

People with Disability Australia
Applicant

and

Australian Human Rights Commission
Respondent

and

Secretary, Department of Social Services
Other Party

and

National Disability Services
Other Party

and

AED Legal Centre
Other Party

Applicant's Application for Review

Applicant's outline of Facts, Contentions and Issues

Introduction

1. This is an application, filed with the Administrative Appeals Tribunal (**AAT**) on 4 May 2015 for review of a decision of the Australian Human Rights Commission (**AHRC**) made on 30 April 2015 under section 55(1) of the *Disability Discrimination Act 1992* (Cth) (**DDA**) by which the AHRC purported to grant an "interim" temporary exemption to the Commonwealth of Australia and to all Australian Disability Enterprises (**ADEs**) using or proposing to use the Business

Services Wage Assessment Tool (**BSWAT**) from the operation of sections 15, 24 and 29 of the DDA (**Application for review, impugned decision**).

Contentions

Jurisdiction

2. The AAT has jurisdiction to deal with this Application for review arising from section 25(1)(a) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), which confers power on the AAT to review decisions designated as reviewable decisions by an enactment. In this respect, section 56 of the DDA confers power on the AAT to review a decision of the AHRC made under section 55 of the DDA.

Relief

3. The Applicant seeks a decision from the AAT pursuant to section 43(1)(c)(i) of the AAT Act setting aside the impugned decision and substituting a correct or preferable decision being a decision to refuse the Commonwealth's application for a temporary exemption.

Standing

7. The Applicant is an organisation entitled to apply to the AAT for review of the impugned decision pursuant to section 27 of the AAT Act because it is an incorporated organisation whose interests are affected by the impugned decision.

Decision must be set aside because it is not correct

8. The impugned decision is not correct in law, in that it exceeds the power conferred on the AHRC by section 55 of the DDA with respect to the granting of temporary exemptions. The AHRC has no power to entertain or determine applications for "interim" temporary exemptions.
9. The impugned decision is not correct in law in that it contravenes, or in the alternative results in the contravention, of a Modern Award, being the *Supported Employment Services Award 2010* (**SESA**), contrary to the civil penalty provision provided by section 45 of the *Fair Work Act 2009* (Cth).
10. The impugned decision is not correct in law, in that it operates contrary to the obligation of the President of the AHRC pursuant to section 46PW(3) of the

AHRCA to refer complaints that allege discriminatory acts under an industrial instrument to the Fair Work Commission

11. The impugned decision is not correct in law on the basis of jurisdictional error in that it failed to accord procedural fairness to parties directly affected by the decision, specifically to supported employees of ADEs.
12. The impugned decision is not correct in law in that it grants a temporary exemption to entities that were not a party to the Commonwealth's application. In this respect the Commonwealth's application was not competent. There was no evidence before the AHRC that the Commonwealth was authorised to make the application on behalf of any or all ADEs, that any or all ADEs consented to the terms of the Application, or that any or all ADEs they agreed to be bound by the terms of any exemption granted.
13. The impugned decision is not correct in law in that it operates contrary to the objects of the DDA which is beneficial legislation that has the fundamental purpose of promoting equality and providing remedies for discrimination on the basis of disability in specified areas of life, including in the areas of employment, the provision of services, and the administration of Commonwealth laws and programs. In this respect, the power to grant exemptions pursuant to section 55 is to be construed and applied narrowly.

Decision must be set aside because it is not preferable

14. The impugned decision is not preferable in that it perpetuates a violation of the human rights of supported employees. Australia is a State Party to the Convention on the Rights of Persons with Disabilities. The Treaty Body responsible for international oversight of that Convention called upon the Australian Government to immediately cease the use of BSWAT on 21 October 2013. DSS and the AHRC are both entities of the Australian Government.
15. The impugned decision is not preferable in that it is not concordant with the objects of the DDA, which include the elimination of discrimination on the basis of disability in the area of work as far as possible, and ensuring as far as practicable that persons with disability enjoy the same rights to equality before the law as other persons. The impugned decision results in the perpetuation of discrimination on the basis of disability in the area of work against the most vulnerable of all Australian employees.

16. The impugned decision is not preferable because it deprives supported employees of ADEs whose wages have been assessed using BSWAT of the benefit of the decision of the Full Court of the Federal Court of Australia *Nojin v the Commonwealth* [2012]FCAFC 192, where it was determined that BSWAT indirectly discriminated against supported employees.
17. The impugned decision is not preferable because the Commonwealth and ADEs have been on notice since the Full Court's decision in *Nojin* in December 2012 that BSWAT is a discriminatory wage assessment tool. The Commonwealth and ADEs have now had two-and-a half years to deal with the implications of that decision. This is ample time.
18. The impugned decision is not preferable because the Commonwealth and ADEs have already had the benefit of a 12 month temporary exemption from the DDA on equivalent terms to that granted by the impugned decision. The Commonwealth and ADEs did not comply with the terms and conditions upon which the earlier 12month temporary exemption was granted. Any further period of exemption is unjustifiable in these circumstances.
19. The impugned decision is not preferable because its' terms and conditions are un-enforceable as between the Commonwealth and ADEs. The Commonwealth has no power to require or compel ADEs to adhere to the terms and conditions upon which the temporary exemption was granted.
20. The impugned decision is not preferable because within the premises of the Commonwealth's own application, as originally filed with the AHRC, it is unnecessary. The Commonwealth contends that the Full Court's decision in *Nojin* is confined to the particular facts of those two supported employees and that it does not mean that BSWAT is a discriminatory wage setting tool *per se*.
21. The impugned decision is not preferable on the basis that the Commonwealth and ADEs have no normative entitlement to relief from the obligations imposed upon all employers by the DDA. No other class of business enterprise has asked for or been granted a temporary exemption from the DDA to facilitate their payment of discriminatory wage levels to employees based on their business viability or for any other reason.
22. The impugned decision is not preferable on the basis that the DDA contains an alternative, preferable, basis for the assessment of whether discrimination on

the basis of disability in employment may be lawfully engaged in. It is open to the respondent to a complaint of disability discrimination to defend that complaint on the basis that it would constitute an unjustifiable hardship for it to act otherwise. This alternative approach to dealing with the claims made by the Commonwealth and ADEs in relation to, for example, the ability of ADEs to pay appropriate wages to supported employees, would ensure that such claims are properly tested in the specific circumstances of each case. The impugned decision grants an exemption of extensive scope and impact where there is no specific testing of its reasonableness in the specific contexts in which it applies

