training course and, where applicable, refresher and continuing training;
  - (ii) possession of Certificate IV in Workplace Assessment and Training or at least certain competencies (unless a person already held an allied health degree, for example in occupational therapy); and
  - (iii) extensive relevant disability and/or employment sector experience.
- (b) More than 90% of assessors held an allied health tertiary qualification (such as in occupational therapy). The assessors who did not hold an allied health degree were required to possess a Certificate IV in Workplace Assessment and Training or at least certain competencies.

6.2.7. The competency component was assessed by the assessor on the basis of observations of the employee (including while the employee was working), interview of the employee and supplementary evidence from third parties.

### **Particulars**

- (a) Interviews of employees were generally conducted by the assessor, unless it was impossible or inappropriate to do so, such as with an intellectually disabled employee who was non-verbal and therefore not able to participate in an interview.
- (b) The supplementary evidence from third parties, to which an assessor may have regard, consists of:
  - (i) The employee's work reports and performance appraisals;
  - (ii) evidence from the employee's supervisor;
  - (iii) the supervisor's Assessment Workbook completed for the employee prior to the employee's assessment under the BSWAT;
  - (iv) the employee's training records;
  - (v) recognition of competencies of the employee (whether by formal or informal recognition); and

- (vi) previous assessments under the BSWAT that have been conducted on the employee.

6.2.8. When the competency component was assessed by the assessor by asking questions in an interview of the employee, an assessor used techniques to maximise the prospects of the employee understanding and answering the questions such as:

- (a) using the stated core competency questions as a guide to seek general understanding and not as a test for technical answers;
- (b) using clear and simple language;
- (c) using language and terms that are used in the employee's workplace;
- (d) contextualising the question to the employee's work environment and/or relevant appropriate answers given by the employee to other questions;
- (e) showing the employee objects, people or other things relevant to the question;
- (f) demonstrating the question to the employee by reference to objects, people or things relevant to the question;
- (g) rephrasing the question;
- (h) repeating the question;
- (i) asking the question outside the employee's interview while the employee is performing a task which is the subject of the question;
- (j) having the employee's supervisor present to assist the assessor understand the employee's answers and/or physical responses to questions asked in the employee's interview; and
- (k) asking the employee to draw or sketch answers on a piece of paper, if the assessor thought that this would make it easier for the employee to understand and answer a particular question.

6.3. The Respondent otherwise denies the allegations contained in paragraph 6.

7. In answer to paragraph 7, the Respondent says as follows:

7.1. The Respondent refers to and repeats paragraphs 5 and 6 above and the particulars thereto.

7.2. The Respondent says that:

- 7.2.1. the extent of a person's intellectual disability can be and has been recognised along a spectrum from mild to moderate to severe to profound; and
- 7.2.2. the conduct of the assessments of the Applicant and the group members under the BSWAT, including the competency component, and the resulting assessments of the Applicant and the group members depended on or was affected by the extent of the intellectual disability of the Applicant and the group members.

### Particulars

- (a) The fact that a person had an intellectual disability did not necessarily mean that the person did not have an intellectual capacity to undertake a BSWAT assessment. Whether a person had such capacity must be assessed on an individual basis and depended to a significant extent on the person's level of intellectual disability.
- (b) Subject to the examination of the Applicant and the group members by persons who can give expert evidence about the capacity of the Applicant and the group members to undertake a BSWAT assessment, the Respondent states that:
- (i) Individuals with mild intellectual disability (that is, an IQ of 55 to 69) were generally likely to have had the intellectual capacity to undertake a BSWAT assessment, including the competency component.
- (ii) Individuals with an IQ of 51 (as is alleged to be the IQ of the Applicant), when the competency component was assessed by asking questions in an interview of the employee, may have experienced difficulty understanding or answering the following questions, particularly if those questions were asked verbatim:
- Why do you use/wear protective clothing or equipment? (page 3 of BSWAT form)
  - What would make your workplace unsafe? (page 3 of BSWAT form)
  - Why is it important to follow evacuation procedures? (page 3 of BSWAT form)
  - What are these meetings for? (This question follows a question "What workplace meeting do you attend?" on page 5 of BSWAT form)
  - If you had a disagreement with someone in the workplace, what would you do? (page 6 of BSWAT form)
  - Why is it important not to make too many mistakes? (page 7 of BSWAT form)
- (iii) However, if any person with intellectual disability (including the Applicant) answered any question incorrectly, this may



mean that the person (A) did not understand the question, (B) understood the question and knew the answer to the question but could not communicate that answer, (C) understood the question but did not know the answer to the question, or (D) did not understand the question but, even if the person had understood the question, the person did not know the answer to the question.

