



Australian Government
Department of Social Services

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

Dear Commissioner

Please find attached the Department of Social Services' response to correspondence received from the Australian Human Rights Commission on 31 July 2015, requesting further information in relation to the Department's application for a temporary exemption under section 55 of the *Disability Discrimination Act 1992*, in respect of the Business Services Wage Assessment Tool.

The Commission has agreed to the Department providing its response by 24 August 2015.

Should you have any questions, or wish to discuss the Department's response, please contact Warren Pearson AM, Branch Manager, Disability and Employment Sector Reform Branch, on (02) 6146 5720 or via email, warren.pearson@dss.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'James Christian', with a long horizontal stroke extending to the right.

James Christian PSM
Group Manager
Disability, Employment and Carers Group

24 August 2015



Australian Government
Department of Social Services

Application for temporary exemption under section 55 of the *Disability Discrimination Act 1992*– Business Services Wage Assessment Tool

The following submission is in response to the Australian Human Rights Commission's request for additional information, received by the Department of Social Services (the Department) on 31 July 2015.

1. Why the exemption is necessary in the context of the DDA – this should deal with the issues in relation to s 47 of the DDA and 'direct compliance with an industrial instrument'.

The Commission's 'Guidelines for temporary exemptions under the Disability Discrimination Act (2010)', provide that an exemption is not necessary where other legislative exemptions exist. The Department's view is that an exemption under section 55 of the *Disability Discrimination Act 1992* (DDA) is necessary because ambiguity exists as to whether or not the payment of Business Services Wage Assessment Tool (BSWAT) assessed wages by an Australian Disability Enterprise (ADE) is in 'direct compliance with an industrial instrument' required under section 47 of the DDA.¹

The Department understands that the words 'direct compliance with an industrial instrument' in section 47 require that the act done in compliance with the industrial instrument must be an act mandated by the industrial instrument. The *Supported Employment Services Award 2010* (the Award) did not mandate the use of BSWAT rather it included the BSWAT in a list of approved wage assessment tools that may be used.

On 5 June 2015 the Fair Work Commission (FWC) approved a consent variation to the Award. New clause 14.6 sets out a transitional arrangement for ADEs paying wages based on a BSWAT assessment. Clause 14.6 requires that ADEs transition to another approved wage assessment tool by 31 October 2015. If an ADE cannot transition to another approved wage assessment tool by 31 October 2015, the ADE may apply to the FWC for an extension of time and if granted by the FWC, the transition must be completed by 29 February 2016. The continued use of the BSWAT is 'permissible' under the transitional arrangement and a supported employment service using the BSWAT 'may continue' to use the BSWAT so long as it meets the requirements of clause 14.6.

¹ Leaving aside the issue concerning the possible application of s 47 of the DDA, the Department's position about the lawfulness of using the BSWAT is set out in its original application for a temporary exemption dated 5 September 2013, page 2 (first and second bullet points).

The Department's view is that an exemption under section 47 during the transitional period could arguably, but not conclusively, be relied on.

The Department's view continues to be that an exemption under section 55 of the DDA is necessary and would, if granted, remove the ambiguity and lack of certainty for employers and supported employees during the period of the operation of clause 14.6 of the Award.

2. How the exemption fits with the objects of the DDA.

The recognition and acceptance of people with disability in the community and their right to employment is a government priority. This priority is progressed through a range of activities including the provision of support services for people who work in supported employment.

The Department is aware that there are stakeholders which oppose the Department's application for an exemption. However, a key factor for requesting a further temporary exemption from the DDA is to maintain stability and certainty for employers and supported employees during the period of transition from the BSWAT. As demonstrated through the June 2015 submissions to the AHRC, the Department's priority is also shared by many supported employment stakeholders.

Maintaining the availability of jobs provided in the supported employment sector is vital for supported employees who, in some circumstances, have limited employment options available to them in open employment.

Supported employment provides options for work, learning new skills and making social connections for people who may otherwise experience unemployment and increased economic and social disadvantage.

Recent work undertaken by the AHRC has focused on exploring obstacles which people with disability face in actively participating in employment. Initial survey results show that respondents considered the availability of jobs as one of the top three most important issues in relation to employment for people with disability.²

The Department ceased all BSWAT assessments in late December 2012 and continues to support full transition of the supported employment sector from the BSWAT to another approved wage assessment tool.

Data on the progress of the transition has been provided to the AHRC in quarterly reports.

The Department notes the agreement between the industrial parties to the removal of the BSWAT from the *Supported Employment Services Award 2010*.

The Department continues to prioritise work towards a new wage assessment tool for employees in supported employment. The Department is one of many interested stakeholders in this process. These matters were addressed in the Department's submission of 26 June 2015.

² Australian Human Rights Commission, National Disability Forum 2014, Summary of Survey Results 15 September 2014 and Australian Human Rights Commission, Willing to Work report.

3. The reasonableness of the exemption when balancing it against the discriminatory effect on employees.

The Department refers to and repeats the matters referred to in its response to question 2 above.

Further, the 5 June 2015 consent variation to the Award requires that ADEs transition to another approved wage assessment tool by 31 October 2015, or if an extension is granted by the FWC, by 29 February 2016.

The Department considers the timetable set out in the consent variation to the Award provides an orderly and definitive timeframe for transition from paying wages assessed using the BSWAT. It is a timetable agreed to (and considered appropriate) by not only the industrial organisations representing supported employees and employers but also by the FWC.

As discussed under item 1 above, the Department considers there is a significant risk that an exemption under section 47 is not applicable in this circumstance. The Department considers that although the circumstances may not fall within section 47 of the DDA, there is a close resemblance with that exemption and the Department submits that in the spirit of section 47, an exemption under section 55 should be granted.

If the application for a further exemption under section 55 of the DDA for the period up to 29 February 2016 is not granted, the Department considers that a level of ambiguity for both employers and supported employees will result. In this situation, should a complaint be made, an ADE might seek to argue the reasonableness of their reliance on the timeframe agreed by the FWC.

The Department is prepared to consider any proposed terms and conditions which further the objects of the DDA. The Department suggests that it continue to provide quarterly updates to the AHRC.

4. In relation to the National Disability Standards for Disability Services please indicate what if any consideration has been given to alternative mechanisms, such as amending the standards, to ensure ADEs are not in breach.

The Department's view is that it is not appropriate to consider altering the National Standards for Disability Services (NSDS). The NSDS have been endorsed by all states and territories to apply across a broad range of service types. The Department of Social Services will not act unilaterally to amend standards.

The NSDS do not specifically reference industrial relations practice, but under *Standard One – Rights*, there is a particular emphasis on 'freedom from discrimination, exploitation, abuse, harm, neglect and violence'.

Under the *Disability Services Act 1986*, ADEs are required to hold a certificate of compliance issued by a Certification Body against the NSDS. The guidelines for Certification Bodies were amended to take account of the Federal Court's decision. These guidelines are regularly reviewed to ensure they are still relevant to the current circumstances.

If the independent Certifying Body determines that an ADE is not meeting any of the NSDS it will issue the ADE with a "non-conformity" notice. If the "non-conformity" is

not rectified in the allocated timeframe, the Department is formally notified and a breach of the funding agreement may be recorded. Depending on the circumstances of the “non-conformity” there are a range of responses available including under the *Disability Services Act 1986* (DSA), the Minister making a declaration stating that the organisation is not meeting the applicable standards and, consequently, is in breach of the condition of the grant.

5. The study on the financial viability of ADEs by independent consultants engaged by NDS and funded by the Department.

NDS has advised that it is on track to deliver this project.