23. The impugned decision is not preferable because it results in two Commonwealth agencies, the AHRC and the Fair Work Commission, concurrently exercising jurisdiction in relation to the same subject matter. It would be preferable for the AHRC to vacate the field leaving this subject matter to be dealt with by the Fair Work Commission. The Fair Work Commission is already seized of the matter and is the agency that has specific responsibility in the area of industrial awards. It is also vested with specific jurisdiction in relation to discrimination in the area of employment.
24. The impugned decision is not preferable on the basis that the Commonwealth has appropriated \$173million to support reforms to wage setting arrangements in the supported employment sector. There is sufficient funding available to the Commonwealth and ADEs to achieve the necessary reforms and manage any liability under the DDA until these reforms are completed.
25. The impugned decision is not preferable because there is no evidence to substantiate the assertions made by the Commonwealth and ADEs to the effect that non-discriminatory wage setting would threaten the viability of ADEs. ADEs operate in an environment where there are many externalities. No direct relationship between supported employee wage levels and the viability of ADEs is established on the evidence before the AHRC or AAT.
26. Within the premises of paragraph 25, even if such a relationship was established, it could not justify or excuse discrimination in employment on the basis of disability. No other group of employers with business viability concerns is exempted from disability discrimination law.

27. The impugned decision is not preferable because there is no evidence to substantiate the assertions made by the Commonwealth and ADEs that discriminatory wage levels in the supported employment sector are justified because of the ancillary benefits supported employees derive from their employment. All employees derive from their employment the ancillary benefits claimed by the Commonwealth and ADEs.
28. The impugned decision is not preferable because it is not in the public interest. The DDA is a public remedial law which has as its fundamental purpose the elimination of discrimination on the basis of disability in the area of work as far as possible, and ensuring as far as practicable that persons with disability enjoy the same rights to equality before the law as other persons. There is a public interest in the DDA being given its full effect.
29. The impugned decision is not preferable because the exposure of the Commonwealth and ADEs to liability under the DDA in relation to discriminatory wage setting is more likely to motivate timely reform than relief from such liability, particularly in circumstances where the Commonwealth and ADEs have already had the benefit of a 12 month period of temporary exemption from the DDA and have they failed to comply with the terms and conditions upon which that temporary exemption was granted.
30. The impugned decision is not preferable because there was no “necessity” whatsoever for the AHRC (or, now, the AAT) to determine the Commonwealth’s temporary exemption application before the expiry of the prior temporary exemption. The timing of the Commonwealth’s application for a further temporary exemption was entirely in its hands. Nothing required or compelled it to wait to lodge this application to just days before the expiry of the prior temporary exemption. The Commonwealth and ADEs knew the position they were in with respect to their compliance with the terms of the prior temporary exemption well before the end of April 2015. Nothing required the AHRC (or, now, requires the AAT) to act urgently or precipitously to rescue the Commonwealth and ADEs from a predicament entirely of their own making, without properly testing the basis for a further temporary exemption application, and without giving persons directly affected by such an application notice of that application and the opportunity to be heard in relation to it.

31. The impugned decision is not preferable because the AHRC relied upon submissions and matters that were before it in relation to the Commonwealth's earlier temporary exemption application which was determined by the AHRC on 29 April 2014. This material was of limited or no relevance to the making of the impugned decision. It wrongly assumed that other interested parties, including the applicant, had nothing new to say in relation to the Commonwealth's application for a further temporary exemption. This defect cannot be cured by these proceedings in the AAT. It requires a proper public consultation process.
32. The impugned decision is not preferable because the AHRC failed to consider the views of persons whose interests are affected by the impugned decision, including those of supported employees and their representative organisations. This defect cannot be cured by these proceedings in the AAT. It requires a proper public consultation process.
33. The impugned decision is not preferable because the AHRC failed completely to interrogate the circumstances in which the Commonwealth and ADE's failed to comply with the conditions of the temporary exemption granted to them by the AHRC on 29 April 2014, in particular by having regard to the views of all persons whose interests were affected by that temporary exemption. This defect cannot be cured by these proceedings in the AAT. It requires a proper public consultation process.
34. The impugned decision is not preferable because the AHRC failed to properly consider the progress and implications of proceedings before the Fair Work Commission in relation to an Application by United Voice and the Health Services Union under the Fair Work Act 2009 to vary the SESA, *inter alia*, so as to exclude BSWAT as an approved wage assessment tool under that Award. This defect cannot be cured by these proceedings in the AAT. It requires a proper public consultation process.
35. The impugned decision is not preferable because the AHRC failed to ascertain and consider the scope and impact of the discrimination on the basis of disability in employment that supported employees whose wages have been determined using BSWAT continue to be subject. Their financial vulnerability and cost of living pressures were given no consideration whatsoever. This defect

cannot be cured by these proceedings in the AAT. It requires a proper public consultation process.