- (iv) Further, the techniques used by assessors, when the competency component was assessed by asking questions in an interview of the employee (as described in paragraph 6.2.8 above), are likely to have assisted each person with intellectual disability (including the Applicant) to understand the questions and answer them appropriately, provided that the person knew the answers to those questions.
- (c) The Applicant's first BSWAT assessment at Scope (the **first assessment**) was conducted by Ms Amy Bodo in May 2009. At the time of the assessment, Ms Bodo had:
  - (i) a Bachelor degree in Occupational Therapy from the University of Queensland, as part of which she successfully completed units dealing with intellectual disability, including strategies for successfully communicating with people with intellectual disability.
  - (ii) worked as a Rehabilitation Consultant for CRS Australia since 15 May 2006 dealing with individuals with various disabilities;
  - (iii) successfully completed a BSWAT training course in March 2007 and subsequent refreshers; and
  - (iv) conducted approximately 300 individual BSWAT assessments.
- (d) The Applicant's second BSWAT assessment (the **second assessment**) was conducted in May 2012 by Mr John McKibbon. At the time of the assessment Mr McKibbon had:
  - (i) a Certificate IV in Workplace Assessment and Training;
  - (ii) more than 20 years' experience working with people with disability;
  - (iii) successfully completed a BSWAT training course in May 2003 and regular refreshers;
  - (iv) successfully completed BSWAT Assessment Coordinator course and held the position of Assessment Coordinator; and

- (v) conducted more than 1600 individual BSWAT assessments, including a large number of assessments at High Point Industries.
- (e) When conducting BSWAT assessments, it was the usual practice of each of Ms Bodo and Mr McKibbon to use the techniques referred to in paragraph 6.2.8 above, when assessing the competency component by asking questions in an interview of the employee. Ms Bodo and Mr McKibbon routinely used the techniques in paragraph 6.2.8(a) to (d), (g) and (h) and used the techniques in paragraph 6.2.8(e), (f) and (i) to (k) as appropriate in the circumstances.
- (f) In the first assessment, Ms Bodo used the techniques referred to in paragraph 6.2.8(a) to (d), (g) and (h) above, and may have used other techniques referred to in paragraph 6.2.8 above, to assist the Applicant to understand the questions asked of him and answer them appropriately.
- (g) In the second assessment, Mr McKibbon used the techniques referred to in paragraphs 6.2.8(a) to (d), (g) and (h) above to assist the Applicant to understand the questions asked of him and answer them appropriately.
- (h) Mr McKibbon is confident, from his regular dealings and conversations with the Applicant at High Point Industries from 2009, that the Applicant is comfortable in conversing with Mr McKibbon and did not find the interview component during the second assessment stressful or difficult and understood the questions asked of him.
- (i) Additional particulars may be provided after the trial of the common issues of law and fact, the return of subpoenas and the examination of the Applicant and the group members by persons who can give expert evidence about the capacity of the Applicant and the group members to undertake a BSWAT assessment, including the competency component.

7.2A The Respondent reserves the right to raise additional matters regarding group members employed by ADEs, following:

7.2A.1 the identification of the common issues of law and fact to be determined at trial; and

7.2A.2 the determination of those common issues of law and fact; by way of response to the allegations regarding the group members.

7.3. The Respondent otherwise denies the allegations in paragraph 7.

7A. In answer to paragraph 7A, the Respondent says as follows:

7A.1 The Respondent refers to and repeats paragraphs 5 to 7 above.

7A.2 The Respondent otherwise denies the allegations in paragraph 7A.

7B. In answer to paragraph 7B, the Respondent says as follows:

7B.1 The Respondent refers to and repeats paragraphs 5 to 7 above and the particulars thereto.

7B.2 Using a productivity only assessment tool to assess the wages of the Applicant would have imposed, and would continue to impose, an unjustifiable hardship on Scope within the meaning of section 11 of the *Disability Discrimination Act 1992 (DDA)*, as the DDA has provided since 5 August 2009.

### **Particulars**

The Respondent refers to and repeats the facts and matters in paragraph 10.1 below.

7B.3. In relation to the allegations in paragraph 7B regarding group members:

7B.3.1 The Respondent makes the Common Issues Objection.

7B.3.2 Under cover of the Common Issues Objection, the Respondent denies the allegations and reserves the right to raise additional matters regarding group members employed by ADEs, following:

(a) the identification of the common issues of law and fact to be determined at trial; and

(b) the determination of those common issues of law and fact;

by way of response to the allegations.

7B.4. The Respondent otherwise denies the allegations in paragraph 7B.

7C. The Respondent denies the allegations in paragraph 7C and says further:

7C.1 In answer to the allegation that the Condition had, has, or is likely to have, the effect of disadvantaging the Applicant, the Respondent refers to and repeats the facts and matters in paragraph 10.1 below.

