



AUSTRALIAN HUMAN RIGHTS COMMISSION

DISABILITY DISCRIMINATION ACT 1992 (Cth), s 55(1)

NOTICE OF GRANT OF A TEMPORARY EXEMPTION

1. By this instrument, under section 55(1) of the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act), the Australian Human Rights Commission grants 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.
2. The exemption is granted for a 12 month period from the date of this instrument and is granted subject to the conditions outlined below.

1 Summary

3. The Commission has granted to the Applicants an exemption from sections 15, 24 and 29 of the Disability Discrimination Act for a period of 12 months.
4. The exemption is granted to allow the payment of wages to ADE employees, based on current assessments already conducted with the Business Services Wage Assessment Tool (BSWAT), subject to the following conditions:

The Commonwealth:

- a. Take all necessary steps to transition from the BSWAT to the Supported Wage System (SWS), or an alternative tool approved by the Fair Work Commission (FWC), as quickly as possible.
- b. Take all appropriate steps to ensure ADEs using or proposing to use the BSWAT to conduct wage assessments immediately commence using the SWS, or an alternative tool approved by FWC, (other than the BSWAT) to conduct new and outstanding wage assessments.
- c. Report to the Commission, on a quarterly basis during the exemption period, as to:
 - i. The number of assessments conducted each quarter; and
 - ii. The number of assessments still to be conducted.
- d. Give consideration to ensuring that no disadvantage is suffered by ADE employees whose wages may be reduced as a result of the application of the SWS or alternative tool.

The ADEs using or proposing to use BSWAT to conduct wage assessments:

- a. Take all necessary steps to transition from the BSWAT to the Supported Wage System (SWS), or an alternative tool approved by the Fair Work Commission (FWC), as quickly as possible
- e. Immediately commence using the SWS, or an alternative tool approved by FWC (other than the BSWAT) to conduct new and outstanding wage assessments.
- f. Give consideration to ensuring that no disadvantage is suffered by ADE employees whose wages may be reduced as a result of the application of the SWS or alternative tool.

2 Background

5. The BSWAT was developed in 2003 and is administered by the Commonwealth. The tool's purpose is to determine the level of wages paid to people with disability, employed in Commonwealth-funded ADEs.
6. There are currently 194 ADEs nation wide employing about 20,000 people with disability, in a range of industries including; packaging, manufacturing, catering, and horticulture. Of the 20,000 employees, approximately half are assessed using the BSWAT.
7. On 21 December 2012, the Full Federal Court found in the case of *Nojin v the Commonwealth*¹ that the test of competency in the BSWAT discriminated against people with an intellectual disability. On 10 May 2013, the Commonwealth was refused special leave by the High Court to appeal the decision.

3 The Application

8. The Applicants request an exemption for a period of three years so that they may continue to use the BSWAT to:
 - a. assess wages for ADE employees; and
 - b. pay wages to ADE employees based on assessments conducted with the BSWAT;

while alternative wage-setting arrangements are being considered, devised and/or established and implemented by the Applicants.

9. Although the Applicants seek an exemption in relation to all employees of ADEs, they also claim that the Full Court decision in *Nojin* found the use of the BSWAT constituted unlawful discrimination only in the particular circumstances of that case. The Commonwealth considers that it may still be lawful to use the BSWAT (including paying wages assessed with the BSWAT) in certain circumstances.
10. The Applicants claim the exemption is needed to allow time to transition to an alternative wage-setting model as:

- a. ADEs who continue to use the BSWAT without an exemption from the relevant provisions of the Act may be assessed as not meeting the requirements of the *Disability Services Standards (FaCSIA) 2007*, Standard 9, Employment Conditions (Disability Services Standards). This may result in the Commonwealth withdrawing the ADE's funding.
- b. Moving immediately to an alternative wage-setting arrangement may result in:
 - i. ADE closure, resulting in unemployment for workers with disability, and adverse financial impacts for these workers, until alternative employment (if available within the community) is individually achieved;
 - ii. An inability for existing systems (for example, the Supported Wage System) to meet immediate demand for assessments.
- c. Further consultation is needed in relation to the appropriate way forward to an alternative wage-setting model.

