



Temporary exemption sought from the DDA by the Department of Social Services (formerly FaHCSIA) and Australian Disability Enterprises

Submission to the Australian Human Rights Commission October 2013

National Disability Services (NDS) supports the application from the Department of Social Services (formerly the Department of Families, Housing, Communities and Indigenous Affairs - FaHCSIA) which seeks a temporary exemption in relation to the use of the Business Services Wage Assessment Tool (BSWAT). The BSWAT has been utilised since 2004 by around half the not-for-profit organisations operating Australian Disability Enterprises (ADEs) to determine pro-rata wages for their employees with disability (supported employees). Around 10,500 supported employees nationally have their wages determined by the BSWAT.

The application is made pursuant to section 44 of the Disability Discrimination Act 1992 (Cth) (DDA). The applicant seeks to exempt existing ADEs from sections 15 and 24 of the DDA and the Commonwealth from section 29 of the DDA.

If granted, the exemption would allow ADEs to use the BSWAT to assess and pay pro-rata wages for supported employees for a period up to three years. Work would occur to ensure that by the conclusion of the exemption period, wage-setting arrangements for supported employees would be fully compliant with the DDA.

Background

In December 2012, the Federal Court upheld the complaints of two supported employees against the use of the BSWAT to set their wages. The Commonwealth has considered the decision, its implications and the actions open to it, following an unsuccessful application to appeal the decision before the High Court.

The long-running case hinged on whether the BSWAT unfairly disadvantaged two supported employees under the Disability Discrimination Act 1992. The majority decision of the Federal Court held that the BSWAT did discriminate unreasonably.

The BSWAT determines a wage by assessing employees' competencies and their rate of productivity (assigning equal weight to each). It involves assessing an employee against four generic competencies and four industry-specific competencies. The competencies are drawn from the Australian Qualifications Framework (AQF) to ensure consistency with mainstream employment practice. In

its decision, the Federal Court held that the competencies test set an unrealistically high benchmark which employees without disability working at the lowest award level would not have to meet. Moreover, the Court criticized the mode of testing – asking supported employees to answer questions – as too abstract for people with intellectual disability.

The decision has created uncertainty for ADEs that use the BSWAT – and, indeed, for all ADEs which use competency-based wage assessment. Given that the BSWAT is owned by the Australian government, independently assessed by a government entity (CRS Australia), and named in the Supported Employment Services Award, ADEs had reasonably considered themselves on safe ground in using the BSWAT.

Why the DDA exemption should be granted

NDS wants to see wage setting arrangements in ADEs that are fair, legal and sustain the jobs of supported employees. It strongly supports the DDA exemption application, for three main reasons:

Impact on employment

Were the temporary exemption not granted, the jobs of thousands of supported employees would be in jeopardy.

ADEs employ people with relatively severe disability, three-quarters with intellectual or learning disabilities, who would have significant difficulty sustaining employment in the open labour market. Section 7 of the Disability Services Act (Cth) defines supported employment services as services that support the paid employment of persons with disabilities “for whom competitive employment at or above the relevant award wage is unlikely; and who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment.” If supported employment is not a viable option, most supported employees would not have an alternative form of employment open to them.

It has been proposed that the productivity-based Supported Wage System (SWS) method should replace the BSWAT. The SWS is used to determine pro-rata wages in open employment and to a very limited extent in supported employment (fewer than 4% of supported employees currently have their wages determined by the SWS method). Replacing the BSWAT with the SWS would have the immediate impact of substantially increasing wage costs for ADEs, which they simply could not afford. The financial viability of many ADEs is tenuous and, in the absence of significant additional income, increased wage costs would cause the closure of many ADEs and the unemployment of supported employees.

Moreover, the most likely supported employees to be priced out of jobs are those with the most precarious footing in the workforce – people whose support needs are high and productivity low. People with severe and profound disability have a very low

labour force participation rate¹ as it is without further denying them employment opportunities of the type provided by ADEs.

While some advocates argue for the SWS on equity grounds, this is not straightforward. Supported employees with intellectual competence and severe physical disabilities (e.g. cerebral palsy) would be materially disadvantaged by a move to the SWS, as would many employees with psychiatric conditions.

Some advocates also argue that supported employees should be in open employment: but overseas experience indicates that when supported (or sheltered) employment closes, only some supported employees make the transition to open employment – most do not.

