



**Australian Government**  
**Department of Social Services**

**Department of Social Services response to Australian Human Rights Commission's 15 May 2015 request for information**

**Purpose**

The purpose of this submission is to respond to a request for information from the Australian Human Rights Commission (the Commission), dated 15 May 2015, to provide supplementary information for the Department of Social Services' 21 April 2015 application for a temporary exemption under section 55 of the *Disability Discrimination Act 1992*. The Commission asked the Department of Social Services to respond to this request by 26 June 2015.

**Additional Information**

- 1. Detailed submissions as to how the application falls within the Commission Guidelines on Temporary Exemptions under the Disability Discrimination Act, particularly the criteria set out on pages 3 and 5 of the guidelines and the issue of reasonableness.**

The basis for the Department for Social Services' (the Department) application is to facilitate the continuation and completion of an orderly transition of all Australian Disability Enterprises (ADEs) which paid wages assessed by the Business Services Wage Assessment Tool (the BSWAT), to another approved wage assessment tool approved under clause 14 of the *Supported Employment Services Award 2010* (the Award).

On 25 June 2015, the Department amended its application made on 21 April 2015 for a temporary exemption under the *Disability Discrimination Act 1992* (DDA) to align with the timeframes set out in new clause 14.6 –Transition arrangement – of the Award made by a consent order on 5 June 2015. A copy of the consent variation is at **Attachment A** to this document.

The Department considers that, if a temporary exemption is granted, the alignment of the period of the exemption with the Fair Work Commission (FWC) timeframe of 29 February 2016 for transition from the BSWAT will provide increased certainty and clarity for the supported employment sector.

As part of its application for a temporary exemption under the DDA, the Department is prepared to consider any proposed terms or conditions that further the objects of the DDA.

**Transition of ADEs from the BSWAT**

In accordance with the conditions of the 29 April 2014 temporary exemption, the Department has provided quarterly reports against the conditions set out in that temporary exemption.

ADEs are not ordinarily required to report to the Department on their wage assessment decisions. However, to meet the conditions of the temporary exemption, the Department requested voluntary data from ADEs on their plans for, and progress towards, transitioning from the BSWAT.

In the period since 29 April 2014, data provided by ADEs which previously used the BSWAT, indicate that organisations have made significant progress transitioning to other approved wage assessment tools.

The following table provides organisation-level data that show that as at 30 April 2015, over 65 per cent, or 72 organisations, have completed or partially completed assessments with an alternative approved wage assessment tool.

The table also shows that the momentum of transition to alternative tools is continuing. Between 31 January 2015 and 30 April 2015, the number of organisations, which have identified an alternative approved wage assessment tool but have not commenced wage assessments, dropped from 47 to 33 and the number, which have not identified an alternative tool, dropped from 24 to 3. For the same period, the number of organisations, which have completed or partially completed the transition, rose from 36 to 72.

**Organisation-level data for the period 1 November 2014 to 30 April 2015<sup>1</sup>:**

Report period	Number or organisations previously using BSWAT	Number of organisations with all workers using alternate tool	Number of organisations with alternative tool and completed some assessments	Number of organisations with alternative tool, but have not commenced assessments	Number of organisations which have not identified an alternate tool	Number of organisations which no longer provide supported employment
Third Quarter: 1 Nov 2014 – 31 Jan 2015	109	17	19	47	24	2  (in process)
Fourth Quarter: 1 Feb 2015 – 30 April 2015	110 <sup>2</sup>	37	35	33	3 <sup>3</sup>	2

Since this reporting period to the end of April 2015, the Department has continued to monitor the three remaining ADEs, which had not chosen an alternative tool, and can now report that as at 15 June 2015, all ADEs report they have chosen an alternative approved wage assessment tool.

<sup>1</sup> This data have been reported by organisations to the Department's Grant Agreement Managers.

<sup>2</sup> One organisation created a new function and is now counted as two organisations.

<sup>3</sup> Between the period 30 April and 15 June 2015 the number of organisations which have not identified another approved wage assessment tool has decreased from 3 to 0.

ADEs have reported that it has been a time-consuming and costly process to select an alternative tool; make changes to business systems; access the required training to implement the alternative tool; and carry out the wage assessments across their workforce. ADEs also report that lack of capacity in wage assessment systems has caused delays in accessing training and new wage assessments in the workplace.

### **Fair Work Commission transition arrangements**

On 5 June 2015, the FWC made a consent order varying the Award. The variation removes the BSWAT as an approved wage assessment tool from the Award and includes transitional arrangements for ADEs to complete transition from the BSWAT.

The Award variation allows ADEs currently using the BSWAT to continue to use the BSWAT up until 31 October 2015, provided that the ADE informs the FWC in writing within one month from 5 June 2015 of its decision to transition to another approved wage assessment tool, and of the name of the tool, to which it intends to transition. The Award variation also allows for a further transitional period for ADEs using the BSWAT until 29 February 2016 on application to the FWC.

The Award variation effectively establishes a sunset date for the BSWAT. Aligning a temporary exemption, if granted, with the FWC timeframe of 29 February 2016, would ensure the greatest level of certainty for ADEs and their supported employees who are transitioning from the BSWAT. It would also prevent any perceived legal ambiguity that may arise if an exemption from the DDA was not in place, but an ADE had been granted a period to complete transition by the FWC.