Phillip French
Solicitor for the Applicant

10 July 2015



People with Disability Australia (PWDA)

Submission in response to an application by the Department of Social Services for an additional exemption from the Disability Discrimination Act 1992 to use the Business Services Wage Assessment Tool in Australian Disability Enterprises

July 2015

Submission to the Australian Human Rights Commission, Legal Section
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About People with Disability Australia

1. People with Disability Australia (PWDA) is a leading national disability rights, advocacy and representative organisation of and for people with disability. We have a cross-disability focus representing the interests of people with all kinds of disability. Our primary membership is made up of people with disability and organisations primarily constituted by people with disability. We are a non-profit, non-government organisation.
2. We are a member of the Australian Cross-Disability Alliance, which is funded by the Federal Government to promote, protect and advance the human rights and freedoms of people with disability in Australia by working collaboratively on areas of shared interest, purpose and strategic opportunity.
3. We have a vision of a socially just, accessible and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are respected and celebrated. Access to the built environment, including access to public transport conveyances, infrastructure and premises, is a key issue in achieving this vision.

Introduction

4. People with Disability Australia (PWDA) welcomes the opportunity to provide a submission to the Australian Human Rights Commission (AHRC) in response to the application by the Commonwealth Department of Social Services (DSS) for a further Exemption from the Disability Discrimination Act 1992, to continue to use the Business Services Wage Assessment Tool (BSWAT).
5. PWDA does not consider the granting of a further Exemption to be appropriate, necessary or justified; it would also result in the continuing violation of the human rights of people with disability.
6. PWDA, strongly objects to any further exemption that will allow Australian Disability Enterprises (ADEs) to continue to pay employees with disability wages that were assessed using the BSWAT.
7. PWDA's submission reflects our positions on wage equity and employment rights within Australian Disability Enterprises (ADEs) which we have previously outlined in a number of other submissions related to this current Exemption application. These are attached for consideration in support of this submission.
 - [PWDA Submission to Australian Human Rights Commission re FaHCSIA DDA Exemption Application \(October 2013\)](#)
 - [Joint Response from Disability Peaks to Australian Human Rights Commission Questions on DSS BSWAT Exemption Application \(January 2014\)](#)
 - [Submission to the Senate Standing Committee Inquiry Into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 \(July 2014\)](#)
8. PWDA supports the submissions made in response to the current Exemption application from:
 - United Voice (UV) and Health Services Union (HSU), dated 22 May 2015
 - AED Legal Services and Inclusion Australia, dated 27 May 2015
 - Australian Council of Trade Unions (ACTU), dated 27 June 2015

Summary of Objections

9. A summary of PWDAs objections to the Exemption application are as follows:
- An Exemption perpetuates violation of the human rights of ADE employees;
 - An Exemption is contrary to the objectives of the DDA;
 - The Commonwealth has no standing on which to seek Exemption on behalf of all ADEs;
 - The Commonwealth and ADEs have already had the benefit of a 12 month temporary Exemption from the DDA;
 - A suitable wage assessment tool already exists and further delays are not justified on basis of development of a new tool;
 - There is sufficient resources to assist with any reforms and transition to a non-discriminatory wage assessment tool;
 - There is no evidence to substantiate the assertions made by the Commonwealth and some ADEs that non-discriminatory wage setting would threaten the viability of ADEs;
 - Ancillary benefits do not justify continued payment of discriminatory wages;
 - An Exemption is not in the public interest; and
 - The AHRC should refer the matter to the Fair Work Commission.
10. Granting a further Exemption to the Disability Discrimination Act (DDA) 1992 (Cth) to permit use of the BSWAT to set wages in ADEs would result in:
- Continued systemic unlawful discrimination against people with disability, particularly people with intellectual disability;
 - Stymying one of the objects of the *Fair Work Act 2009* (Cth) (subsection 3(e)) being the “*enabling of fairness ... at work and the prevention of discrimination*”;
 - Permitting continuation of payment of wages which are based on the BSWAT, a practice that:
 - is contrary to the Full Federal Court judgment of *Nojin & Prior v Commonwealth* [2012] FCAFC 192;
 - runs counter to the objects of the DDA (in section 3) in that it permits, rather than eliminates, discrimination against persons on the ground of disability in the area of work;
 - runs counter to the objects of the DDA (in section 3) in that it does not promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community; and
 - is contrary to Article 27 of the Convention on the Rights of Persons with Disabilities.

PWDA asserts that the interests of approximately 6,000 employees, most of whom have an intellectual disability, will be directly and adversely affected if a further Exemption was granted by the AHRC.

Recommendations

11. It is PWDAs position that:
- (a) continued use of the BSWAT (and other wage assessment tools which incorporate a ‘competency’ component) is unlawful and must cease immediately; and
 - (b) that the Commonwealth and ADEs have had more than sufficient time, resources and support to transition wage assessment of employees with disability off BSWAT and onto fair and lawful wage assessment tools, such as the Supported Wage System (SWS).
12. In considering the current exemption application before it, the AHRC must:
- (a) interrogate the circumstances in which the Commonwealth and ADEs failed to comply with the conditions of the temporary Exemption granted to them by the AHRC on 29 April 2014, in particular by having regard to the views of people whose interests were affected by that temporary Exemption;

- (b) properly consider the progress and implications of proceedings before the Fair Work Commission in relation to the Application by United Voice and the Health Services Union under the Fair Work Act 2009 to vary the SESA, and refer the matter to the FWC; and
 - (c) ascertain and consider the scope and impact of the discrimination on the basis of disability in employment that supported employees, whose wages have been determined using BSWAT, continue to be subject. Their financial vulnerability and cost of living pressures must be given due consideration, at least equal to considerations given to the viability of ADEs, in making a decision on this application.
13. PWDA recommends that the AHRC:
- (a) denies the Exemption application and determine that the SWS is the only wage assessment tool available for ADEs to use; and
 - (b) determines that the Commonwealth embark on an immediate course of action to prohibit ADEs from using the BSWAT and other competency-based wage assessment tools; and provides resources to ADEs to support them throughout the transition to the SWS.
14. Meanwhile, the Commonwealth should continue to consult at a policy level, and within a time bound framework, in order to plan, design, and implement genuine supported employment options which meet the needs of people with disability and realises their rights.

