



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,

A handwritten signature in black ink, appearing to read 'S. French', written in a cursive style.

Samantha French

Advocacy Projects Manager

People with Disability Australia (PWDA)

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