**APPLICATION FOR TEMPORARY EXEMPTION UNDER SECTION 55 OF THE DISABILITY DISCRIMINATION ACT 1992**

***Introduction***

On 29 April 2014, the Australian Human Rights Commission (AHRC) announced its decision to grant a 12-month conditional exemption under section 55(1) of the *Disability Discrimination Act 1992* (Cth) (DDA), to the Commonwealth and all Australian Disability Enterprises (ADEs) using or proposing to use the Business Services Wage Assessment Tool (the Applicants), an exemption from the operation of sections 15, 24 and 29 of the Disability Discrimination Act.

The Department of Social Services (DSS) asks the AHRC for a further 12-month conditional extension.

DSS is acutely aware that any further period of exemption would have an impact on the wage outcomes of workers with disability.

However, given the potential for impacts associated with the development and release of a new productivity-based wage tool and the four yearly *Supported Employment Services Award 2010* (SESA) review, a further 12-months would allow these issues to be bedded down and the implications for wage setting in ADEs to be clear. DSS is particularly concerned that the inability to secure a further 12-month exemption would cause further disruption to transition for the sector.

In addition, significant work has been undertaken in the past twelve months to encourage transition, and many ADEs are well on their way to full transition to an alternative wage tool.

In summary, the likely consequences should a further exemption not be granted are as follows:

* 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. A breach may result in the withdrawal of funding, resulting in job losses for supported employees;
* Some ADEs may simply choose to cease operations, resulting in job losses for supported employees;
* ADEs will be distracted from focusing on transitioning to alternative wage setting arrangements to deal with the implications of non-compliance with the DDA and their funding agreement; and
* The potential for disruption to work already underway to develop a new productivity-based wage assessment tool.

***Current Situation***

Since the decision of the AHRC in April 2014, The Commonwealth has committed $173m to the development and implementation of a new productivity-based wage tool, including forward assessments, and support for ADEs to transition. Discussions to inform tool development are continuing through a conciliation process in the Fair Work Commission (FWC), overseen by Deputy President Anna Booth. Parties at the table include unions, disability advocates, parents and carers, Australian Disability Enterprises (ADEs), National Disability Services (NDS), the Australian Council of Trade Unions (ACTU), and the Department of Social Services.

During the period of the exemption, DSS has reported quarterly to the AHRC, while also providing information to the ADE sector on a range of implications arising from:

* the findings of the Full Federal Court;
* the AHRC decision on 29 April 2014 to grant a 12-month exemption from the DDA to allow wages to supported employees to be paid based according to BSWAT assessment; and
* proceedings before the FWC and the Federal Court.

***Basis for Exemption***

DSS does not hold information about wage tools used or assessments undertaken using wage tools included for use in the *Supported Employment Services Award 2010* (SESA). However, information reported by individual ADEs to DSS in February 2015 indicates that approximately one-third of individuals (32 per cent) formerly assessed using BSWAT had, at that time, been assessed using a different wage tool. DSS understands these figures will increase leading up to the end of April 2015, as assessments with different wage tools continue. This will be reflected in the final quarterly report for the period of the existing exemption.

As also advised in the quarterly report to February 2015, ADEs have been reporting to DSS that:

* A number of ADEs identify a significant increase in wage costs as a barrier to moving to SWS; and
* There are some delays with the SkillsMaster and Greenacre assessments at some ADEs that have purchased these wage assessment tools due to the current volume of work for the two businesses that own and provide training for these tools.

The reports also indicate that movement to SWS has not been as significant as movement to other wage tools.

The Department is in regular contact with ADEs to provide support and information in relation to transition. However, the Department has no contractual ability to force organisations to change wage tools. This decision is one for individual ADEs taking into account the implications of the exemption and their industrial relations requirements as employers.

When initially applying for the exemption, DSS considered it would take approximately three years for the sector to transition from BSWAT to alternative wage setting arrangements. Transition to date suggests the estimate was correct. However, given the work that continues to be undertaken in this space, and the incentives currently available, DSS only seeks a further 12-month period of exemption to allow for the following elements to progress and full transition to occur:

*Development of the new wage tool*

Good progress is being made in the Fair Work Commission. A small scale observational study is currently being undertaken across three ADEs with thirty workers to test the impact of an amended assessment process for the Supported Wage System in supported employment. Given this process continues, with the intention of developing a productivity-based wage tool for supported employment, a 12-month extension would allow the tool to be developed through the group, tested, validated and released to the sector. It should be noted that parties at the table in the Fair Work process include advocates of people with disability, ADEs, the Health Services Union, United Voice, the Australian Council of trade unions, National Disability Services, parents and carers of people with disability and DSS. In addition to this work, the four-yearly review of the SESA is running alongside the FWC conference process. The implications of the review are not yet known and may need to be considered in a wage setting context for the sector.

**Consequences if an exemption is not granted**

DSS is concerned that failure to secure a further 12-month exemption would result in a number of consequences for supported employees, their families and carers, and undermine work undertaken to resolve this issue to date.

As earlier advised, the likely consequences are as follows:

* 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. A breach may result in the withdrawal of funding, resulting in job losses for supported employees;
* Some ADEs may simply choose to cease operations, resulting in job losses for supported employees;
* ADEs will be distracted from focusing on transitioning to alternative wage setting arrangements to deal with the implications of non-compliance with the DDA and their funding agreement; and
* The potential for disruption to work already underway to develop a new productivity-based wage assessment tool.

**Continuing Work**

From DSS’ perspective, continuing work will include:

* Ongoing engagement with ADEs to check transition progress to alternative wage assessment arrangements;
* Ongoing work in the conference process in the FWC to develop and test a new productivity-based wage tool for supported employment;
* When developed, validation, implementation and roll out of the new productivity-based wage tool;
* Ongoing monitoring of the four-yearly SESA review process and outcomes; and
* Continuation of information provision to ADEs about any exemption (if granted), the FWC process and new wage tool development, developments in the Federal Court and other settings related to the 2012 BSWAT decision.

As part of this application, DSS is prepared to consider any proposed terms or conditions which further the objects of the DDA.