7C.2 In answer to the allegation that the Condition had, has, or is likely to have, the effect of disadvantaging the group members:

7C.2.1 The Respondent makes the Common Issues Objection.

7C.2.2 Under cover of the Common Issues Objection, the Respondent reserves the right to raise additional matters regarding group members employed by ADEs, following:

- (a) the identification of the common issues of law and fact to be determined at trial; and
- (b) the determination of those common issues of law and fact;  
by way of response to the allegation.

7D. The Respondent denies the allegations in paragraph 7D and says further:

7D.1 In relation to the allegation that the failure to make reasonable adjustments, namely using a productivity only wage assessment tool, had, has, or is likely to have, the effect of disadvantaging the Applicant, the Respondent refers to and repeats the facts and matters in paragraphs 7B.2 above and 10.1 below.

7D.2 In relation to the allegation that the failure to make reasonable adjustments, namely using a productivity only wage assessment tool, had, has, or is likely to have, the effect of disadvantaging the group members:

7D.2.1 The Respondent makes the Common Issues Objection.

7D.2.2 Under cover of the Common Issues Objection, the Respondent reserves the right to raise additional matters regarding group members employed by ADEs, following:

- (a) the identification of the common issues of law and fact to be determined at trial; and
- (b) the determination of those common issues of law and fact;  
by way of response to the allegation.

8. The Respondent denies the allegations in paragraph 8 and further refers to and repeats paragraphs 6.2.6 to 6.2.8 and 7.2 above.

9. The Respondent denies the allegations in paragraph 9.

9A. The Respondent denies the allegations in paragraph 9A.

10. The Respondent denies the allegations in paragraph 10 and says further:

10.1. The use by Scope of the BSWAT to assess the wages of the Applicant was reasonable having regard to the circumstances of the case and, in particular, the following circumstances:

10.1.1. Scope is a charitable, not for profit organisation, which had (and continues to have) limited resources and its ongoing financial viability would have been (and would continue to be) destroyed, alternatively threatened, if the BSWAT (or a wage assessment tool that assessed competency and productivity in a manner similar to BSWAT) was not

used to assess the wages of its intellectually disabled employees, including the Applicant.

### **Particulars**

- (a) The purposes, powers and not for profit status of Scope are set out in the Constitution of Scope (see clauses 2, 3 and 4 of the Constitution). The Constitution is in writing and dated 7 November 2008. The Constitution may be inspected at the offices of the Respondent's solicitor by appointment.
- (b) The Respondent refers to and repeats the facts and matters in the Confidential Further and Better Particulars of the Defence dated 3 September 2014, which are subject to the confidentiality order made by the Honourable Justice Davies on 26 August 2014.

10.1.2. The use of the BSWAT by Scope to assess the wages of its intellectually disabled employees, including the Applicant, enabled Scope to:

- (a) offer employment to those employees; and
- (b) provide ongoing employment to those employees.

10.1.3. If Scope had been required to use the Supported Wage System (**SWS**) or another productivity only assessment tool to assess the wages of its intellectually disabled employees, including the Applicant:

- (a) Scope would have been required to pay significantly increased wages to those intellectually disabled employees, which payment could not have been sustained by the income received from the business operations of Scope's ADEs.
- (b) Scope's ADE's would have become financially unviable;
- (c) Scope would have closed the ADEs it operates, including High Point, and its intellectually disabled employees, including the Applicant, would have had their employment terminated;
- (d) further or alternatively to 10.1.3(c) above, Scope would have restructured its business so as to:
  - (i) employ only "low support needs" intellectually disabled employees; and
  - (ii) not employ "high support needs" intellectually disabled employees (such as the Applicant); and

### Particulars

- (a) By “low support needs” intellectually disabled employees, the Respondent means employees who were regarded by Scope as needing a minimal amount of support to perform the requirements of employment at the employees’ Award grade levels.
  - (b) By “high support needs” intellectually disabled employees, the Respondent means employees who were regarded by Scope as needing a substantial amount of support to perform the requirements of employment at the employees’ Award grade levels.
  - (e) many of Scope’s intellectually disabled employees, including the Applicant, would not have been offered employment, and/or would not have continued to be employed, by Scope.
- 10.1.4. The employment roles of Scope’s intellectually disabled employees, including the Applicant, were designed by Scope to:
- (a) take account of the limitations on the work the employees could perform by reason of their disability; and
  - (b) provide the employees with an opportunity to engage in meaningful employment.
- 10.1.5. The range of tasks and duties that Scope required its intellectually disabled employees, including the Applicant, to perform in their employment roles were more limited than the range of tasks and duties that Scope would have required, or would have expected, a non-disabled employee working at the same Award grade level as an intellectually disabled employee to perform.
- 10.1.6. Scope provided training to the Applicant on competencies that were the subject of the competency component, such as pursuant to Standard 10 of the *Disability Services (Disability Employment and Rehabilitation Program) Standard 2002 (2002 Standards)* and/or the *Disability Services Standards (FaCSIA) 2007 (2007 Standards)*.
- 10.1.7. The performance criteria in the core competency units and industry competency unit(s), against which the Applicant was assessed, were:
- (a) relevant to the tasks and duties that the Applicant performed in his employment with Scope; and/or
  - (b) competencies that Scope would have required or expected a non-disabled employee, working at the same Award grade level as the Applicant, to possess.