The Disabled Persons Employment Promotion Act introduced in New Zealand in 2004 required that all supported employees be paid no less than the minimum wage. In 2007, at the end of a phase-in period, the Act was repealed and replaced by the Minimum Wage Amendment Act 2007. This allowed permits to be issued allowing individual workers to be paid less than the minimum wage. The New Zealand Minister of Disability Issues at the time said: “To counter concerns about the continuing financial viability of sheltered workshops, the ministry has put in place a system of individual minimum wage exemption permits for workers who are ‘significantly and demonstrably limited’ in their work.” The requirement to pay no less than the minimum wage was displacing many supported employees from work and a significant number of NZ supported employment services had converted to day centres providing non-work activities.

It is essential to the success of reforms to wage setting that they not be imposed like a sledgehammer from above, but that genuine efforts are made to engage stakeholders positively and gain their support. Rapid implementation of the Federal Court BSWAT decision would alarm and alienate many supported employees, families and service providers. It would cause great consternation in the supported employment sector, with many seeing the survival of ADEs as the issue at stake.

A 2007 US report, sympathetic to reform of sub-minimum wages for people with disability, concluded that imposing rapid change on the sector is counter-productive:

Changes to policies regarding sub-minimum wage must be integrated into a state’s overall systems change efforts and commitment to community employment at meaningful wages. Such efforts must include improvements in the funding mechanisms for day and employment supports, as well as support to community rehabilitation providers in the form of training, technical assistance, and support for organizational change. Evidence to date indicates that implementing dramatic changes in policy regarding sub-minimum wage as the primary mechanism for systems change, is likely to result in a multitude of unintended consequences, with service providers in particular focusing on maintaining the status quo, rather than seeing this as an opportunity for change. The experiences of Arizona and British Columbia also suggest that in

¹ In 2009, those aged 15-64 years with moderate or mild disability had a participation rate of 53%, while those with profound or severe disability had a labour force participation rate of 31%. Source: ABS 2009 Survey of Disability, Ageing and Carers (SDAC) (cat. no. 4430.0)

the absence of a clear policy intent, individuals may in fact lose the legal protections and benefits of an employer-employee relationship when activities are redefined as training or service activities rather than employment.

In contrast to British Columbia, Arizona and New Zealand, where changes to sub-minimum wage involved complete elimination with little notice, it may be possible to make less radical changes with an adequate period of notice so that impact can be assessed and providers can be offered the necessary technical assistance and support to determine how they will respond.²

If the capacity of ADEs to pay wages is to expand, effort, investment and time are essential. Imposing a requirement to pay higher wages without a source of additional income would ensure the loss of jobs for people whose alternative employment options are very few.

The consultation with supported employees that informed the development of the Vision for Inclusive Employment identified a desire to improve wages, but not a case for radical change. The majority of supported employees expressed satisfaction with their work. This underlines the fact that wages are only one factor in determining the level of satisfaction experienced by supported employees. Many value the dignity they gain from work, the social network they have at work and the knowledge that they are producing things of worth.

Practicality

Changing wage assessment tools used by ADEs would be logistically difficult to complete quickly. Re-assessing thousands of employees using a new wage assessment tool would require considerable time, training and resources. Moving the ADE sector (or at least half of it) en masse to the SWS would require a large number of SWS assessors. The necessary workforce of qualified assessors does not exist; assessors would need to be recruited and trained. This would be time-consuming and ensure that supported employees remained in a state of uncertainty as to the actual level of their wage rates.

Complexity

The process to develop the BSWAT a decade ago was technically complex, entailed extensive consultation and was painstaking. It took several years. The process for amending or replacing the BSWAT will be equally complex and should be thorough, consultative and methodical.

Adding to the complexity is that legal interpretations of the Federal Court decision differ. Implementing change will require clarity about the change to wage setting which the Federal Court decision requires. The best alternative to the BSWAT, at this point in time, is not clear. Options include modifying the BSWAT, developing a new tool or moving to another recognised wage assessment tool.

² J Butterworth, A Hall, D Hoff, A Miglioie, 'State and International Efforts to Reform or Eliminate the Use of Sub-Minimum Wage for Persons with Disabilities', Institute for Community Inclusion, University of Massachusetts Boston, November 2007.

The BSWAT is named in the Supported Employment Services Award and any change to that Award would need to engage all interested parties, including unions and employer representatives.

Adding to the complexity is the disability policy environment which ADEs are entering, in particular the National Disability Insurance Scheme (NDIS). The NDIS is an exciting and promising development, but one that nevertheless poses challenges for ADEs as they move into a system which is demand-driven and based on principles of participant choice and control. Reform of wage-setting arrangements should not be tackled in isolation of the implementation of the NDIS. As far as possible, preparing for the NDIS should be aligned with the introduction of revised wage-setting arrangements. It is worth noting that the Vision for Inclusive Employment, which sets out high-level reform goals for supported employment and recognises the inter-connectedness of these goals, extends over ten years.