Human Rights Framework

15. All people with disability have the right to an adequate standard of living for themselves and their families, and for continuous improvement of their living conditions. Article 28 of the UN Convention on the Rights of Persons with Disabilities (CRPD)¹ obliges the Australian Government to safeguard and promote the realisation of these rights.
16. Article 27 (1) (b) of the CRPD requires states to; “Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;”
17. According to the UN High Commissioner on Human Rights, this right extends to all forms of employment; “The right to enjoyment of just and favourable conditions of work applies to all workers with disabilities without distinction, whether they work in the open labour market or in alternative forms of employment.”²
18. In 2013 following a review of Australia’s progress in implementing the CRPD, the UN CRPD Committee made the following Recommendations in its Concluding Observations relating to Article 27, stating that Australia; “Immediately discontinues the use of the BSWAT”, and “ensures that the Australians Supported Wage System (SWS) is changed to secure the right assessment of the wages of persons in supported employment.”
19. The UN CRPD Committee also emphasised the need for the Supported Wage System (SWS) to be used as the appropriate and fair tool for assessment of the wages of workers in supported employment.

¹ Australia ratified the UN Convention on the Rights of Persons with Disabilities in 2008. The full convention can be found here <http://www.un.org/disabilities/convention/conventionfull.shtml>

² Thematic study on the work and employment of persons with disabilities. 17 December 2012. Report of the Office of the United Nations High Commissioner for Human Rights

20. The SWS is consistent with the CRPD's requirement for *equal remuneration for work of equal value*. This is the hallmark of the SWS in terms of its direct comparison of the volume of work by a worker paid full award wages doing the same job task.

The Direction of Legislative and Policy Reform

21. In keeping with the CRPD and the CRPD Committee's Concluding Observations to Australia, the Commonwealth should implement legislative reform and policy direction in order to bring all employees with disability in ADEs under the SWS, and declare the SWS as the single national award-based wage assessment tool to be used in ADEs.
22. This reform process should include development of a comprehensive transition plan to review the employment options of ADE employees through the roll-out of SWS assessments across all ADEs. This process should be done in consultation with employees with disability and their representative organisations, ADEs, and the SWS Management Unit as per Articles 4 and 33 of the CRPD.
23. Fundamentally, the Commonwealth and ADEs must commit to a course of action that has the rights of people with disability at the very forefront of decision making concerning the reform of wage assessment tools and the role of ADEs as employers.
24. Questions regarding the viability of ADEs need to be separated out from the right of ADE employees to equal pay for work of equal value. A major question for the Commonwealth is whether it should continue to sustain an employment industry that struggles to achieve viability or pay fair wages. It is an industry where employees are primarily dependent on the Disability Support Pension and few earn a wage from their employment through an ADE which significantly reduces this reliance or provides considerably increased lifestyle opportunities.
25. Maintaining the financial viability of ADEs is not a factor that should override the right of a worker to receive equal pay for work of equal value. If the Commonwealth has concerns about the sustainability of the ADE business model if employees are paid fair wages, then it is the business model and/or funding formulas that need restructuring. The right of a worker to receive equal pay for work of equal value cannot be compromised.
26. Unlike their counterparts in open employment, the vast majority of people with disability working in ADEs do not receive equal pay for work of equal value or have access to the same industrial protections as other workers. Employment outcomes for these workers is unacceptably poor and in breach of Australia's obligations under the CRPD and other international employment standards. There is an urgent need to address the inequitable wages and working conditions experienced by employees of ADEs.

Background to the Current Exemption Application

Nojin & Prior v Commonwealth [2012] FCAFC 192

27. PWDA welcomed the decision of the Federal Court in *Nojin & Prior v Commonwealth [2012] FCAFC 192* in December 2012, and the refusal by the High Court of Australia to grant leave to the Commonwealth to appeal that decision in May 2013. In this decision, the Full Federal Court found the Commonwealth had unlawfully discriminated against the complainants in its application of the Business Services Wage Assessment Tool (BSWAT) to assessment of their wages.
28. PWDA acknowledges the courage and determination of Mr Nojin, Mr Prior, and their families in bringing the case, raising awareness of the nature and extent of discrimination inherent in

the BSWAT, and standing up for the rights of workers with disability. The outcome of this case provided an unprecedented opportunity and impetus to correct one of the employment practices that has unlawfully and systematically discriminated against people with disability, particularly people with intellectual disability, for many years.

Commonwealth Government DDA Exemption Application 2014

29. PWDA, along with a number of other national disability peaks and advocacy organisations, provided a series of submissions to AHRC in 2013 and 2014 when a similar application was made by the Commonwealth seeking a three year Exemption from the DDA. PWDA opposed this application and remains greatly disappointed in the decision of the AHRC to grant a one year Exemption until 29 April 2015.

United Voice and the Health Services Union Fair Work Commission Application 2014

30. PWDA, is presently a party to the application by United Voice and the Health Services Union to the Fair Work Commission (FWC) for the variation of the *Supported Employment Services Award 2010* (AM2013/30). So too are AED Legal Services, Inclusion Australia, the Commonwealth Government and a number of ADEs. The parties to the Fair Work Application have been engaged in conciliation by way of conference pursuant to section 592 of the *Fair Work Act 2009* (Cth) for more than eighteen months, including approximately 13 days of conferencing.