3.1 Submissions received by the Commission

- 11. The Applicants request for a temporary exemption was posted on the Commission's website and interested parties were invited to comment on the Application. The Commission received over one hundred submissions in response to the Application.
- 12. The submissions were divided as to whether the exemption should be granted. The majority recognised that some time was needed to transition to a new tool, however many submitted that three years was too long. Of those that opposed the grant of the exemption outright, most did so on the basis that there are alternative tools immediately available, namely the SWS and the productivity component of the BSWAT.
- 13. Given the identification of alternative tools, the Commission wrote to the Applicants and other stakeholders seeking further submissions as to the appropriateness of the alternatives. This request was published on the Commission's website. The Commission received a further five submissions dealing specifically with the alternative tools.

4 Relevant Law

4.1 Disability Discrimination Act 1992

- 14. The Commission may grant exemptions from the provisions of Division 1 or 2 of the Disability Discrimination Act.ⁱⁱ An exemption may be granted subject to terms and conditions, and may be expressed to apply only in particular circumstances, or to particular activities.ⁱⁱⁱ Exemptions are to be granted for a specified period not exceeding five years.^{iv} It is not unlawful for a person who has been granted an exemption to act in accordance with the exemption.^v
- 15. It is unlawful for an employer to discriminate against an employee on the ground of the employee's disability, in the terms and conditions of employment that the employer affords the employee.^{vi} It is also unlawful to discriminate on the ground of

disability in the provisions of goods and services^{vii} and in the administration of Commonwealth laws and programs.^{viii} The relevant provisions are located in Divisions 1 and 2 of Part 2 of the Disability Discrimination Act.

5 Reasons For Decision

16. The Commission has considered all of the material that has been placed before it, together with the Commission's Guidelines on Temporary Exemptions under the Disability Discrimination Act, and has decided to grant an exemption for a period of 12 months from the date of this instrument, subject to the conditions outlined below.

5.1 Necessity

17. The Commission notes that although the Applicants seek an exemption in relation to all employees of ADEs, they also claim that the Full Court decision in *Nojin* found the use of the BSWAT constituted unlawful discrimination only in the *particular circumstances* of that case. The Commonwealth considers that it may still be lawful to use the BSWAT (including paying wages assessed with the BSWAT) in certain circumstances.
18. The Commission also notes that the decision in *Nojin* did not consider whether the application of the BSWAT to people with a non-intellectual disability was discriminatory. However, in light of the comments and findings of the Full Court, in relation to the unreasonableness of the competency aspect of the BSWAT,^{ix} the Commission considers it is at least arguable that the use of the competency part of the BSWAT may discriminate against all ADE employees. In these circumstances the Commission considers an exemption would be necessary to allow the ongoing use of the BSWAT for all ADE employees.

5.2 Reasonableness of the exemption

19. The Commission has assessed the reasonableness of the exemption application and has weighed the discriminatory effect of the exemption against the reasons for the exemption.

(a) Arguments for the exemption

Time to conduct new assessments and to transition to a new tool

20. The Applicants and the majority of the submissions recognise that an alternative wage assessment tool is needed. Many submissions, including those that oppose the application, also recognise that finding or creating and implementing the new tool will take time. Many who oppose the application, do so only on the basis that the three years requested by the Applicants is too long.
21. The bulk of those who oppose the application, other than purely because of the length of time requested, do so on the basis that there are currently available tools that could and should be used immediately. However, as the Applicants point out, while an alternative tool is currently available, for wages to be paid pursuant to that tool, employees will need to have an assessment conducted with that tool. These assessments cannot be done instantly.

22. As the Commonwealth issued a direction to the ADEs not to use BSWAT after the decision in *Nojin*, many people who commenced employment after the decision have not had an assessment of wages undertaken, and many who were due to have their assessment reviewed have not had a review. As such, time is needed to allow assessments to be conducted. The Applicants submit that while the assessments are being conducted, it will be necessary to allow wages currently paid pursuant to a BSWAT assessment to continue.
23. It has been almost 12 months since the High Court refused leave to appeal the decision in *Nojin*. From that date it became clear that the tool was discriminatory and that the Commonwealth would need to find a new tool for at least those employees with an intellectual disability. Although the submission from the Commonwealth contains a number of steps they have undertaken to move forward, a new tool has not been developed. Nonetheless, the Commission considers, given the complexity of the issues and the circumstances of the employees and employers that some further time is needed to enable transition to another tool.

