Introduction

Endeavour Foundation wishes to make a submission to the Human Rights Commission supporting the application by the Department of Social Services for temporary exemption under Section 55 of the Disability Discrimination Act 1992.

Background

Endeavour Foundation is the largest employer of people with an intellectual disability in Australia, providing supported employment opportunities for 1855 people at its 25 Australian Disability Enterprises (ADEs) in Queensland and New South Wales. In November it will take over the operations of another ADE in Victoria. This provides us with unique insights into the industrial, commercial, social and human rights implications of the recent decision of the Federal Court. Our ADE operations range in size from small (less than 10 employees) to large (greater than 200 employees). They are in urban, regional and rural areas. We employ people from Culturally and Linguistically Diverse (CALD) backgrounds and people who identify as Aboriginal or Torres Strait Islander. Endeavour Foundation has been providing employment opportunities for people with a disability (primarily people with an intellectual disability) for more than 50 years.

The Federal Government reform process and the introduction of the Disability Services Standards in July 2005, was a sincere undertaking to recognise the valuable contribution people with an intellectual disability can make in a work environment with appropriate supports in situ.

In response to this, Endeavour Foundation had immediately adopted a framework that focussed on improving the skill sets of individuals to increase participation, add variety and expand capability as well as improving productivity. These factors together would assist to lift both wage and employment outcomes.

Commercial viability was a critical element of the process, as without it the organisation would be unsustainable and employment opportunities for people with a disability would be lost. This commercial imperative has an often overlooked intrinsic benefit in that it demonstrates to the participants that the output of their work is assessed no differently from any other commercial organisation. In the process of defining one’s place in a community the measure of the value of one’s work is a defining aspect in the notions of dignity, self-worth and independence. Various detractors of Australian Disability Enterprises fail to recognise that people who work in ADEs are cognizant of the value of their labour in achieving commercial outcomes. Endeavour Foundation takes the view that attempts to define the work environment in a one-dimensional construct of ‘open’ versus ‘closed’ employment are driven by a misunderstanding of how employees value their contribution - or it is an attempt to achieve ideological aims through whatever means possible.
It is our contention that the Commission should primarily focus on the implications of any aspect of their decision that would significantly impact on the commercial viability of ADEs. Fundamentally if these organisations fail commercially then people with a disability will lose their jobs. We hasten to add that we will support a determination that causes a refinement of the use of assessment tools which in turn may lead to higher wage outcomes. In effect that is what the Government is seeking on behalf of people with a disability. However to achieve this, a reasonable period of time is needed to conduct the process of consultation with all stakeholders to ensure a sustainable outcome.

**Supported employment: costs and tools**

Endeavour Foundation’s average ADE wages are higher than the national average. Employees also work a higher number of hours each week on average compared to the national average. Endeavour Foundation has a focus on skills improvement for employees, irrespective of whether this is linked to an improved commercial outcome or whether there will be an opportunity for the newly acquired skills to be immediately applied. This is because our skills improvement programs is based on the goals and interests of individual employees and is developed in consultation with each individual. The BSWAT tool rewards people who increase their skills. The commercial tension is that there is not necessarily a link between skills improvement as measured by BSWAT and productive output and by implication improved commercial results. It is our further contention that the view that a person with intellectual disability can be accurately assessed for their contribution to a work task by existing tools such as the Supported Wages System (SWS) or the productivity component of the BSWAT is wrong in principle as well as being spectacularly unencumbered by commercial realities.

Notwithstanding the reasoning of their Honours in the Federal Court in respect of the issue of discrimination, we consider the issues to be very clear. In determining a fair wage in exchange for labour, the totality of the costs associated with the provision of a work environment needs to be considered so as to ensure that there is a link between outputs and the ongoing commercial viability of organisations involved in these undertakings. The question of who is responsible for the cost of provisioning of the environment is a separate issue. However it is self-evident that irrespective of the supports provided there will need to be a parallel assessment of a person’s comparative ability to contribute to the work outcomes defined by the business.