31. On 5 June 2015, the FWC made an order by consent varying the Supported Employment Services Award (SESA). The effect of this variation was to require:

- removal of BSWAT as an approved assessment tool from the Award;
- ADEs to identify an alternative assessment tool within 1 month of the variation;
- ADEs which have not moved off the BSWAT, to do so by 31 October 2015; and
- those ADEs not able to meet this deadline to apply in writing to the FWC seeking a further extension to 29 February 2015.

Commonwealth Government DDA Exemption Application 2015

32. On 25 June 2015, DSS amended its current Exemption application to align the timeframes of the Exemption being sought with the FWC, i.e. 29 February 2016.

33. PWDA opposed the making of the one year 2014-2015 Exemption, we oppose the 4 month Temporary Exemption granted by AHRC on 30 April 2015 on expiry of the initial 12 month Exemption (which was granted without opportunity for third party input), and we oppose the application for further Exemption sought by the Commonwealth for itself and ADEs using or proposing to use the BSWAT until 29 February 2016.

Objections to the Granting of an Exemption

34. In addition to the arguments made in previous submissions (see links in Introduction), the following arguments highlight our opposition to the granting of a further Exemption to DSS and ADEs regarding the use of BSWAT:

An Exemption would perpetuate a violation of the human rights of ADE employees

35. Australia is a State Party to the Convention on the Rights of Persons with Disabilities. The Treaty Body responsible for international oversight of that Convention called upon the Australian Government to immediately cease the use of BSWAT on 21 October 2013. DSS and the AHRC are both entities of the Australian Government.

36. As previously noted, Article 27 of the CRPD requires state parties to take appropriate steps, including through legislation, to prohibit discrimination on the basis of disability with regard to all matters concerning employment, and to protect the rights of persons with disabilities to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value.
37. In September 2013 Australia's compliance with, and progress in implementation of, the UN CRPD was reviewed by the CRPD Committee. In relation to work and employment the Committee expressed concern that employees with disabilities in ADEs are still being paid wages based on assessments under the BSWAT and recommended Australia immediately discontinue its use.
38. It would be a significantly retrograde step for the AHRC to grant a further Exemption considering the clear breaches of normative human rights standards the BSWAT illustrates; and especially in the face of the CRPD Committee's comments.
39. The right to work is an economic and social right which States may implement progressively. This, however, does not imply that the timeframe is open-ended. Active steps must be taken to move towards full implementation in a way that is mindful of the most disadvantaged, in this case people with disability working in ADEs. Moreover, freedom from discrimination is an immediately applicable civil and political right which an Exemption would curtail without reasonable justification.

An exemption is contrary to the objectives of the Disability Discrimination Act (DDA)

40. The DDA has the fundamental purpose of promoting equality and remedies for discrimination on the basis of disability in specified areas of life, including in the areas of employment, the provision of services, and the administration of Commonwealth laws and programs. An exemption would result in the perpetuation of discrimination on the basis of disability in the area of work against the most vulnerable of all Australian employees.
41. Additionally, an objective of the DDA is to promote recognition and acceptance within the community of the principle that people with disability have the same fundamental rights as the rest of the community. Granting an Exemption would seriously undermine the confidence of people with disability, particularly persons with intellectual disability, in the DDA as an effective piece of legislation able to protect them from current or potential discrimination.
42. An Exemption would also prevent any future claims under the DDA relating to the BSWAT, essentially rendering this legal avenue of complaint and redress void. PWDA asserts this to be a critical factor requiring careful consideration by the AHRC.

The Commonwealth has no standing on which to seek exemption on behalf of all ADEs

43. PWDA supports the arguments presented in AED and Inclusion Australia's submission that any application for Exemption to continue to use the BSWAT should have been made by individual ADEs, not the Commonwealth.
44. There appears to be no evidence before the AHRC that the Commonwealth was authorised to make an application on behalf of any or all ADEs, that any or all ADEs consented to the terms of the Application, or that any or all ADEs agreed to be bound by the terms of any Exemption granted. Further, the terms and conditions of such an Exemption would be un-enforceable between the Commonwealth and ADEs as the Commonwealth has no power to require or compel ADEs to adhere to the terms and conditions upon which an Exemption is made.

The Commonwealth and ADEs have already had the benefit of a 12 month temporary Exemption from the DDA

45. The Commonwealth and ADEs did not comply with the terms and conditions upon which the earlier 12 month temporary Exemption was granted. Any further period of Exemption is unjustifiable in these circumstances.
46. The decision of the Full Federal Court in *Nojin v Commonwealth 2012 (FCAFC 192)*, was handed down over 2 ½ years ago. The Commonwealth and ADEs have had ample time to transition from the BSWAT to a fairer, non-discriminatory wage assessment tool. PWDA agrees with the assertion of United Voice and the Health Services Union in their submission that people with disability working in ADEs have the right to legal protections and that; “The AHRC, by providing administrative exemptions against a clear judgment of the Full Federal Court is frustrating this fundamental entitlement”.
47. Further, the exposure of the Commonwealth and ADEs to liability under the DDA in relation to discriminatory wage setting is more likely to motivate timely reform than relief from such liability, particularly in circumstances where the Commonwealth and ADEs have already had the benefit of a 12 month period of temporary exemption from the DDA and where they have failed to comply with the terms and conditions upon which that temporary Exemption was granted.