- 10.1.8. The assessment of the Applicant, under the BSWAT generally resulted in a reasonably accurate measure or assessment of his actual capacity to perform the requirements of employment at his Award grade level.

**Particulars**

- (a) The words “generally resulted” and “reasonably accurate” as used in paragraph 10.1.8 have their ordinary or natural meaning.
- (b) The Respondent refers to and repeats the facts and matters in paragraphs 6.2, 10.1.4, 10.1.5, 10.1.6, 10.1.7, 10.1.9, 10.1.11 and 10.1.15 of the Defence.
- (c) The Respondent further relies on the following matters in relation to paragraph 10.1.8:
  - (i) The impact of the Applicant’s disabilities on his capacity to perform the requirements of employment of his Award grade level.
  - (ii) The support the Applicant needed to undertake his employment and the impact of that support on the Applicant’s capacity to work at his Award grade level.
  - (iii) The operational requirements of Scope and, in particular, the extent to which the Applicant could not be relied upon to:
    - (A) follow workplace health and safety practices at High Point Industries;
    - (B) communicate with supervisors and co-workers at High Point Industries in a manner consistent with the operational requirements of High Point Industries;
    - (C) work with supervisors and co-workers at High Point Industries in a manner consistent with the operational requirements of High Point Industries; and
    - (D) apply quality standards relevant to the work he performed in a manner consistent with the operational requirements of High Point Industries.
  - (iv) The value to Scope of the Applicant possessing the competencies contained in the competency component of the BSWAT.

- (v) The conduct and result(s) of the BSWAT assessment(s) of the Applicant.
  - (d) Further particulars as to the facts and matters of the circumstances referred to in paragraph (c) of these Particulars will be provided after the return of relevant subpoenas and the examination of the Applicant on behalf of the Respondent by persons who can give expert evidence about the same.
- 10.1.9. The assessments of wages of the Applicant under the BSWAT were undertaken by independent assessors trained in the use and application of the BSWAT in ADEs. The Respondent refers to and repeats paragraphs 6.2.6 to 6.2.8 and paragraphs (c) and (d) of the particulars under paragraph 7.2.2 above.
- 10.1.10. Assessment of the Applicant under the SWS or another productivity only assessment tool would generally not have resulted in a reasonably accurate measure or assessment of his actual capacity to perform the requirements of employment at the Award grade level that applied to him.

#### **Particulars**

- (a) The words “reasonably accurate” and “actual capacity” as used in paragraph 10.1.10 have their ordinary or natural meaning.
- (b) The Respondent refers to and repeats the particulars in paragraph 10.1.8 above.
- (c) If the SWS was used to assess the wages of Scope’s intellectually disabled employees, Scope would have been required to pay a minimum weekly wage to the Applicant in circumstances where the actual weekly wage of the Applicant assessed under the SWS would have been less than the minimum weekly wage.
- (d) The SWS and other productivity only tools that assessed wages in a manner similar to the SWS (**other productivity only tools**) would have only assessed the Applicant on productivity and would not have:
  - (i) assessed the Applicant on the competencies contained in the competency component of the BSWAT; and
  - (ii) assessed (or adequately assessed) the Applicant on the skills and knowledge required to undertake his employment.
- (e) The SWS and other productivity only tools would have assessed the Applicant on his productivity in performing



discrete tasks over a short amount of time and would not have taken into account other matters that would have impacted on his productivity during his actual working time, namely:

- (i) the behavioural issues affecting the Applicant, which resulted in him being unproductive for periods of time;
  - (ii) the support and supervision that the Applicant needed to perform his tasks and duties and for non-vocational matters (such as personal matters) arising during his employment;
  - (iii) the time spent by the Applicant on non-vocational matters;
  - (iv) the daily or regular retraining that the Applicant required on tasks and duties and other matters relevant to his employment (such as occupational health and safety, communicating with others, getting along with others, etc);
  - (v) the fact that the Applicant would not or could not at times stay focussed on the task he was required to perform;
  - (vi) the counselling that the Applicant required; and
  - (vii) the fact that the Applicant could only perform limited tasks and had periods of downtime after the tasks he could perform were completed.
- (f) The SWS and other productivity only tools would have produced an inflated wage outcome for the Applicant, who could only perform a limited number of tasks.
- (g) Further particulars as to the facts and matters of the circumstances referred to in paragraph 10.1.10 will be provided after the return of relevant subpoenas and the examination of the Applicant on behalf of the Respondent by a person who can give expert evidence about the same.

