



people with disability

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## **People with Disability Australia (PWDA)**

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**Re the application from the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) for an exemption for all Australian Disability Enterprises (ADEs) from sections 15 and 24 of the Disability Discrimination Act 1992 (Cth) (DDA) and for the Commonwealth from section 29 of the DDA**

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**Submission  
October 2013**

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**This submission has been endorsed by the Multicultural Disability Advocacy Association of NSW (MDAA) and the NSW Council for Intellectual Disability (NSWCID).**



## About Us

People with Disability Australia (PWDA) is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated.

PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

## Introduction

PWDA welcomed the decision of the Federal Court in *Nojin & Prior v Commonwealth [2012] FCAFC 192* in December 2012, and the recent supportive ruling of the High Court in May 2013. We acknowledge the courage and determination of Mr Nojin, Mr Prior, and their families in bringing the case, raising awareness of the nature and extent of discrimination inherent in the Business Services Wage Assessment Tool (BSWAT), and standing up for the rights of workers with disability.

The outcome of this case provides an unprecedented opportunity and impetus to correct one of the employment practices that has unlawfully and systematically discriminated against people with disability, particularly people with intellectual disability, for many years.

Ending use of the BSWAT as soon as possible would send a clear message that ALL workers in Australia have the right to enjoy equal pay for work of equal value.

Alternatively, reluctance on behalf of the Commonwealth, and/or Australian Disability Enterprises (ADEs) and/or the Australian Human Rights Commission (AHRC) to act swiftly in bringing an end to the use of the BSWAT would imply that it is acceptable for people with disability to remain unequal citizens, with unenforceable rights, and ineffective means of redress for injustices done.

PWDA strongly encourages all stakeholders to commit to a course of action that has the rights of people with disability at the very forefront of decision making concerning the reform of wage assessment tools, and the role of ADEs as employers.

## Summary

A 3 year exemption to the Disability Discrimination Act (DDA) 1992 (Cth) to permit use of the BSWAT to continue is unnecessary. The Supported Wage System (SWS) is a non-discriminatory alternative which is available, already in use, widely supported, and could be transitioned to relatively quickly.

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Granting the exemption is also unjustifiable because the AHRC cannot be confident that the Commonwealth's plans for greater improvements and reforms over 3 years will be appropriate, or that they will be achieved.

Granting the exemption would be inconsistent with the objects of the DDA, counter to the realisation of rights for people with disability as detailed in the Convention on the Rights of Persons with Disabilities (CRPD), and contrary to the application of human rights principles.

PWDA recommends that the AHRC denies the exemption application and that the Commonwealth embarks on an immediate course of action to prohibit ADEs from using the BSWAT to the assess wages of people with disability; determine that the SWS is the only wage assessment tool available for ADEs to use; and provide temporary resources to ADEs to support them through the transition.

Meanwhile, the Commonwealth should continue to consult at a policy level, and within a time bound framework, in order to plan, design, and implement genuine supported employment options which meet the needs of people with disability and realises their rights.

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### **Immediate transition to the Support Wage System**

It is not necessary to pause for 3 years while a new wage assessment tool is devised and tested where one already exists. The Supported Wage System (SWS) is widely regarded by the disability sector both nationally and internationally as a fair, reliable, and appropriate wage assessment tool with independent and transparent processes, opportunities for employee advancement, and regular review. Critically, it does not contain the competency assessment element which caused the BSWAT to fall foul of the law in *Nojin*. Moreover, the SWS is already successfully being used in many ADEs across Australia, which is evidence that it can be an accurate wage assessment tool in an ADE setting.

ADE employees who currently have their wages assessed by the BSWAT should be reassessed using the SWS. This would resolve the immediate problem of ensuring that employees of ADEs were having their wages assessed fairly and without discrimination.

The Commonwealth should provide temporary support where appropriate to provide for the reassessment of ADE employees by independent SWS Wage Assessors, and to pay the potentially higher wages. This way, a rapid transition to the SWS can be achieved while protecting workers from job losses, and preventing ADEs from falling foul of their own contractual obligations with government.

FaHCSIA's (now the Department of Social Services') application did not provide an accurate figure of the number of people who may be affected by this change, or an assessment of the costs involved in doing so. However, anecdotal evidence from ADEs and the disability sector suggests that the reassessments and transition could be completed in a matter of months. It is within the resources of the Commonwealth to commit to this short term injection of funds in order to achieve wage parity for workers with disability.

### **Maintaining the viability of ADEs is not a justifiable consideration**

Maintaining the financial viability of ADEs is not a consideration that should trump the right of a worker to receive equal pay for work of equal value. If the Commonwealth has doubts about whether the ADE business model is sustainable if workers are provided with equal pay then it is the model that requires restructuring.

The basic right for a worker to be paid fairly on the same basis as other workers doing the same job cannot be compromised on the ground that s/he works for an employer whose viability rests on exploitation of its

workforce rather than the quality of its operation and output. No other employer in Australia is permitted to determine minimum wages and conditions unlawfully based on the profitability or viability of their business.

## **Industrial protection for all workers**

Workers assessed using the BSWAT are excluded from the industrial protections that prohibit employers from practices that exploit their workforce. Industrial relations have been a highly regulated feature of the Australian legal landscape since federation. The operation of independent, fair and transparent wage setting processes and conditions of work based on industry standards is the backbone of Australian industrial relations, and has significantly influenced what society regards as being fair treatment.

Immediate transition to the SWS would end the segregation of people with disability, particularly people with intellectual disability, from the fair work protections that every other worker in Australia takes for granted. On the contrary, granting the exemption would prevent any attempts by workers to challenge this further form of discrimination against workers with disability that is exemplified by the BSWAT.