To develop wage setting arrangements that fully comply with the DDA will require working through industrial, technical, policy and legal issues that are complex. It is important that this process proceed at a measured pace which enables well-informed decision-making and, as far as possible, maintains the support of stakeholders.

Review wage-setting arrangements

NDS's view is that, if the exemption is granted, a review should be established to:

- examine existing wage assessment tools focusing on their applicability to supported employment settings in the context of the Federal Court decision;
- engage a wide range of stakeholders in order to ensure that relevant expertise and opinion are considered;
- investigate an alternative or alternatives to current wage-setting methods;
- examine the issue of a social wage for supported employees that includes welfare benefits, income tests, wages and the relationship to the minimum wage;
- develop strategies to ensure that ADEs have the capacity to pay wages;
- develop an implementation plan that ensures that employment opportunities of people with disability expand;
- make recommendations in relation to the implementation of future wage-setting arrangements in ADEs that will be fully compliant with the DDA.

Stakeholders that will need to be engaged during the review process include: ADEs, supported employees and their families and carers; industry and peak body representatives; the Fair Work Commission; unions; employer bodies; AHRC; technical experts in wage assessment; legal experts and business analysts.

A set of milestones should be established which include:

- forming of a review reference group;
- development of a work plan;
- engagement of consultants to conduct the technical analysis required;
- a stakeholder and public consultation period addressing an identified set of parameters;
- preparation of a draft report analysing all relevant matters in scope;

- consideration of a draft report through public consultation and by the reference group, including consultation with Government;
- release of a final report including recommendations identifying how the transition to an outcome fully compliant with the DDA will take place, the actions required and the timeframe;
- the implementation of a transition plan that achieves compliance with the DDA without jeopardising supported employment opportunities.

The review will need to consider the characteristics of best-practice wage assessment in the context of supported employment. Based on NDS's own preliminary research, with input from members, the following features are important:

- formal industrial recognition through inclusion in the Supported Employment Services Award;
- a mandatory minimum hourly pro-rata wage rate (expressed as a percentage of the Award rate);
- a trial period for an initial assessment (and pay a specified wage rate during this period);
- allowance for the nature of an employee's disability in the assessment process;
- assessment of a range of factors (e.g. productive capacity, work skills, qualifications, overall performance) to determine the wage rate;
- be applicable to any industry or job type;
- include linkages to training and development activities;
- be transparent and easily understood;
- wage assessments by accredited assessors over a set period of time;
- an appeal mechanism for wage assessments, including a review;
- not artificially limit earnings based on a maximum rate;
- allow a maximum period between assessments and more frequent assessments if both employee and employer agree.

The review would also need to take into account the original principles set out in the Guide to Good Practice Wage Determination (referred to in Standard 9 of the Disability Services Employment Standards):

- Compliance with relevant legislation;
- Validity;
- Reliability;
- Wage outcome; and
- Practical application of the tool.

Additional factors could include:

- current concepts of competency and productivity;
- consistency of wage outcomes achieved by tools measured across an employee control group;
- additional assessment components that might be incorporated into wage tools to ensure fairness and equity;
- identifying inconsistencies in assessment processes used by wage tools.

The review of wage assessment tools should consider a reduction in the number of wage tools recognised in the Award. Currently, there are five wage assessment tools that are used by approximately 90% of organisations that operate ADEs and a

further subset of three tools that are used by approximately 80% of those organisations. Four of the 30 tools identified in the SES Award are no longer used. Of these wage assessment tools, all but two include a competency component. The existence of such a large number of wage tools places was a factor in the Federal Court's deliberations. Although all tools have been independently assessed as complying with the employment standard in the National Disability Service Standards, the existence of a large number of tools fosters the perception of inconsistent wage assessments. The designers and users of currently recognised wage tools should be invited to provide input to the review.

Conclusion

The history of the development of the current wage assessment tools; the technical complexities involved in ensuring that wage assessment is equitable, valid and reliable; the intersection of the industrial arena with the disability world; the logistics of moving from one system of wage assessment to another – these factors in combination argue strongly for a measured, consultative and staged approach to change.

Most important of all is avoiding the potentially devastating impact on the jobs of supported employees that would result from a sudden shift to a wage assessment method which produces higher wage costs for ADEs without additional income.

For the reasons set out above, NDS believes that a three-year DDA exemption is essential. NDS is committed to working with other parties to find a solution that is compliant with the DDA and fair to supported employees but does not truncate their future employment opportunities by jeopardising the financial viability of their employers.

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About National Disability Services

National Disability Services is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes 830 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.