Financial Viability of ADEs

24. One of the reasons the Applicants seek the exemption is to enable stability of the ADE environment to ensure that they can maintain viability and in turn protect the delivery of services provided by the ADEs, and the employment of their support staff, which number about 4000. Many of the submissions in support of the application submit that the increased wages that will occur as a result of the application of a new or alternative tool will mean the demise of many of the ADEs. The information provided to the Commission as to the viability of the ADEs was limited and mostly anecdotal.
25. Although the figures vary as to the estimated increase in wages, it is generally accepted in the submissions received, that there will be an increase and that it will be significant. One submission suggests it could be as high as 73%. This will undoubtedly have a significant impact on the operations of the ADEs that, according to the Commonwealth are, to a significant extent, already at high to medium risk of failure.
26. Some of the submissions in opposition to the exemption acknowledge that the application of a new or alternative tool will mean increased wages but that it is incumbent on the Commonwealth to take the necessary steps to ensure the ongoing operation of the ADEs and the services they provide and that this should not come at the expense of workers receiving an appropriate wage.
27. While it is acknowledged that ADEs provide a number of services beyond the employment of the individual with a disability (including the ancillary benefits of that employment such as emotional and psychological wellbeing), training and development, care, accommodation and employment for support workers, these services should not come at the expense of those individuals who are not receiving a wage to which they are entitled. On balance, the Commission considers that a short term exemption is appropriate to allow the Applicants to explore avenues to support the ongoing role of ADEs.

Compliance with the *Disability Services Standards (FaCSIA) 2007*

28. It is submitted that ADEs who continue to use the BSWAT, without an exemption from the relevant provisions of the Act, may be assessed as not meeting the requirements of the Disability Services Standards, and that this may result in the Commonwealth withdrawing the ADE's funding. Standard 9 provides that:

the pro-rata wage must be determined through a transparent assessment tool or process, such as Supported Wage System (SWS), or tools that comply with the criteria referred to in the Guide to Good Practice Wage Determination.

29. The Commission notes the neither the Disability Standards nor the *Guide to Good Practice Wage Determination* requires ADEs to use of the BSWAT. It further notes that the Standard in fact suggests the use the SWS. In these circumstances the Commission considers that compliance with the Disability Standards could be achieved through use of at least the SWS and possibly other tools.

(b) *Arguments against the exemption*

Continuation of discrimination

30. As the use of the BSWAT has been found to be discriminatory, a number of submissions point out that the exemption would allow discrimination against ADE employees to continue if an exemption is granted. This would be contrary to the object of eliminating discrimination and is the basis for many of the objections to the application. The Commission considers that as the grant of an exemption will allow discrimination against ADE employees to continue, it is important to ensure the terms of the exemption are appropriately targeted to minimise the discriminatory impact.

Recommendation of the Committee on the Rights of Persons with Disabilities

31. Certain submissions also drew attention to the Concluding Observations of the Committee on the Rights of Persons with Disabilities, which recommended:

the State party:

- a. Immediately discontinue the use of the Business Services Wage Assessment Tool;*
- b. Ensure that the Supported Wage System is modified to secure correct assessment of the wages of persons in supported employment;^x*

Alternatives immediately available

32. As indicated above, a number of the submissions in opposition to the application submit that there are two alternative tools that are available immediately, the SWS, or the productivity component of the BSWAT. In the questions put by the Commission to the Commonwealth and other stakeholders the Commission asked for arguments for and against the use of both of these tools.

Supported Wage System (SWS)

33. From the responses and submissions, in relation to the SWS, the following are arguments that were put in support of the SWS:

- a. It is owned by the Australian Government and assessments conducted with it are paid for by the Commonwealth.
- b. It is an authorised tool under the *Supported Employment Services Award 2010* (Award).
- c. It is already used in open employment and by a small number of ADEs, and has been in use for about 20 years.
- d. It has been the subject of two reviews, which found it was not appropriate in all circumstances, but upheld the validity of the SWS and made recommendations for changes.
- e. It would result in an increase in wages for most employees.
- f. As it measures productivity only, it is less likely to be discriminatory.
- g. It is the preferred option for most advocacy services.
- h. It was recognised as an appropriate alternative by the High Court and the Full Court in the *Nojin* case and by the Committee on the Rights of Persons with Disabilities.

34. The following were raised as arguments against using SWS:

- a. New assessments would need to be conducted for many employees. This would create a significant burden on assessors and ADEs.
- b. Supported employees with the highest support needs would fall out of employment as it would not be economically viable to retain them.
- c. The period of assessment under the SWS is relatively short and may not be adequate for employees with higher needs to demonstrate their productivity.
- d. The SWS incorporates a minimum wage of \$78.00 to all employees regardless of hours worked.
- e. Its use would mean a significant increase in the wages of supported employees that would risk the financial viability of the ADEs and cause loss of employment and other services provided by the ADEs.
- f. The SWS may not be able to take into account the pared back nature of some jobs in supported employment.
- g. Some employees would have their wages reduced – eg those with a severe physical disability. This would apply to approximately 200 people.
- h. ADEs with enterprise agreements would need to go through a process of termination or re-negotiating them.