A suitable wage assessment tool already exists and further delays are not justified on basis of development of a new tool

48. Note the work being undertaken by PWDA and other parties to the FWC Application on development of a new wage assessment tool. PWDA agrees with the Australian Council of Trade Unions (ACTU) submission that any such tool should be modified and developed through the FWC conciliation process, and that this becomes the default wage assessment tool to be used.
49. It is not necessary for an Exemption while a new wage assessment tool is devised and tested where one already exists. The Supported Wage System (SWS) is widely regarded by the disability sector both nationally and internationally as a fair, reliable, and appropriate wage assessment tool with independent and transparent processes, opportunities for employee advancement, and regular review. The SWS is a non-discriminatory alternative which is available, already in use in many ADEs, widely supported, and could be transitioned to relatively quickly. Critically, the SWS does not contain the competency assessment element which caused the BSWAT to fall foul of the law in *Nojin*.
50. Moreover, the fact that the SWS is already successfully being used in many ADEs across Australia, without risking financial viability, is evidence that it can be an accurate and sustainable wage assessment tool in an ADE setting.
51. PWDA asserts that all ADE employees whose wages are currently based on the BSWAT, should be reassessed using the SWS. This would resolve the immediate problem of ensuring that employees of ADEs were having their wages assessed fairly and without discrimination.

There are sufficient resources available to assist with any reforms and transition to a non-discriminatory wage assessment tool

52. The Commonwealth has appropriated substantial resources to support reforms to wage setting arrangements in the supported employment sector. There are significant funds available, \$173 million announced by DSS in August 2014³, to assist ADEs to transition to an

³ <http://mitchfield.dss.gov.au/media-releases/155>

alternative wage assessment tool and to supplement any increase in costs that arise out of the use of a new tool. Resources are also available to assist in the development and implementation of a new productivity-based wage assessment tool. However, as noted in the AED and Inclusion Australia submission, there is still no specific or transparent plans proposed by the Commonwealth or ADEs on the transition to a fair wage assessment tool or detail as to how this \$173 million fund will be spent.

53. There is a lack of any substantive data or evidence from the Commonwealth to support its application. An Exemption should not be granted based on acceptance by the AHRC of hearsay assertions made by the Commonwealth.
54. Moreover, the assertion made in the letter from Mr Pratt to the AHRC dated 21 April 2015 that "*significant progress has been made to date*" on the development of a new wage assessment tool is untested.

There is no evidence to substantiate the assertions made by the Commonwealth and some ADEs that non-discriminatory wage setting would threaten the viability of ADEs

55. Maintaining the financial viability of ADEs is not a consideration that should trump the right of a worker to receive equal pay for work of equal value. If the Commonwealth has doubts about whether the ADE business model is sustainable if workers are paid fairly for the work they do, then it is the model that requires restructuring.
56. The basic right for a worker to be paid fairly on the same basis as other workers doing the same job cannot be compromised on the ground that s/he works for an employer whose viability rests on exploitation of its workforce rather than the quality of its operation and output. No other employer in Australia is permitted to determine minimum wages and conditions unlawfully based on the profitability or viability of their business.
57. ADEs operate in an environment where there are many externalities. No direct relationship between supported employee wage levels and the viability of ADEs has been established on the evidence before the AHRC. Even if such a relationship was established, it could not justify or excuse discrimination in employment on the basis of disability. No other group of employers with business viability concerns is exempted from disability discrimination law.
58. The Commonwealth and ADEs have no entitlement to relief from the obligations imposed upon all employers by the DDA. No other class of business enterprise has asked for, or been granted, a temporary Exemption from the DDA to facilitate their payment of discriminatory wage levels to employees based on their business viability or for any other reason.
59. The DDA contains an alternative, preferable, basis for the assessment of whether discrimination on the basis of disability in employment may be lawfully engaged in. It is open to the respondent to a complaint of disability discrimination to defend that complaint on the basis that it would constitute an unjustifiable hardship for it to act otherwise. This alternative approach to dealing with the claims made by the Commonwealth and ADEs in relation to, for example, the ability of ADEs to pay appropriate wages to supported employees, would ensure that such claims are properly tested in the specific circumstances of each case. A further exemption that applies to all ADEs is allowing an exemption of extensive scope and impact where there is no specific testing of its reasonableness in the specific contexts in which it applies.

Ancillary benefits do not justify continued payment of discriminatory wages

60. There is no evidence to substantiate the assertions made by the Commonwealth and ADEs that discriminatory wage levels in the supported employment sector are justified because of the ancillary benefits that ADE employees derive from their employment. Employees in any

employment setting derive ancillary benefits claimed by the Commonwealth and ADEs, such as the opportunity to develop social networks and self-esteem.

An Exemption is not in the public interest

61. The DDA is a public remedial law which has as its fundamental purpose as the elimination of discrimination on the basis of disability in the area of work, and ensuring, as far as practicable, that persons with disability enjoy the same rights to equality before the law as other persons. There is a public interest in the DDA being given its full effect.

The AHRC should refer the matter to the Fair Work Commission

62. The AHRC, pursuant to section 46PW(3) of the AHRC Act has responsibility for referring complaints that allege discriminatory acts under an industrial instrument to the Fair Work Commission: A further Exemption would result in two Commonwealth agencies, the AHRC and the Fair Work Commission, concurrently exercising jurisdiction in relation to the same subject matter. It would be preferable for the AHRC to vacate the field leaving this subject matter to be dealt with by the Fair Work Commission. The Fair Work Commission is already dealing with the matter and is the agency that has specific responsibility in the area of industrial awards. It is also vested with specific jurisdiction in relation to discrimination in the area of employment.

Conclusion

63. In conclusion, PWDA aligns with AED Legal Services, Inclusion Australia, United Voice, Health Services Union and the Australian Council of Trade Unions in calling on the AHRC to refuse any further Exemptions regarding the use of BSWAT and allow progress towards wage justice for employees of Australian Disability Enterprises to be realized without further hindrance.