- 2. Anonymised details of the employees that are still being paid pursuant to an assessment with the BSWAT, including:**
  - a. The ADE by which they are employed**
  - b. The date on which their current assessment was conducted.**
  - c. The proposed date on which their assessment under an alternative tool will be conducted.**
  - d. If there is no proposed date, the reason.**
  - e. The reason(s) they have not already been assessed under an alternative tool.**
  - f. The steps being taken to overcome any hurdles or barriers to the reassessment.**

ADEs are not-for-profit businesses that operate in a commercial environment with organisational governance arrangements independent from government. Day-to-day business decisions and overall business management of each ADE sits with the relevant management team and Board.

The specific data requested above is a matter for individual ADEs. However, the Department has provided aggregated employee-level data to the Commission in its quarterly reports. There has been a 100 per cent response rate from ADEs to the voluntary data request. The Department has no statutory or contractual basis upon which it can require the collection of that information.

Data from the Department's February-April 2015 quarterly report show that, as at 30 April 2015, 4948 or 58 per cent of supported employees, whose employer previously used the BSWAT, had been assessed with another approved wage assessment tool. That number is up from 2861, or 32 per cent, of supported employees, in the previous quarter.

**Supported employee-level data for the period 1 November 2014 to 30 April 2015:<sup>4</sup>**

Report period	Number of supported employees who work at an ADE that had previously used BSWAT	Number of supported employees assessed under alternate tool	Number of supported employees yet to be assessed by alternate tool	Percentage of employees who have transitioned to new wage tool
Third Quarter:  1 Nov 2014 – 31 Jan 2015	8534	2861	5673	32%
Fourth Quarter:  1 Feb 2015 – 30 April 2015	8538	4948	3590	58%

The employee-level data in the table below show that, as at 30 April 2015, only 20 per cent of supported employees previously assessed by the BSWAT are employed in an ADE that has not commenced assessments. Therefore, 80 per cent of supported employees previously assessed by the BSWAT are employed in ADEs that have completed or partially completed transition to an alternative approved wage assessment tool.

**Further analysis of supported employee-level data for the period 1 November 2014 to 30 April 2015:<sup>5</sup>**

Report period	Number of supported employees who work at an ADE that had previously used BSWAT	Number of supported employees assessed under alternate tool	Number of supported employees yet to be assessed by alternate tool, where organisation has commenced assessments on alternate tool	Number of supported employees yet to be assessed by alternate tool, where organisation has NOT commenced assessments on alternate tool
Third Quarter:  1 Nov 2014 – 31 Jan 2015	8534	2861  32%	This information was not disaggregated for the Third Quarter Report.	
Fourth Quarter:  1 Feb 2015 – 30 April 2015	8538	4948  58%	1900  22%	1690  20%

Reasons provided by ADEs, which have not completed the assessments of supported employees using another approved wage assessment tool, include: a lack of resources to

<sup>4</sup> These data have been reported by organisations to the Department's Grant Agreement Managers.

<sup>5</sup> These data have been reported by organisations to the Department's Grant Agreement Managers.

implement requisite changes quickly, as well as a lack of capacity in the wage assessment systems to respond to the significant increase in demand.

**3. The relevance of the new productivity-based wage assessment tool being developed by the Fair Work Commission (FWC) to the application, given the current availability of alternative tools.**

The Australian Government has made \$32 million available to the Department to facilitate the development of a new productivity-based wage assessment tool. The tool is being developed through the FWC. Parties involved in the process include the peak organisation representing ADEs, National Disability Services, ADE representatives, Health Services Union, United Voice and advocates of people with disability.

Since April 2015, it has become evident that the development of a new productivity-based wage assessment tool is unlikely to be finalised through the FWC conciliation process during the period of the temporary exemption being sought by the Department. ADEs transitioning from the BSWAT have been progressively moving to other wage tools included in the Award.

As noted in response to question 1 above, all ADEs have now chosen an alternative approved wage assessment tool. As a result, the relevance of the new productivity-based tool to the Department's application for a temporary exemption has changed, and is now less relevant. However, with the completion of the development of a new productivity-based wage tool and its inclusion in the Award, the new tool will provide an important option for ADEs in the future.

**4. The status of proceedings in the FWC.**

As outlined in response to question 1 above, the FWC has, by consent, varied the Award to remove the BSWAT as an approved wage assessment tool and established transitional provisions to allow ADEs to transition to the use of another approved wage assessment tool.

**Development of a new wage assessment tool**

The Department continues to engage with the FWC conciliation process as an interested party and is facilitating the engagement of a consultancy to inform the development of a new productivity-based wage tool for the supported employment sector. That consultancy follows a small-scale observational study in March-April 2015 in three ADEs to test the impact of an amended assessment process for the Supported Wage System (SWS) in supported employment.

At a conciliation conference on 6 May 2015, the parties agreed to a further piece of work to develop a definition of *historical data* and give guidance to ADEs and assessors as to how it should be collected, and how it should impact the wage assessment in the SWS.