Endeavour Foundation has begun an internal assessment of several alternative tools which might be used instead of BSWAT. We have found countless examples where the application of the SWS toolset will result in a complete disconnect between the ‘measured’ productivity and the commercial viability of a work outcome. This is because the method of measurement in the SWS tool makes no provision for the issues that are inherently present when determining a person with an intellectual disability’s contribution to a task. To suggest that one tool can be used for both physical and intellectual disability to measure productivity does not survive even a cursory examination, given the inherent and implicit requirement of cognition necessary for the performance of a task. It should also be noted that any suggestion that these jobs could be successfully transferred to open employment or other government employment programs is completely without evidence. Endeavour Foundation contends that
this notion is based in pious optimism and can only exist without regard to the fluctuations in Australia’s economic and social development in recent times.

**Open employment**

The open employment market is unwilling to offer employment to people who require constant supervision and support. The commercial world by its very nature has little appetite for social programs that potentially add considerable expense. Employees with higher support needs will find it virtually impossible to find and sustain a position in open employment. They are competing with community perceptions, workplace health and safety (WH&S) issues and other job seekers within the open employment market. In a post-industrial digital age it must be acknowledged that an intellectual disability is a particular impediment to attaining a job because cognition is increasingly a determining requirement over physical labour.

Endeavour Foundation has firsthand experience of the challenges people with an intellectual disability face in our efforts to support people making the transition from supported employment to open employment. Endeavour Foundation developed the Creating Opportunities for Mainstream Employment and Training (COMET) program which was designed to assist people with an intellectual disability transition from an ADE into open employment. The program has operated for three years with limited success. This is despite the allocation of considerable resources, staff training, marketing and industry engagement. Importantly the program was developed with a view to how a National Disability Insurance Scheme might operate – specifically working with individuals to achieve their employment goals in an open market.

The social conscience of prospective employers dissipates somewhat as they comprehend that a person with an intellectual disability may need assistance with personal hygiene, repeated guidance regarding simple directions and WH&S requirements, continual training on the use of equipment and may take a casual approach to punctuality and attendance. Employers are not experienced in the best responses to behavioural issues, family intervention and the additional regulatory issues associated with the employment of people with an intellectual disability. Prospective employers do not provide literacy and numeracy training, social skills and language programs, travel training or family inclusion in workplace outcomes.

These examples are by no means exhaustive yet they are in strict contrast to Endeavour Foundation’s approach (and our experience with the vast majority of ADE’s) to the employment of people with an intellectual disability.

Endeavour Foundation employs Training and Development Officers (TDOs) at all of its ADEs. Their principle function is to assist people with an intellectual disability to improve their skill set, wage and employment outcomes, productivity and quality of life outside the work environment.

There is no evidence that open employment organisations including McDonalds, KFC, Coles, Woolworths or Bunnings provide similar support. It could be argued that, even if they provided support and skills development, these businesses operate in a competitive environment and must necessarily maintain a cost base which militates against long term
investment in a social objective. People with an intellectual disability who leave these organisations in favour of supported employment at Endeavour Foundation improve their confidence, capability and job satisfaction almost immediately. Endeavour Foundation has numerous case studies to demonstrate this, however the most compelling evidence can be found in the Disability Employment Service (DES) monthly data.

**Disability Employment Service (DES) Monthly data March 2010 –September 2013.**

<table>
<thead>
<tr>
<th>Classification</th>
<th>Number of referrals</th>
<th>Number commenced</th>
<th>Percentage commenced</th>
<th>Number of exits of those commenced</th>
<th>Percentage of exits of those commenced</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intellectual disability</td>
<td>18,851</td>
<td>15,489</td>
<td>82%</td>
<td>14,703</td>
<td>93%</td>
</tr>
</tbody>
</table>

*Source: DES monthly data Sept 2013*

The data highlights the excessively high turnover rates for people with an intellectual disability in open employment. Within a 3.5 year period 93% of persons with an intellectual disability exited their open employment placement. This is because the support mechanisms are not in place and open employers don’t understand the challenges that employees with an intellectual disability face on a daily or hourly basis.

In contrast to these figures, supported employees in Endeavour Foundation ADEs remain employed for an average of 12.45 years. This is because the relevant support mechanisms are in place and Endeavour Foundation support staff understand the challenges that employees with an intellectual disability face on a daily and hourly basis.