10.1.11. Further, the assessments of wages of the Applicant under the BSWAT were undertaken and completed within a quality assured framework pursuant to arrangements between CRS Australia and the Department of Families, Housing, Community Services and Indigenous Affairs.

### **Particulars**

- (a) The arrangements are in writing and contained in the following Memoranda of Understanding:
- (i) Wage Assessments and Case Management for Employees with a Disability Working in FaCS Funded

Business Services - Memorandum of Understanding between the Australian Government Department of Family and Community Services (FaCS) and CRS Australia (June 2005), which applied from 1 May 2005 to 30 June 2006.

- (ii) Wage Assessments and Case Management for Employees with a Disability Working in FaCSIA Funded Business Services - Memorandum of Understanding between the Australian Government Department of Family and Community Services and Indigenous Affairs (FaCSIA) and CRS Australia (June 2006), which applied from 1 July 2006 to 30 June 2008.
- (iii) Wage Assessments for Employees with a Disability Working in FaHCSIA Funded Business Services - Memorandum of Understanding between the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and CRS Australia (June 2008), which applied from 1 July 2008 to 30 June 2010.
- (iv) Wage Assessments for Employees with a Disability Working in FaHCSIA Funded Australian Disability Enterprises - Memorandum of Understanding between the Department of FaHCSIA and CRS Australia (1 July 2010 – 30 June 2011), which applied from 1 July 2010 to 30 June 2011.
- (v) Wage Assessments for Employees with a Disability Working in FaHCSIA Funded Australian Disability Enterprises - Memorandum of Understanding between the Department of FaHCSIA and CRS Australia (1 July 2011 – 30 June 2012), which applied from 1 July 2011 to 30 June 2012.
- (vi) Wage Assessments for Employees with a Disability Working in FaHCSIA Funded Australian Disability Enterprises - Memorandum of Understanding between the Department of FaHCSIA and Department of Human Services - CRS Australia (1 July 2012 – 31 December 2012), which applied from 1 July 2012 to 31 December 2012.

10.1.12. The Applicant was, at all relevant times, in receipt of the Disability Support Pension, which supplemented the income he received from Scope.

10.1.13. Supported employment with Scope provided significant non-economic benefits to its intellectually disabled employees, including the Applicant.

10.1.14. The Respondent refers to and repeats the facts and matters in paragraph 5.1.2.

10.1.15. The history and development of the BSWAT, and the regulatory and industrial environment in which the BSWAT was developed and in which the BSWAT was used by Scope, included the following features:

- (a) the fact that Scope provides, and provided, “supported employment services” within the meaning of section 7 of the *Disability Services Act 1986* (Cth), namely services to support the paid employment of people with disabilities, being persons:
  - (i) for whom competitive employment at or above the relevant award wage is unlikely; and
  - (ii) who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment;
- (b) a significant amount of research, consultation, trialling and consideration of the BSWAT by independent experts;
- (c) approval by the relevant union of employees, the Liquor, Hospitality and Miscellaneous Workers Union (the **LHMU**), of the BSWAT as a wage assessment tool available to be used by business services, such approval being demonstrated by the LHMU making an application to amend the *Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001* (the **Award**) to permit the use of the BSWAT assessment tool or “a tool with an equivalent or better wage outcome”;
- (d) support of the Victorian Employers Chamber of Commerce and Industry, the Australian Council for the Rights of the Disabled, the Minister for Employment and Workplace Relations, the Australian Council of Trade Unions and the Australian Parent Advocacy Inc of the LHMU’s application described in paragraph 10.1.15(c) above;
- (e) the decision by the Australian Industrial Relations Commission (the **AIRC**) on 19 August 2005 to vary the Award so as to include the BSWAT as one of the wage assessment tools authorised to be used by ADEs (following the ex tempore remarks by the AIRC on 27 June 2005 that the AIRC would vary the Award in the terms sought by the LHMU);
- (f) the decision by the Australian Fair Pay Commission in Wage-Assessing Decision No. 1 2006, which determined that BSWAT was one of the wage assessment tools authorised for use in assessing the wage for an employee with a disability employed in an ADE and who was not covered by an Australian Pay and

Classification Scale derived from the Award, thus extending the use of the BSWAT outside the coverage of the Award;