64. Whilst it is widely acknowledged that the entire supported employment framework for people with disability requires transformation, any overarching structural review of supported employment opportunities for people with disability can and should be undertaken quite separately to the matter in hand; which is to implement a fair and non-discriminatory wage assessment tool for workers in ADEs. This should occur as soon as possible, particularly given that for every day that an exemption remains in place, workers in ADEs continue to face discrimination.

65. PWDA strongly advocates that the whole system of supported employment needs to be reviewed from a rights perspective as well as from an economic one. The ADE model is a sheltered employment option which acts to socially and economically segregate and isolate people with disability from the wider community and leave them open to abuse and exploitation.

66. Further, there is little evidence to support claims by some ADEs that there would be mass ADE closures and job losses should they be required to pay fairer, productivity-based wages. PWDA has repeatedly called on the Commonwealth to support the development of a progressive jobs plan that addresses the transition of ADE employees to fair and equitable wages and conditions of employment, including increased support to seek employment in the open labour market.⁴

Thank you for the opportunity to make this submission.

⁴ For example PWDA "Get Real on Jobs" Policy Position <http://www.pwd.org.au/pwda-publications/get-real-on-jobs2.html>



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NGO in Special Consultative Status with the
Economic and Social Council of the United Nations

16 November 2015

The Honourable Susan Ryan AO
Age and Disability Discrimination Commissioner
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Dear Ms Ryan,

Application for a Temporary Exemption under s55 of the *Disability Discrimination Act 1992 (Cth)* by the Commonwealth on behalf of Australian Disability Enterprises (ADEs) using or proposing to use the Business Services Wage Assessment Tool (BSWAT), for the period from 30 April 2015 to the date of an AHRC decision on the Primary Application.

1. We write in regards to the above Application for an 'Interim' Temporary Exemption. We also refer to the letter of Mr Finn Pratt to you dated 21 April 2015, a copy of which was provided to us via Deputy President Booth of the Fair Work Commission (FWC) on 27 April 2015.
2. People with Disability Australia (PWDA) is a leading national disability rights, advocacy and representative organisation of and for people with disability. We are a member of the Australian Cross-Disability Alliance, which is funded by the Federal Government to promote, protect and advance the human rights and freedoms of people with disability in Australia by working collaboratively on areas of shared interest, purpose and strategic opportunity.
3. As you may be aware, PWDA filed three sets of written submissions with the Australian Human Rights Commission (AHRC) in 2013 and 2014 when a similar exemption application was made. On that occasion the Applicant (the Commonwealth) was seeking a three year exemption for itself and all

Australian Disability Enterprises (ADEs) and was granted a one year exemption to 29 April 2015 (2014-2015 Exemption)

4. PWDA opposed the making of the 2014-2015 Exemption and opposes the current Application for a Temporary Exemption and the further 12 month Exemption (Primary Exemption Application) sought by the Commonwealth for ADEs using or proposing to use the BSWAT. As you may also be aware, PWDA filed a further submission with the AHRC in July 2015 in regards to the 2015 Primary Exemption Application and we note that, as at 5 November 2015, there has been no decision made by the AHRC in regards to that Primary Application.
5. Following the 30 April 2015 decision of the AHRC to grant a temporary four month exemption to the Commonwealth and ADEs, PWDA lodged an Application in the Administrative Appeals Tribunal (AAT) on 15 May 2015 for a review of the AHRC decision. Details of our objections and issues with regards to granting of this temporary exemption are contained within the PWDA AAT Application and are outlined below.
6. PWDA is also presently a party to the application by United Voice and the Health Services Union to the Fair Work Commission (FWC) for the variation of the *Supported Employment Services Award 2010* (AM2013/30) (Fair Work Application). So too is the Commonwealth and a number of ADEs. The parties to the Fair Work Application have been engaged in conciliation by way of conference pursuant to section 592 of the *Fair Work Act 2009* (Cth) (FWA) for more than 18 months, having attended approximately 18 days of conferencing.
7. PWDA objects to any further exemption that will allow Australian Disability Enterprises (ADEs) to continue to pay employees with disability wages that were assessed using the BSWAT. PWDA opposes the granting of a temporary exemption for the period from 30 April 2015 to the date of an AHRC decision on the Primary Application for the following reasons.
8. Granting of a temporary exemption would represent:
 - 8.1. **A violation of the human rights of supported employees and is contrary to Article 27 of the Convention on the Rights of Persons with Disabilities.** Australia is a State Party to the Convention on the Rights of Persons with Disabilities. The Treaty Body responsible for international oversight of that Convention called upon the Australian Government to immediately cease the use of BSWAT on 21 October 2013. The Commonwealth Department of Social Services (DSS) and the AHRC are both entities of the Australian Government.