The other relevant data is that only 5.4% of job seekers in the Employment Support Services market have an intellectual disability. This figure is down from 6.2% over the last two years, providing further evidence that fewer and fewer job seekers with an intellectual disability are seeking open employment. In contrast to these figures 97% of Endeavour Foundations supported employees have an intellectual disability, suggesting they have found supported employment to be their preferred option.

**Scale expands opportunities**

Endeavour Foundation is fortunate in that its size and geographical spread create greater opportunities for employees with an intellectual disability, compared with the open employment market. Endeavour Foundation operates 25 ADEs, involved in more than 45 different production and service activities. The Southport Service on the Gold Coast, which currently employs 77 people with an intellectual disability, provides an excellent example of how scale can increase opportunities. The following table highlights the number and diversity of activities taking place at Southport, as well as the tasks, training and skills required.
<table>
<thead>
<tr>
<th>Jobs and activities available at the Southport Service</th>
<th>Tasks</th>
<th>Skills and training required</th>
</tr>
</thead>
</table>
| **Trailer assembly – Boat and box trailers.** | Placing trailer frames onto assembly jig.  
Understand the complex assembly instructions.  
Install electric wiring to trailer lights.  
Assembly of nuts and bolts of various sizes.  
Fitting wheels to axle and spare to frame.  
Using compressed air tools, spanners and screw drivers.  
Forklift and pallet jack operations.  
Quality testing. | 1. High dexterity  
2. Ability to follow complex instructions  
3. WH&S knowledge  
4. Forklift license  
5. Modest literacy skills  
6. Modest numeracy skills  
7. Despatch trailers, record trailer number.  
8. Receive trailers, record parts received.  
9. Completion and understanding of all Safe Work Procedures (SWPs) for trailer operations. |
| **Electronic Waste Recycling (recycling TV's and computers)** | 1. Collecting and sorting different categories.  
2. Dismantling e-waste using compressed air tools, spanners and screw drivers.  
3. Copper wire identification.  
5. Component identification (specialised task).  
7. Forklift and pallet jack operations. | 1. High dexterity  
2. Ability to follow complex instructions.  
3. WH&S knowledge  
4. Recycling training and the importance of recycling.  
5. Completion and understanding of all SWPs. |
| **General Packaging** | 1. Receiving customers products.  
2. Sorting by variety.  
3. Collating packaging components.  
5. Sealing cartons.  
6. Quality testing.  
7. Despatching completed packaged goods.  
8. Forklift and pallet jack operations. | 1. Nominal dexterity  
2. Ability to follow instructions.  
3. Modest numeracy skills.  
5. WH&S knowledge.  
6. Forklift license. |
2. Retail operations.  
3. Product identification and sorting.  
5. Forklift and pallet jack operations. | 1. High dexterity  
2. Ability to follow complex instructions.  
3. Retail and customer service training.  
4. WH&S knowledge.  
5. Forklift license.  
6. Completion and understanding of all SWPs. |
| **Sawdust packaging** | 1. Set large bags on specialist jig.  
2. Shovel sawdust into bags.  
4. Load bags onto pallets.  
5. Forklift and pallet jack operations. | 1. Ability to follow instructions.  
2. WH&S knowledge.  
3. Modest numeracy skills.  
4. Forklift license.  
5. Completion and understanding of all SWPs. |
Each supported employee at the Southport ADE has the opportunity to be involved in all the above activities. Unfortunately not all employees are able to perform every activity, however this example demonstrates that one of the significant benefits of supported employment versus open employment for employees with an intellectual disability is that there is a greater variety of activities available. In other words there is a job for everyone, regardless of their capacity and support needs. There is also the opportunity to work in a supportive and positive team environment alongside peers and friends. This team environment is also a significant asset to training and improving skills as seeing others perform tasks is in itself an important part of learning.

This is in strict contrast to one current supported employee’s prior experience in open employment working at a Coles supermarket. She was allocated the job of bringing stock forward from the middle and back of the shelves to the front, as part of Coles’ merchandising policy. She was allocated the same two columns of shelving each with six rows. Her opportunity and variety was vastly different from the supported employees at the Endeavour Foundation Southport ADE. She also worked in isolation, without any opportunities to communicate or create workplace friendships. The naive assumption that the difficulties of open employment can somehow be addressed through government policy ignores the overwhelming pressures of operating commercial enterprises.