With the endorsement of a sub group of parties, the Department has engaged a consultancy for the development of draft guidelines for the use of historical productivity data in wage assessments, which will run until the end of August 2015. Draft guidelines will be prepared for the consideration of the broader conciliation conference.

5. **A full explanation of and evidence to support the following assertions made in the Application:**
- a. **Disruption to transition for the sector if the exemption is not granted.**
  - b. **ADEs that have not commenced, or commenced but not yet completed, transition to alternative SESA wage tools may be in breach of their funding agreements with the department. And how a breach may result in the withdrawal of funding, resulting in job losses for supported employees.**
  - c. **Some ADEs may simply choose to cease operations, resulting in job losses for supported employees.**
  - d. **Disruption of work already underway to develop a new productivity based wage assessment tool if the exemption is not granted.**

A temporary exemption, if granted, will ensure the greatest level of certainty and stability for ADEs and their supported employees who are transitioning from the BSWAT. If the exemption is not granted, there is likely to be disruption to the supported employment sector due to:

- a. the possibility of ADEs being assessed by an independent accredited certification body as not satisfying legislated third party quality assurance requirements, exposing ADEs to the possibility of removal of government funding; and/or
- b. the constrained timeframes and the increased pressure for change may see a number of ADEs operating with marginal viability fail.

### **Non-conformity with legislated quality assurance requirements**

The *Disability Services Act 1986* requires any funded ADE to hold a current certificate of compliance against the six National Standards for Disability Services set out in the *Disability Services Act (National Standards for Disability Services) Determination 2014*. Quality Assurance audits are conducted by independent, third party certifying bodies annually.

Without a temporary exemption under the DDA allowing the payment of wages assessed by the BSWAT, ADEs that have not completed the transition to another approved tool might be at risk of being assessed by an independent accredited certification body as not conforming with legislated quality assurance requirements (that is, the National Standards for Disability Services).

If an ADE was to be assessed as non-compliant with the National Standards for Disability Services, that ADE could have its certificate of compliance revoked by the independent accredited certification body.<sup>6</sup> That would expose the ADE to risk of being de-funded. In the event that an organisation lost its government funding to provide employment support to supported employees, and an arrangement could not be negotiated with an alternative provider, jobs for supported employees would be at risk.

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<sup>6</sup> See s 6D of the DSA

## **Financial viability of the ADE sector**

ADEs and their peak representative body, National Disability Services (NDS), have reported that transitioning to another approved assessment wage tool is a time-consuming and costly process for organisations. Organisations report that the process of selecting an alternative tool, updating business systems, accessing the training required to use the tool, and carrying out the wage assessments with their supported employees has placed significant additional demands on their resources, a number of which operate with marginal viability.

Departmental analysis of financial statements, provided by ADE parent organisations for the financial year 2013-14, using standard financial ratios, indicates that across the sector, 23 per cent of parent organisations operate with a high financial risk rating, 25 per cent operate with a medium risk rating and 52 per cent of enterprises operate with a low financial risk rating. Additional information on the standard financial ratios used by the Department and the calculation of the level of risk, is provided in **Attachment B** to this document. .

Information provided by funding agreement managers also indicates a degree of instability in the ADE sector. During the last twelve months, two organisations have ceased providing supported employment services and a further two organisations have restructured their business and as a result relinquished a proportion of their supported employment places.

For those ADEs operating with marginal viability, there is a risk that additional pressures on their resources from the process of transitioning to another approved wage assessment tool within tight timeframes, could result in organisations deciding to cease providing supported employment services.

The Department is providing funding to NDS to engage an independent consultancy to undertake a supported employment viability and productivity study to gain independent analysis of the impact on ADEs of adopting alternative wage assessment tools. NDS is due to report on this work in late-August 2015.

### **6. Full details of the changes in wages of those who have been reassessed using an alternative tool and the actual financial impact this has had on the individual ADEs.**

The Department does not have access to individual ADEs' data on any changes in wages and resulting financial impact that they have experienced transitioning from the BSWAT to another approved wage assessment tool.

### **7. Full details of the plan to transition from the BSWAT to an alternative tool approved by FWC, with a proposed timeframe.**

The Department considers that the FWC by its decision to make the consent order to vary the Award on 5 June 2015, has set out the plan to transition all ADEs from the BSWAT to an alternative approved wage assessment tool. As a result, ADEs may not pay BSWAT assessed wages after close of business on 29 February 2016.

Individual ADEs are responsible for transitioning from the BSWAT to an alternative wage assessment tool approved by the FWC. Based on the data provided by the Department in the Department's last quarterly report and consultations with ADEs, the Department is reassured that this process is well underway for ADEs.

The Department will continue to communicate with, monitor and support ADEs to complete their transition from the BSWAT as soon as practicable.

### **Consultation**

The Department welcomes any further consultation to assist the Commission in its decision-making process. The relevant contact officer is Mr Warren Pearson AM, Branch Manager, Disability and Employment Sector Reform Branch, on (02) 6146 5720, or via email at [warren.pearson@dss.gov.au](mailto:warren.pearson@dss.gov.au)