BSWAT productivity component

35. The responses to the questions of the Commission indicate the following are the advantages of using only the productivity component of the BSWAT:

- a. It could be relatively straightforward as data from existing assessments could be used.
- b. It would increase wages in most cases.
- c. It allows assessment of productivity over a longer time than the SWS does.
- d. It would be in accordance with the Full Court decision and reduce the risk of discrimination.

36. The following arguments against its use:

- a. As with the SWS, some employees would have their wages reduced.
- b. The wage increase that would flow from the BSWAT would be much greater than the SWS and therefore cause greater difficulties for the ADEs.
- c. The use of competency assessment may be valid in some circumstances.
- d. Use of only one part of the BSWAT would be to apply a tool in a manner that contravenes the Award.

37. Having considered all of the above arguments, the Commission considers that while either tool could be used, on balance, the SWS should be preferred, at least as an interim measure, as:

- a. Its use would be in compliance with both the Award and the Disability Services Standards, whereas the productivity component of the BSWAT would not.
- b. It is already used in both open and supported employment and the BSWAT productivity component is not.

6 Conclusion

38. On balance, the Commission considers that it is not reasonable to grant an exemption for three years, given the ongoing discrimination and the existence of an alternative tool that is able to be used immediately. However, having considered; the submissions, the complexity of the financial circumstances of the ADEs, the nature of the services provided by the ADEs and the number of assessments that need to be conducted, the Commission considers that an exemption for a 12 month period is reasonable. Limiting the exemption period to 12 months will allow the Applicants time to transition to a new tool whilst ensuring the discriminatory impacts on ADE employees is minimised.

39. The Commission also considers that it is not appropriate to conduct new assessments with the BSWAT (as it has been found to be discriminatory) and has therefore concluded that the exemption should be granted in part only. That is, the Commission has decided to grant the exemption only to allow the payment of

wages to ADE employees who have already had an assessment conducted with the BSWAT and where that assessment is current.

40. To ensure that the discriminatory impact is minimised and that transition to a new wage-setting model is achieved as quickly as possible, it is appropriate to grant the exemption subject to conditions.
41. Accordingly, the Commission grants the Applicants an exemption from the operation of sections 15, 24 and 29 of the Disability Discrimination Act to allow the payment of wages to ADE employees, based on current assessments already conducted with the BSWAT, for a period of 12 months from the date of this instrument, subject to the following conditions:

The Commonwealth:

- a. Take all necessary steps to transition from the BSWAT to the Supported Wage System (SWS), or an alternative tool approved by the Fair Work Commission (FWC), as quickly as possible.
- b. Take all appropriate steps to ensure ADEs using or proposing to use the BSWAT to conduct wage assessments immediately commence using the SWS, or an alternative tool approved by FWC, (other than the BSWAT) to conduct new and outstanding wage assessments.
- c. Report to the Commission, on a quarterly basis during the exemption period, as to:
 - i. The number of assessments conducted each quarter; and
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- c. Give consideration to ensuring that no disadvantage is suffered by ADE employees whose wages may be reduced as a result of the application of the SWS or alternative tool.

7 Application For Review

42. Subject to the *Administrative Appeals Tribunal Act 1975* (Cth), any person whose interests are affected by this decision may apply to the Administrative Appeals Tribunal for a review of the decision.

Dated this 29th day of April 2014.

Signed by the President, Professor Gillian Triggs, on behalf of the Commission.

ⁱ *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

ⁱⁱ Section 55(1) *Disability Discrimination Act 1992*.

ⁱⁱⁱ Section 55(3)(a) and (b) *Disability Discrimination Act 1992*.

^{iv} Section 55(3)(c) *Disability Discrimination Act 1992*.

^v Section 58 *Disability Discrimination Act 1992*.

^{vi} Section 15 *Disability Discrimination Act 1992*.

^{vii} Section 24 *Disability Discrimination Act 1992*.

^{viii} Section 29 *Disability Discrimination Act 1992*.

^{ix} *Nojin* [63], [70], [76], [91] [107], [109], [127], [134]-[139], [145], [254] [258].

^x Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities: Australia*, UN Doc CRPD/C/AUS/CO/1 (2013), para 50. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=883&Lang=en (viewed 11 April 2014).