<table>
<thead>
<tr>
<th>Jobs and activities available at the Southport Service</th>
<th>Tasks</th>
<th>Skills and training required</th>
</tr>
</thead>
</table>
| Personal Protective Equipment (PPE) warehousing and distribution | 1. Stock management by category and size  
2. Receiving inwards products  
3. Counting inwards stock  
4. Storing inwards stock by category and size  
5. Stock picking orders  
6. Packaging orders  
7. Sealing cartons  
8. Forklift and pallet jack operations | 1. High dexterity  
2. Ability to follow complex instructions  
3. Modest numeracy skills  
4. Modest literacy skills  
5. Despatch and receiving skills  
6. WH&S Knowledge  
7. Forklift license  
8. Completion and understanding of all SWPs |

<table>
<thead>
<tr>
<th>Jobs and activities available as a merchandise attendant at Coles supermarket</th>
<th>Tasks</th>
<th>Skills and training required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coles product merchandising</td>
<td>1. Move stock from middle and rear of shelves to the front.</td>
<td>1. Basic dexterity skills</td>
</tr>
</tbody>
</table>

**Hours of work available in supported employment versus open employment**

Endeavour Foundation encourages employees with an intellectual disability to work as many hours as possible. The ADEs offer a standard 38 hour working week; however as we branch
into new activities, the opportunity to engage in shift and weekend work is becoming increasingly available. This has proven desirable to a number of employees.

The average number of hours an employee with an intellectual disability works in an Endeavour Foundation ADE is 29 hours per week. *(FaHCSIA KPI data September 2013)*. In contrast to this figure, 94% of employees in open employment work less than 29 hours per week. *(DES monthly data September 2013)*. There are several reasons for this, however the principal reasons are the lack of variety and opportunity in open employment for employees with an intellectual disability. You can only stock so many shelves, wipe down so many tables and take out so many garbage bags - which are the primary tasks available to be carried out by people with an intellectual disability by the mainstream open employer organisations previously listed.

**Case Studies**

Endeavour Foundations ADE operations focus on two key objectives. The first of these is to improve the employment outcomes for employees with an intellectual disability and the second is to remain commercially viable. Equal weighting is applied to both objectives. The ADE operations recognise that improved employment outcomes in the form of upgrading skill sets, training and job satisfaction lead to increases in productivity that ultimately assist commercial viability. This is the philosophy behind why Endeavour Foundation invests so much effort into improved employment outcomes. Improved employment outcomes benefit both the supported employee and the organisation.

**Frank – Mt Druitt ADE Sydney:**

Frank finished school in 2008 and commenced work in February 2009 on the starting wage of $1.74 per hour. He was often defiant, unwilling to follow instructions and rude to his co-workers and supervisors. In an open employment environment, Frank’s employment would have been terminated and as a result the Government funding spent on assisting him into employment would have been wasted. He would have been one of the 93% of people with an intellectual disability who exited their open employment placement, as mentioned earlier.

Endeavour Foundation’s Mt Druitt training and development team spent considerable time and effort on Frank’s personal development and skill set. Just five years later, Frank runs the Gumption and Ant Rid packaging lines at Mt Druitt. Sales from these two products are worth $850K per annum for Endeavour Foundation. Recently Frank was appointed a WH&S employee representative, his current wage rate is $9.58 per hour and he works with a high degree of independence, 38 hours per week.

**Wayne – Mackay ADE central Queensland:**

Wayne worked at Endeavour Foundation before venturing into open employment. Unfortunately the opportunity did not work out and Wayne lost his job. Wayne remained on the books of the ESS provider however they were unable to find him a job. He sat at home, lost his confidence and became depressed, as often occurs when a person wants to work but cannot find a suitable position.
Wayne contacted Endeavour Foundation and was immediately offered employment. He commenced work in the Mackay warehouse and soon gained his forklift license. His responsibilities included warehousing duties, stock management, the receipt of goods and occasional deliveries.

Endeavour Foundation assisted Wayne to gain his Heavy Rigid truck license and to complete his Standard 11 Resources Registered Training Organisation induction for working in a coal mine. Wayne is now responsible for the vendor refilling operation for Endeavour Foundations’ range of Personal Protective Equipment products at several Queensland coal mines. Wayne works in excess of 38 hours per week and his rate of pay will move to $16.84 per hour.