- (g) pursuant to clause 14.1 of the Award, an employee was graded having regard to the employee's skills, experience and qualifications. The grades (grades 1 to 7) were set out in Schedule A to the Award. Under clause 1.1.1 of Schedule A, the induction training that a person in grade 1 would undertake may have included information equivalent to the core competency units in the BSWAT. The higher grades listed in Schedule A to the Award assumed the skills, experience and qualifications of the lower grades;
- (h) pursuant to clause 14.1 of the *Supported Employment Services Award 2010* (the **SES Award**), an employee is graded having regard to the employee's skills, experience and qualifications. The grades (grades 1 to 7) are set out in Schedule B to the SES Award. Under clause B.1.1 of Schedule B, the induction training that a person in grade 1 will undertake may include information equivalent to the core competency units in the BSWAT. The higher grades listed in Schedule B to the SES Award assume the skills, experience and qualifications of the lower grades;
- (i) clause 14.4 of the SES Award, which provides and provided that an employee with a disability will be paid such percentage of the rate of pay of the relevant Award grade as assessed under an approved wage assessment tool (which includes the BSWAT) chosen by a supported employment service;
- (j) Standard 9, KPI 9.1 of the 2002 Standards and Standard 9, KPI 9.1 of the 2007 Standards, made under section 5A of the DDA, required ADEs (including Scope) to ensure that people with a disability placed in supported employment, who were unable to work at full productive capacity due to a disability, received a pro-rata wage:
  - (i) based on an applicable award, order or industrial agreement; and
  - (ii) determined through a transparent assessment tool or process, including a tool that complied (as the BSWAT did) with the criteria referred to in the Guide to Good Practice Wage Determination.

### Particulars

Further particulars as to the facts and matters of the circumstances referred to in paragraph 10.1 above may be provided after the return of relevant subpoenas.

10.2. In relation to the allegations in paragraph 10 regarding group members:

10.2.1. The Respondent makes the Common Issues Objection.

10.2.2. Under cover of the Common Issues Objection, the Respondent denies the allegations and reserves the right to raise additional matters regarding group members employed by ADEs, following:

(a) the identification of the common issues of law and fact to be determined at trial; and

(b) the determination of those common issues of law and fact; by way of response to the allegations.

10A. In response to paragraph 10A, the Respondent says as follows:

10A.1. In relation to the allegations in paragraph 10A regarding the Applicant:

10A.1.1 The Respondent refers to and repeats paragraph 10.1 above and says that facts and matters referred to in paragraph 10.1 have continued to apply to Scope since 5 August 2009.

10A.1.2 The Respondent otherwise denies the allegations.

10A.2. In relation to the allegations in paragraph 10A relating to the group members, the Respondent refers to and repeats paragraph 10.2 above.

### **Discrimination in employment**

11. In response to paragraph 11, the Respondent says as follows:

11.1. The Respondent refers to and repeats paragraph 5.1 above and the particulars thereto.

11.2. The Respondent says that the Applicant is, and has been since 2 February 2009, employed by Scope to work at High Point Industries. At all relevant times, the Applicant has been employed as a production worker for 60 hours per fortnight.

11.3. The Respondent otherwise denies the allegations in paragraph 11.

12. The Respondent admits the allegations in paragraph 12.

13. The Respondent admits the allegations in paragraph 13.

14. The Respondent admits the allegations in paragraph 14.

15. The Respondent admits the allegations in paragraph 15.

16. The Respondent admits the allegations in paragraph 16 and says further:

- 16.1. From 11 May 2009, the Applicant was paid \$2.21 per hour in accordance with the first assessment.
- 16.2. From 5 July 2010, the Applicant was paid \$2.32 per hour, the increase being due to a change in the applicable rate under the SES Award.
- 16.3. From 4 July 2011, the Applicant was paid \$2.40 per hour, the increase being due to a change in the applicable rate under the SES Award.
17. The Respondent admits the allegations in paragraph 17.
18. The Respondent admits the allegations in paragraph 18.
19. The Respondent admits paragraph 19 and further says:
  - 19.1. The Applicant was not employed as a cleaner.
  - 19.2. The Applicant's duties did not involve cleaning, except insofar as cleaning was incidental to his employment as a production worker.
20. The Respondent admits paragraph 20.
21. The Respondent admits paragraph 21 and says further:
  - 21.1. From 28 May 2012, the Applicant was paid \$1.77 per hour on the basis of the second assessment.
  - 21.2. From 2 July 2012, the Applicant was paid \$1.82 per hour; the increase being due to a change in the applicable rate under the SES Award.
22. The Respondent denies the allegations in paragraph 22 and refers to and repeats paragraphs 16 and 21 above.
23. The Respondent denies the allegations in paragraph 23 and refers to and repeats paragraphs 6 and 7 above and the particulars thereto.
- 23A. The Respondent denies the allegations in paragraph 23A and refers to and repeats paragraphs 6 and 7 above and the particulars thereto.

