



# THE NATION

## Judge gives test for disabled an F

EXCLUSIVE

SUSANNAH MORAN

A JUDGE has slammed a controversial “competency” test devised by the government for disabled workers, saying it has led to lower wages and is discriminatory.

In a landmark legal case, two intellectually disabled men took on their employers and the government and secured a legal victory that could affect more than 20,000 other workers with disabilities nationally.

The federal government could be liable for a compensation bill for disabled workers, some of whom earn less than a dollar an hour working in government-subsidised businesses known as Australian Disability Enterprises (ADEs), doing tasks such as filling envelopes, packing muesli bars and gardening work.

The ADEs, formerly known as sheltered workshops, assess workers using the Business Services Wage Assessment Tool (BSWAT), which measures their productivity as well as “core” and “industry” competencies.

The complicated competencies test includes quizzing workers on what jobs their peers do, and observing them to see if they can complete safety checks on machinery they are not required to maintain.

The BSWAT test is not used to assess workers with disabilities who work in the private sector, where wages are based on productivity.

Michael Nojin, who has cerebral palsy and an intellectual disability, was earning \$1.85 an hour doing tasks such as document shredding, while Gordon Prior, who is legally blind and has a mild intellectual disability, was earning less than \$3 an hour doing gardening work when they decided to take legal action. They lost in the Federal Court, but won on appeal. Two of three judges agreed Mr Nojin and Mr Prior had been in-

directly discriminated against.

In his judgment Justice John Buchanan noted that after the

BSWAT was trialled in 2002 the tool was adjusted because it “produced results which were regarded as yielding wage outcomes that were too high”. A modified version was introduced in mid-2004. Mr Prior was marked down in his test because he could not complete safety checks, but Justice Buchanan noted Mr Prior had a visual impairment and was not responsible to check his equipment — his supervisor was.

Justice Buchanan was scathing about the competency test, and noted workers employed more widely doing the same type of work as Mr Prior and Mr Nojin were not required to undergo a similar test to secure their wages. Failing the competency test slashes a disabled worker’s already low pay by half.

“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,” Justice Buchanan said. “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.”

He said introducing the competency tool has led to declining wages for intellectually disabled workers, who comprise more than 75 per cent of those employed at ADEs, and who cannot articulate “concepts in response to a theoretical construct borrowed from training concepts which have no application to them”.

“It seems impossible, further-

more, to resist the inference that the tool was adjusted so that it would not produce a better result than a simple productivity measure,” Justice Buchanan said.

Mr Prior has since moved to a new job at a local dry-cleaning business where he is considered an excellent employee — and is being paid a lot more.

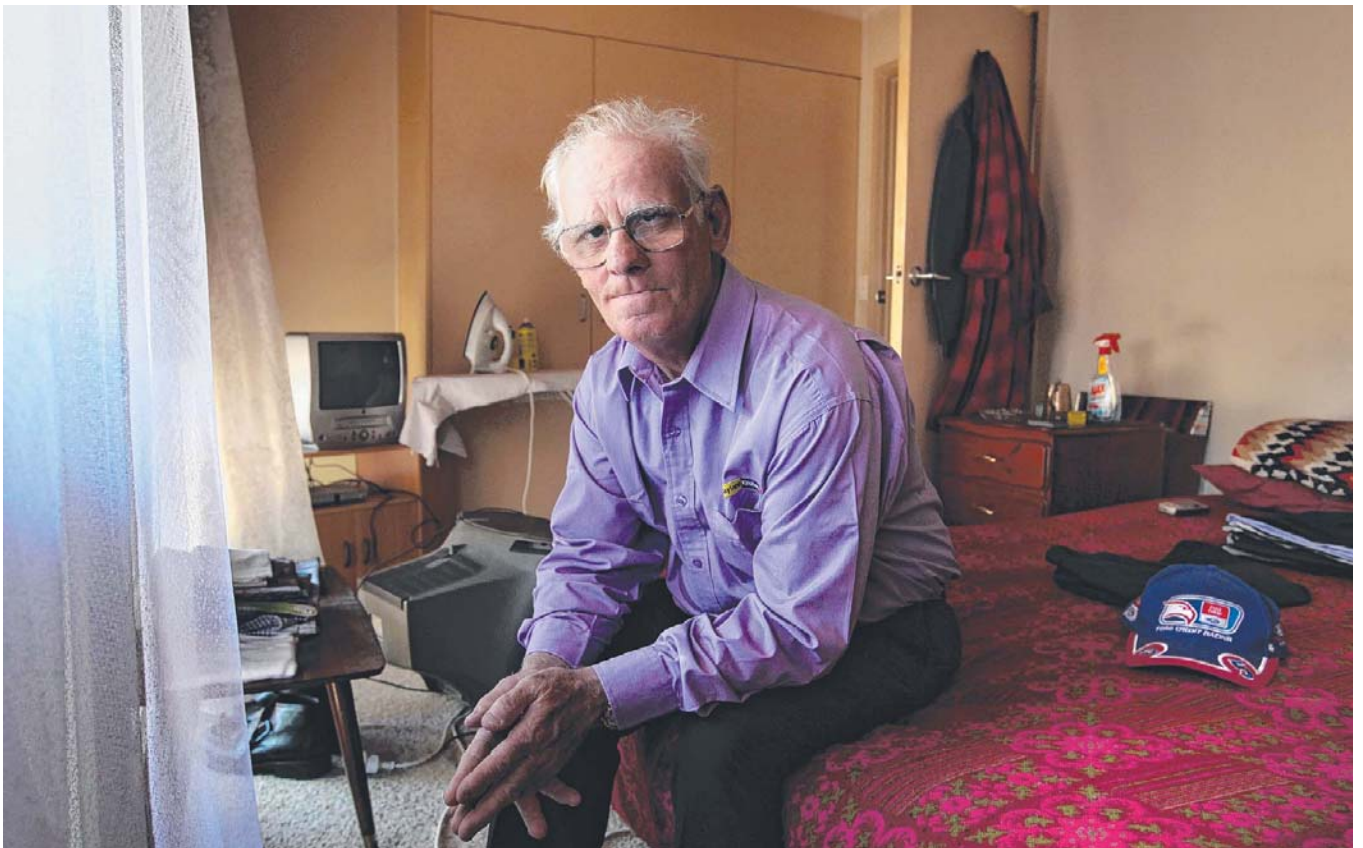
“It is a stunning result,” Mr Prior said of his court victory. “I was discriminated against.”

Lawyer Kairsty Wilson, from the AED Legal Centre, ran the case and was helped by law firm Holding Redlich.

The Department of Families, Housing, Community Services and Indigenous Affairs did not respond to the criticisms of the BSWAT test made in the judgment.

A spokesperson said: “The Business Services Wage Assessment Tool has been independently assessed as an appropriate and accurate way of measuring the competency and productivity of employees with disability.

“The Department will review the Federal Court’s full judgment before deciding on the next course of action.”



DAVID GERAGHTY

**Gordon Prior, who is legally blind and has a mild intellectual disability, in his flat at Stawell, Victoria, is celebrating victory in his discrimination appeal**