Linda – Geebung ADE Brisbane

Linda came to Endeavour Foundation after working in many different jobs in open employment, none of which lasted very long. Linda had developed arthritis and depression and was admitted to a rehabilitation facility for a period of time. In 1981 Linda commenced work at Endeavour Foundation in the mailing operations at Northgate. She developed skills on all the mailing equipment and her confidence and self-esteem were quickly restored.

With Endeavour Foundation’s support, Linda completed a course in office procedures including customer service and telephone answering. Recently she completed a Certificate II in Warehousing and Transport. Today Linda works across all areas of the Endeavour Foundation mailing and printing operations at the Geebung ADE. She works a 38 hour week and earns $13.45 per hour.

The stories of Frank, Wayne and Linda highlight how difficult it is for people with an intellectual disability to survive long-term in open employment, let alone thrive. These three employees have relatively low support needs yet they struggled to prosper in open employment. Seventy-two per cent of Endeavour Foundation’s employees with an intellectual disability have high support needs. They need assistance to locate their work stations, put on their personal protective equipment, shower after an “uncontrolled accident”, turn their equipment on and off and much more. They do not have the capacity to work in an environment that does not understand their specific needs or does not have the significant resources and systems to provide ongoing on-demand support.

The Supported Wage System (SWS)

The Supported Wage System is a productivity based wage assessment tool that primarily determines the difference between the productivity of a person with a disability and the productivity of a person doing the job without a disability. This tool is then suited only to a disability that affects a person’s productive capacity only. This may be the case with a person with a physical disability but does not cater for people whose disability has a more broad impact on a variety of employment areas. It is very similar to the productivity component of the BSWAT which is used by Endeavour Foundation and the majority of ADEs. Endeavour Foundation elected to utilise the BSWAT in July 2005 for two reasons. The first of these is that it was developed by the Federal Government and the second was that it involved a third party independent assessment. Endeavour Foundation recognised that there were elements within
the tool that could be improved; however the organisation opted for the BSWAT believing it to be the fairest system available. Importantly Endeavour Foundation has a range of practices to assist employees to improve their skills, which in turn leads to higher wages under BSWAT assessments.

Those who advocate for an immediate switch to a productivity-based assessment tool fail to appreciate that employees in ADEs primarily have an intellectual disability. In the case of an employee with an intellectual disability, a wages assessment tool that focuses purely on an individual’s productivity does not take into account:

- The need for regular, ongoing workplace instructions
- The limited capacity to make decisions
- The ability or limited ability to work in a team
- Willingness or ability to adopt change
- Assistance required to set up work stations and maintain work flow
- The need to be multi tasked
- The need for constant supervision
- The recognition of the importance of wearing personal protective equipment
- The need to breakdown basic tasks
- Training and retraining
- Basic safety considerations
- Behavioural issues and the impact on the individual and their peers’ productivity

While this list is not exhaustive, it demonstrates that a wages tool that focuses purely on productivity does not take into account the productivity impact of these factors. We would contend these are also examples of why very few people with an intellectual disability gain meaningful and long term employment in open employment.

The financial impact of the SWS

Endeavour Foundation has conducted an analysis of the financial impact of an immediate switch to the SWS. A sample of 40 employees with an intellectual disability across four ADEs has highlighted that average wage rates would increase by $3.52 per hour. If this figure was amortised across all employees with an intellectual disability throughout Endeavour Foundation’s 25 ADE operations the impact would be an increase in wages of $10.5M or 73%.

Quite simply Endeavour Foundation does not have the financial capacity to meet this increase. There is no evidence that the market would withstand significant price increases to offset cost increases. In fact our recent experience in the current economic climate is there is ongoing downward pressure on cost inputs from the majority of our customers. If presented with this scenario the Board of Directors of Endeavour Foundation would need to consider the very real issue of solvency and the most likely outcome would be a decision to close the organisation’s ADE operations. The consequence of this decision is that 1855 employees with an intellectual disability would become unemployed.