### **Particulars**

Further particulars will be provided after the trial of the common issues and the return of relevant subpoenas.

24. The Respondent does not plead to paragraph 24 because:
  - 24.1. the Full Court's judgment in *Nojin v The Commonwealth; Prior v The Commonwealth* (2012) 208 CLR FCR 1 was delivered by reference to, and was based on, the particular evidence before the Court and the particular findings of fact made by the Court in that proceeding; and

- 24.2. paragraph 24 makes no allegation relevant to the alleged causes of action of the Applicant and the group members against the Respondent.
25. The Respondent does not plead to paragraph 25 because:
- 25.1. the High Court's refusal to grant the Respondent special leave to appeal from the Full Court's judgment was made by reference to, and was based on, the particular evidence before the Federal Court and the particular findings of fact made by the Federal Court in that proceeding; and
- 25.2. paragraph 25 makes no allegation relevant to the alleged causes of action of the Applicant and the group members against the Respondent.
26. The Respondent denies the allegations in paragraph 26. The Respondent says further that assessing the Applicant's wages by using the SWS (or another productivity only assessment tool that assessed wages in a manner similar to the SWS) would have imposed an unjustifiable hardship on Scope within the meaning of sections 21B and 11(1) of the DDA as it existed from 5 August 2009.

### **Particulars**

The Respondent refers to and repeats the matters in paragraph 10.1 above.

- 26A. The Respondent makes the Common Issues Objection and, under cover of the Common Issues Objection, denies the allegations in paragraph 26A and reserves the right to raise additional matters and defences regarding group members employed by ADEs, following:
- 26A.1 the identification of the common issues of law and fact to be determined at trial; and
- 26A.2 the determination of those common issues of law and fact;
- by way of response to the allegations.

### **Discrimination in provision of services**

27. In answer to paragraph 27, the Respondent says as follows:
- 27.1 Scope has provided or offered to provide supported employment to the Applicant since February 2009. The Respondent refers to and repeats paragraphs 5.1 and 11.2 above.
- 27.2 The Respondent otherwise denies the allegations in paragraph 27 (whether the Applicant relies on paragraph (a) of section 24 of the DDA as alleged or on other paragraphs of section 24 of the DDA).
- 27A. In answer to paragraph 27A, the Respondent says as follows:

27A.1 From time to time from June or July 2009, employing ADEs have provided or offered to provide supported employment to persons including group members.

27A.1 The Respondent otherwise denies the allegations in paragraph 27A (whether the Applicant relies on paragraph (a) of section 24 of the DDA as alleged or on other paragraphs of section 24 of the DDA).

28. In answer to paragraph 28, the Respondent says as follows:

28.1. The Respondent denies the allegations in paragraph 28 and refers to and repeats paragraphs 5 to 23A above and the particulars thereto.

28.2. The Respondent says further that assessing the Applicant's wages by using the SWS or another productivity only assessment tool would have imposed an unjustifiable hardship on Scope within the meaning of:

28.2.1. sections 24(2) and 11 of the DDA as it existed before 5 August 2009; and

28.2.2. sections 29A and 11(1) of the DDA as it existed from 5 August 2009.

#### **Particulars**

The Respondent refers to and repeats the matters in paragraph 10.1 above.

28A. In answer to paragraph 28A, the Respondent says as follows:

28A.1 The Respondent makes the Common Issues Objection.

28A.2 Under cover of the Common Issues Objection, the Respondent denies the allegations in paragraph 28A and reserves the right to raise additional matters regarding group members employed by ADEs, following:

28A.2.1 the identification of the common issues of law and fact to be determined at trial; and

28A.2.2 the determination of those common issues of law and fact, by way of response to those allegations.

#### **Involvement of the Commonwealth**

29. The Respondent admits the allegations in paragraph 29 but denies that it has done any of the things alleged in paragraph 29 after 23 December 2012.

30. The Respondent does not plead to paragraph 30 because it contains no allegations against the Respondent.

31. The Respondent admits the allegations in paragraph 31.



32. In answer to paragraph 32, the Respondent says as follows:

32.1 The Respondent admits that, to the extent that Scope and the employing ADEs are found to have done an act or acts that contravened relevant provisions of the DDA by reason of their use of the BSWAT, the Respondent is liable for those contravention(s).