## **A legacy of poor policy**

Industrial relations have been neglected by the supported employment industries for far too long. The lack of industrial protections afforded to workers whose wages are assessed using the BSWAT brings into question the economic value that ADEs and the government consider these workers to contribute. It also questions whether these workers are considered to be genuine workers at all, given they aren't treated as such. If they aren't, then genuine supported employment is not the true nature of the service that ADEs provide.

Moreover, there is no factual evidence to suggest that many ADE workers couldn't move into open employment under the SWS. There are merely no incentives for ADE employers to encourage this shift or assessment processes in place to realise it.

In reality, ADEs walk a grey line between acting as an employer and a support service, and for workers assessed under the BSWAT ADEs are failing at both. Addressing the role of ADEs will require thorough consultation and reform, but in the meantime workers should not continue to suffer the discriminatory consequences that decades of poor supported employment policy has resulted in.

FaHCSIA has been on notice from the disability sector and the AHRC itself that the BSWAT system was discriminatory and unacceptable for many years but it has repeatedly failed to address the problem. It is not open for the Department to now claim that it has been caught unawares.

## **Inclusive Employment 2012-2022 (the Vision)**

The entire supported employment framework for people with disability requires transformation, recognised, in part, by the reference in FaHCSIA's application to Inclusive Employment 2012-2022 (The Vision). However, any overarching structural review of supported employment opportunities for people with disability can and should be undertaken quite separately to the matter in hand; which is to identify and implement a fair and non-discriminatory wage assessment tool for workers in ADEs as soon as possible.

## **The outcomes of implementing the Vision are uncertain**

FaHCSIA's reasoning for a 3 year exemption relies on the fact that introducing fundamental changes to the provision of employment support will require careful consideration and consultation, as well as time and resources to implement. However, achieving greater choice and control in employment for people with

disability requires a substantial transformation in the number and form of opportunities available, not to mention a significant paradigm shift in employer and community attitudes.

As such, FaHCSIA's commitment to fast track a 10 year Vision into a 3 or even 5 year success story seems overly ambitious and unlikely to be achieved. Logically, it could be estimated that fast-tracking this initiative would require more intensive strategic and financial resourcing over a longer period of time than simply taking the immediate SWS transition route. There is also no guarantee that the transformation outlined by the Vision would be achieved. Its implementation may even result in the job losses and declining profitability of ADEs that FaHCSIA regards as so central to the current application.

Moreover, the Vision was an initiative of the previous Labour government and to date there is no clarity regarding the current administration's policies on employment for people with disability, or the extent of their commitment either in terms of political will or resourcing.

### **The role of ADEs as employers**

Critically, the Vision accepts that ADEs have a role to play as a supported employment option, and this premise needs to be carefully reconsidered. The ADE model is a sheltered employment option which acts to socially and economically segregate and isolate people with disability from the wider community and leave them open to abuse and exploitation. It also serves to perpetuate the stigma, negative attitudes and marginalisation that allows discrimination against people with disability, particularly people with intellectual disability, to remain unchallenged or unaddressed – as illustrated by the terms of the current application.

The whole system of supported employment for people with disability urgently needs to be examined from a rights perspective as well as an economic one. However, the opportunity to realise rights for some people with disability immediately by transitioning workers to the SWS outweighs the promise of undefined progress for all people with disability at some unidentified point in the future.

The right to work is an economic and social right which states may implement progressively. This does not imply that the timeframe is open-ended. Active steps must be taken to move towards full implementation in a way that is mindful of the most disadvantaged, in this case people with intellectual disability working in ADEs. Moreover, freedom from discrimination is an immediately applicable civil and political right which the current exemption application aims to curtail without reasonable justification.

### **Breaching the Convention on the Rights of Persons with Disabilities (CRPD)**

Article 27 of the CRPD requires state parties to take appropriate steps, including through legislation, to prohibit discrimination on the basis of disability with regard to all matters concerning employment, and to protect the rights of persons with disabilities to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value.

In September 2013 Australia's compliance with, and progress in implementation of, the UN CRPD was reviewed by the CRPD Committee. In relation to work and employment the Committee expressed concern that employees with disabilities in ADEs are still being paid wages based on the BSWAT and recommended Australia immediately discontinue its use.

It would be a significantly retrograde step for the AHRC to grant this exemption considering the clear breaches of normative human rights standards the BSWAT illustrates; and especially in the face of the CRPD Committee's recent comments.

## **Undermining the DDA**

The objects of the DDA include elimination of discrimination against persons on the grounds of disability including in the areas of work and the administration of Commonwealth laws and programs. Additionally, to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

Granting the exemption would seriously undermine the confidence of people with disability, particularly intellectual disability, in the DDA as an effective piece of legislation able to protect them from current or potential discrimination. The exemption would also prevent any future claims under the DDA relating to the BSWAT, essentially rendering this legal avenue of complaint and redress void.

## **Opportunities for systemic reform should be embraced**

In effect, granting the exemption would be akin to giving the government a 'get out of jail free card' to avoid or delay implementation of court judgments with a systemic discrimination element simply because to do so may require resourcing a rapid reform. It would also imply that it is an acceptable status quo for people with disability, particularly people with intellectual disability, to remain unequal citizens, with unenforceable rights, and ineffective means of redress for injustices done.

PWDA is of the view that it is cases such as *Nojin* which shine light into the darkest corners of our communities, and provide the catalyst for longstanding systemic abuses to finally be addressed. The AHRC should mirror the pursuit of justice, equality, and fairness shown by Mr Nojin and Mr Prior in pursuing their litigation against the Commonwealth, and make the decision to refuse the exemption and force immediate change to occur.

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**Thank you for the opportunity to make this submission**

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