Of the 1855 people employed at Endeavour Foundation ADEs, approximately 400 live in residential accommodation operated by the Endeavour Foundation. People in these
residential facilities receive support in the morning and evening through funding from the Queensland Government. There is no funding (nor prospect) available to provide support at these residential facilities during the day. Endeavour Foundation has no capacity to cover the additional costs to provide additional support. To do so would put the whole organisation under tremendous financial pressure. Given that Endeavour Foundation currently provides support to approximately 3500 people with an intellectual disability, the economic and social impact of Endeavour Foundation closing its doors because we were unable to comply with an inappropriate wages tool is self-evidently absurd. The purpose of this submission is to illustrate the economic and social impact of a failure to grant a temporary exemption under Section 55 of the Disability Discrimination Act.

The United Nations Convention on the Rights of Persons with Disabilities sets out the responsibilities of signatory countries of which we are confident that the commission has a detailed understanding. We ask the Commission not to allow a circumstance to arise where the misguided advocacy of a few people would potentially, catastrophically impact on the livelihood and welfare of more than 20,000 already marginalised people who currently gain many benefits from positive employment arrangements. Their right to work would be negatively and severely impacted by people purporting to represent their interests. We respectfully request the Commission to take heed of the results of the consultation process conducted by departmental officials, and the input from organisations like Endeavour Foundation, which have vast and relevant experience of the circumstances of employment of persons with an intellectual disability. Most importantly the Commission needs to hear the voices of those that have taken up the opportunity to work, to claim their rights through informed decisions and in so doing take their place in the community with dignity and self-respect.

Endeavour Foundation acknowledges the emotion in this debate. Endeavour Foundation also understands the need to treat everyone with respect and dignity. Focusing on the rights of people with a disability is at the very core of the reason for Endeavour Foundation’s existence.

Endeavour Foundation also recognises the relevant shortcomings of the BSWAT and would readily accept changes to ensure all employees with an intellectual or physical disability are paid at fair and reasonable rates. We do not accept that this can be achieved through the application of productivity based assessment tools alone. Endeavour Foundation will fully support changes that properly consider all of the issues.

**Recommendations**

Endeavour Foundation would encourage the Commission to:

- Remove the emotion from the current debate. The process is currently being driven by advocates with apparently good intentions who do not appear to understand the complex nature of supporting and maintaining the employment of people with an intellectual disability.
• Engage with all stakeholders including employees, ADEs, government departments and families. We cannot over-emphasise the need to ask the employees with an intellectual disability what they want.
• Support the establishment of a sector taskforce that includes a variety of stakeholders.
• Encourage the taskforce to develop a new, agreed tool that addresses all the issues of the current productivity / competency assessment tools. Whilst the Federal Court decision has imposed constraints around the use of ‘competency’ based assessments the tool must address the impact of the points listed earlier.
• Approve the temporary exemption to allow for the reactivation of BSWAT until an appropriate tool is developed. Without this, the sector is in a state of limbo and organisations are reluctant to employ people with an intellectual disability until this issue is resolved. Issues are arising around quality audits. Employees with an intellectual disability who are currently due for wage re-assessments have been placed on hold, with the unintended consequence that they are possibly being prevented from receiving justified wage increases.
• Encourage an immediate change to the BSWAT to allow for yearly assessments as opposed to triennial assessments, until the new tool is developed. This would address some of the concerns with the BSWAT.
• Encourage sector rationalisation. There are currently 250 service providers providing employment for approximately 21,000 employees with an intellectual disability. Rationalisation would remove cost and overhead and provide greater consistency in terms of support levels and employment outcomes for employees with a disability. As pointed out earlier, scale provides for increased employment and training opportunities and assists with commercial viability.

Conclusion

This submission has provided an overview of the myriad issues of supported employment for people with a disability (primarily intellectual) and the critical success factors and high level of resources involved in maintaining that employment. Without these high levels of support this group of employees find it close to impossible to maintain a job and consequently lose the economic and social benefits that employment can provide. It is the costs of these additional supports that cannot be borne in the open market or when an organisation is unable to adjust wages to allow for the reduced ability of the employee. Without these adjustments and based on our initial trials of the SWS wage assessment tool few if any ADE’s will be viable. It is Endeavour Foundation’s request that the proposed application by the Federal Government for an exemption to the Disability Discrimination Act be approved allowing the use of BSWAT for up to 3 years until another assessment tool can be developed and applied.