32.2 The Respondent otherwise denies the allegations in paragraph 32.

33. In answer to paragraph 33, the Respondent refers to and repeats paragraph 32 above.

**Discrimination in administration of Commonwealth programs**

34. In answer to paragraph 34, the Respondent says as follows:

34.1. The Respondent refers to and repeats paragraphs 5.1 and 11.2 above.

34.2. The Respondent otherwise denies the allegations in paragraph 34.

34A. In answer to paragraph 34A, the Respondent says as follows:

34A.1. The Respondent refers to and repeats paragraph 27A.1 above.

34A.2. The Respondent otherwise denies the allegations in paragraph 34A.

35. In answer to paragraph 35 the Respondent says as follows:

35.1. The Respondent denies the allegations in paragraph 35 and refers to and repeats paragraphs 5 to 23A above and the particulars thereto.

35.2. The Respondent says further that assessing the Applicant's wages using the SWS or another productivity only assessment tool would impose an unjustifiable hardship on Scope within the meaning of section 11 of the DDA as the DDA has provided since 5 August 2009.

**Particulars**

The Respondent refers to and repeats the matters in paragraph 10.1 above.

35A. In answer to paragraph 35A, the Respondent says as follows:

35A.1. The Respondent makes the Common Issues Objection.

35A.2. Under cover of the Common Issues Objection, the Respondent denies the allegations in paragraph 35A and reserves the right to raise additional matters regarding group members employed by ADEs, following:

35A.2.1 the identification of the common issues of law and fact to be determined at trial; and

35A.2.2 the determination of those common issues of law and fact,  
by way of response to those allegations.

### **Complaint and proceeding**

- 36. The Respondent admits the allegations in paragraph 36.
- 37. The Respondent admits the allegations in paragraph 37.
- 38. The Respondent admits the allegations in paragraph 38.

### **Loss and Damage**

- 39. In answer to paragraph 39, the Respondent says as follows:

39.1. Payment of the Applicant's wages as assessed under the BSWAT resulted in the Applicant being paid a lower wage than if his wages had been paid only as assessed under the productivity component in the BSWAT.

39.2. To the extent that paragraph 39 makes allegations regarding the payment of wages to group members:

39.2.1. the Respondent makes the Common Issues Objection;

39.2.2. under cover of the Common Issues Objection, the Respondent says that payment of many group member's wages as assessed under the BSWAT resulted in those group members being paid a lower wage than if their wages had been paid as assessed by reference to the productivity component alone in the BSWAT; and

39.2.3. the Respondent reserves the right to raise additional matters regarding group members employed by ADEs, following:

(a) the identification of the common issues of law and fact to be determined at trial; and

(b) the determination of those common issues of law and fact;

by way of response to those allegations.

39.3. The Respondent otherwise denies the allegations in paragraph 39.

- 40. The Respondent denies the allegations in paragraph 40.

### **Other Defences**

- 41. Further and alternatively in answer to the FASOC, the Respondent says as follows:

41.1. The Respondent refers to and repeats paragraph 10.1 above.

41.2. The Respondent says that, at all material times prior to 5 August 2009, the use of the BSWAT by Scope to assess the Applicant's wages was reasonably intended to afford the Applicant access to facilities, services, opportunities, benefits or programs to meet his special needs in relation to:

41.2.1. employment;

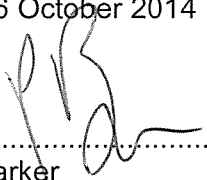
41.2.2. the provision of services; or

41.2.3. the administration of Commonwealth laws and programs.

41.3. The Respondent says that, if the discrimination alleged in paragraphs 26, 28, 33 and 35 of the FASOC to have occurred before 5 August 2009 did occur (which is denied), that discrimination is not unlawful by reason of the matters pleaded in paragraphs 41.1 and 41.2 above and section 45(b) and/or section 45(c) of the DDA as those provisions existed before 5 August 2009.

42. Further and alternatively in answer to the allegations relating to group members in the FASOC, the Respondent reserves the right, following the determination of the common issues of law and fact, to raise additional defences under sections 45 and 47 of the DDA (as those provisions stood from time to time) regarding group members employed by ADEs by way of response to those allegations.

Date: 6 October 2014

  
.....  
Paul Barker  
A lawyer employed by  
Australian Government Solicitor  
Lawyer for the Respondent

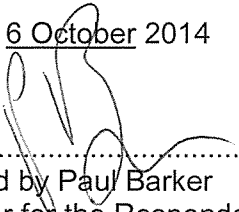
This pleading was prepared by the Australian Government Solicitor and settled by Peter Hanks QC with Dan Star of Counsel.

### CERTIFICATE OF LAWYER

I, Paul Barker certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

1. each allegation in the pleading; and
2. each denial in the pleading; and
3. each non-admission in the pleading.

Date: 6 October 2014

  
.....  
Signed by Paul Barker  
Lawyer for the Respondent