- 8.2. **Perpetuating continued systemic unlawful discrimination against people with disability, particularly people with intellectual disability. A further temporary exemption is not concordant with the objects of the DDA**, which include the elimination of discrimination on the basis of disability in the area of work as far as possible, and ensuring as far as practicable that persons with disability enjoy the same rights to equality before the law as other persons. It perpetuates discrimination on the basis of disability in the area of work against the most vulnerable of all Australian employees.
- 8.3. Continuation of a practice (that is, wage assessment based on BSWAT) that is **contrary to the Full Federal Court judgment of *Nojin & Prior v Commonwealth [2012] FCAFC 192***, where it was determined that BSWAT indirectly discriminated against supported employees and runs counter to the objects of the DDA as such an exemption permits, rather than eliminates, discrimination against persons on the ground of disability in the area of work. An exemption would deprive supported employees, whose wages have been assessed using BSWAT, of the benefit of the decision of the Full Court of the Federal Court of Australia.
- 8.4. **Styming one of the objects of the *Fair Work Act 2009 (Cth)* being the “enabling [of] fairness ... at work and the prevention of discrimination”**. An exemption would also result in two Commonwealth agencies, the AHRC and the Fair Work Commission (FWC), concurrently exercising jurisdiction in relation to the same subject matter. It would be preferable for the AHRC to vacate the field leaving this subject matter to be dealt with by the FWC. The FWC is already handling the matter and is the agency that has specific responsibility in the area of industrial awards. It is also vested with specific jurisdiction in relation to discrimination in the area of employment. Granting of a further temporary exemption would represent a **failure to take into account the progress and implications of proceedings before the Fair Work Commission** in relation to the Application by United Voice and the Health Services Union under the Fair Work Act 2009 to vary the SESA, so as to exclude BSWAT as an approved wage assessment tool under that Award.
- 8.5. Failure to take into account the scope and impact of the discrimination on the basis of disability in employment, that supported employees whose wages have been determined using BSWAT, continue to be subject. A further exemption would also represent failure of the AHRC

to consider the **financial vulnerability and cost of living pressures** experienced by supported employees whose wages are based on the BSWAT.

9. In addition, any further period of exemption is unjustifiable given the following circumstances.

- 9.1. The Commonwealth and ADEs **have been on notice since the Full Court's decision in *Nojin* in December 2012** that BSWAT is a discriminatory wage assessment tool. The Commonwealth and ADEs had over two-and-a-half-years to deal with the implications of that decision, which is ample time;
- 9.2. The Commonwealth and ADEs **already had the benefit of a 12 month temporary exemption from the DDA;**
- 9.3. The Commonwealth and ADEs **did not comply with the terms and conditions** upon which the earlier 12 month temporary exemption was granted;
- 9.4. The **terms and conditions of an interim temporary exemption are un-enforceable** as between the Commonwealth and ADEs. The Commonwealth has no power to require or compel ADEs to adhere to the terms and conditions upon which a temporary exemption is granted;
- 9.5. The Commonwealth and ADEs **have no normative entitlement to relief from the obligations imposed upon all employers by the DDA.** No other class of business enterprise has asked for or been granted a temporary exemption from the DDA to facilitate their payment of discriminatory wage levels to employees based on their business viability or for any other reason;
- 9.6. **The DDA contains an alternative and preferable basis for the assessment of whether discrimination on the basis of disability in employment may be lawfully engaged in.** It is open to the respondent to a complaint of disability discrimination to defend that complaint on the basis that it would constitute an **unjustifiable hardship** for it to act otherwise. This alternative approach to dealing with the claims made by the Commonwealth and ADEs in relation to, for example, the ability of ADEs to pay appropriate wages to supported employees, would ensure that such claims are properly tested in the specific circumstances of each case.

- 9.7. There is **no empirical evidence** to substantiate the assertions made by the Commonwealth and some ADEs that non-discriminatory wage setting would threaten the viability of ADEs. ADEs operate in an environment where there are many externalities. **No direct relationship between supported employee wage levels and the viability of ADEs** is established on the evidence before the AHRC. Within the premises of paragraph 25, **even if such a relationship was established, it could not justify or excuse discrimination in employment on the basis of disability**. No other group of employers with business viability concerns is exempted from disability discrimination law.
- 9.8. There is **no evidence to substantiate the assertions** made by the Commonwealth and some ADEs **that discriminatory wage levels in the supported employment sector are justified because of the ancillary benefits** supported employees derive from their employment. All employees derive from their employment the ancillary benefits claimed by the Commonwealth and ADEs.
- 9.9. The Commonwealth has appropriated \$173 million to support reforms to wage setting arrangements in the supported employment sector. **There is sufficient funding available to the Commonwealth and ADEs to achieve the necessary reforms** and manage any liability under the DDA until these reforms are completed.
- 9.10. **Exposure of the Commonwealth and ADEs to liability under the DDA in relation to discriminatory wage setting is more likely to motivate timely reform** than relief from such liability, particularly in circumstances where the Commonwealth and ADEs had already had the benefit of a 12 month period of temporary exemption from the DDA and have they failed to comply with the terms and conditions upon which that temporary exemption was granted.
- 9.11. The timing of the Commonwealth's application for a further temporary exemption was entirely in its hands. Nothing required or compelled the Commonwealth to wait to lodge this application to just days before the expiry of the prior temporary exemption. The Commonwealth and ADEs knew the position they were in with respect to their compliance with the terms of the previous temporary exemption well before the end of April 2015. **Nothing requires the AHRC to provide a temporary exemption in order to rescue the Commonwealth and ADEs from a predicament entirely of their own making,**

10. We further assert that granting of a temporary exemption is **not in the public interest**. The DDA is a public remedial law which has as its fundamental purpose the elimination of discrimination on the basis of disability in the area of work as far as possible, and ensuring as far as practicable that persons with disability enjoy the same rights to equality before the law as other persons. There is a public interest in the DDA being given its full effect.
11. Additionally, granting of a temporary exemption under the DDA would not promote recognition and acceptance within the community of the principle that **persons with disabilities have the same fundamental rights as the rest of the community**.
12. In conclusion, PWDA does not consider the granting of a temporary exemptions by the AHRC to be appropriate, necessary or justified. We consider that such an exemption would result in continuing violation of the human rights of people with disability working in ADEs. PWDA calls on the AHRC to refuse any further exemptions regarding the use of BSWAT and allow progress towards wage justice for employees of Australian Disability Enterprises to be realised without further hindrance.

Yours sincerely,



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