IN THE AUSTRALIAN HUMAN RIGHTS COMMISSION

IN THE MATTER OF AN APPLICATION FOR AN EXEMPTION PURSUANT TO SECTION 55 OF THE DISABILITY DISCRIMINATION ACT 1992

SUBMISSION ON BEHALF OF THE AED LEGAL CENTRE IN OPPOSITION TO THE APPLICATION

INTRODUCTION

1. This submission is made by AED Legal Centre in opposition to the application for temporary exemption (**Application**) made by the Department of Families, Housing, Community Services and Indigenous Affairs (**Commonwealth**) on 5 September 2013 to exempt the use of BSWAT in Australian Disability Enterprises (**ADEs**) from the application of the DDA.

AED Legal Centre

2. AED Legal Centre (**AED**) was established in 2008 by the Association of Employees with Disability Inc. AED provides legal advocacy to people with a disability in the areas of employment and education. Its main objective is to protect and advance the rights of people with disability who experience difficulties and/or discrimination in employment or education because of the disability.

3. AED is a member of the Federation of Community Legal Centres of Victoria.

4. It is funded by the Australian Government through the Department of Families, Housing, Community Services and Indigenous Affairs, now known as the Department of Social Services (DSS).

5. AED works in partnership with service users, other disability and community agencies, trade unions, employers and governments to:

   - protect the human, civil and legal rights of people with disabilities;

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- empower employees with a disability who experience workplace discrimination or disadvantage;
- promote the inclusion and participation of people with a disability in employment, education and training;
- empower students and their families in addressing barriers to education; and
- increase community awareness and promote better community attitudes towards people with a disability.

PRELIMINARY

6. The Application is seriously deficient in both form and substance.

7. The grounds for the exemption sought are in the form of broad assertions unsupported by any data or reference to supporting facts.

8. There is no attempt to address the Commission Guidelines for dealing with such applications dated 16 February 2010 and published on the Commission website (**Guidelines**).

9. Section 3 of the Guidelines, titled "What criteria does the Commission apply in deciding whether to grant an exemption?" includes a section titled "Is granting an exemption consistent with the objects of the Disability Discrimination Act?". Under that section, the Guidelines state:

> "If an exemption is sought that would allow conduct that is inconsistent with, or would undermine, the objects of the Disability Discrimination Act, this would be a significant reason not to grant an exemption."

10. It goes on:

> "Where an exemption is sought for reasons wholly unrelated to the objects of the Disability Discrimination Act (such as to gain commercial advantage) this may be a factor weighing against the grant of an exemption."

11. The deficiencies in the Application make it difficult to provide a response in other than equally broad generalities. AED anticipates that the Commonwealth will seek to put its <u>real</u> case in reply to the submissions received from objectors. AED foreshadows

that if that occurs, it will seek an opportunity to respond to the case which the Commonwealth then seeks to advance.

BUSINESS SERVICES WAGE ASSESSMENT TOOL

12. The Business Services Wage Assessment Tool (**BSWAT**) is a test which is used to determine the appropriate wage rates to be paid to employees with disabilities who work in ADEs.

13. Its use arises under clause 14.4 of the Supported Employment Services Award 2010 (**Award**), which is a modern award made under the Fair Work Act and which came into operation on 1 July 2010.

14. Clause 14.4 is headed "Wage Assessment – Employees with a Disability" and reads as follows:

> "(a) An employee with a disability will be paid such percentage of the rate of pay of the relevant grade in clause 14.2 as assessed under an approved wage assessment tool chosen by a supported employment service.
>
> (b) For the purposes of this clause an approved wage assessment tool means and is limited to: [*the clause then identifies 30 wage assessment tools, which include the Supported Wage System and BSWAT*]"

15. As was noted by Justice Buchanan at [11] of his judgment in the Full Court in the *Nojin & Prior* (2012) 208 FCR 1 case:

> "BSWAT examined both a disabled worker's "productivity" (by reference to work actually performed) and also the extent to which a disabled worker possessed identified "competencies". An assessment of competencies (as the term is here used) does not relate necessarily, and often will not relate, to work actually carried out, or the way it is performed. Rather, an assessment of competencies tests more general knowledge, and perhaps aptitude."

16. His Honour also noted at [12] of the judgment that "the challenge made in the present proceedings was that examination of competencies proceeded by reference to questions involving abstract concepts, which intellectually disabled persons would

find more difficult to answer correctly or successfully than disabled persons who are not intellectually disabled".

17. The challenge to BSWAT in the *Nojin & Prior* case also included a challenge to the assessment methodology. That methodology is described by Justice Buchanan at paragraph [60] to [64] of his judgment.

18. In summary, the assessment under BSWAT is in two parts, each accounting for 50% of the final assessment.

19. The assessment of a worker's productivity is done by setting given tasks for the worker to perform and comparing that performance (usually measured in terms of output and/or time taken) against the performance of the same task or tasks by an employee (usually a supervisor) without any disability. The comparison is reduced to a percentage score. AED makes no challenge to the productivity component of the BSWAT assessment process in the present submissions.

20. With regard to the process for testing competencies, we set out the following description from Justice Buchanan's judgment:

> 61 So far as it measured competencies, BSWAT dealt with two areas of competencies: core competencies and industry competencies. There were four core competencies and four industry competencies. For each unit of competency questions were provided to the assessor, together with indicative areas of acceptable response. The details will be appreciated from a study of the relevant forms, which will be set out shortly.
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> 62 All the questions and assessment criteria under each core competency were classified as "critical". The significance of this was that an incorrect response to any of those questions or criteria resulted in an assessment of "not yet competent" ("NYC") for that core competency. In other words, an incorrect response to a single question or criterion under any of the core competencies would result in a score of 0 for that competency, irrespective of how many of the remaining questions were answered correctly. This aspect of BSWAT was referred to in the evidence as "all or nothing". Having regard to the fact that there were eight competencies to be scored, and that the competency component comprised 50% of a worker's overall score, each competency carried a final value of 6.25%.

> 63 In relation to industry competencies, the position was more complicated. First, it was assumed that every job done by a disabled worker could be measured against at least four "industry" competencies. An industry competency could be applicable provided at least one person in the workplace was required to exercise it, whether or not the employee in question was required to do so. If four industry competencies could not be identified and tested in this way, any shortfall (i.e. 6.25% each time) was simply scored 0. Mr Nojin was assessed against only three identified industry competencies (losing 6.25% from his final score at the outset). Mr Prior was tested against only one identified industry competency (losing 18.75% from his final score at the outset).
>
> 64 The second complication was that not every question or assessment criterion under each industry competency was classified as "critical". Although most questions and criteria were regarded as critical, a number were classified as "non-critical". An assessment of NYC for a non-critical component would not prevent the worker from being assessed as "competent" ("C") overall for that unit of competency. Nevertheless, in order to score at all for an industry competency, it was necessary to be scored C on every "critical" element of an industry competency.

21. There was much discussion in the *Nojin & Prior* case about the propriety of testing industry competencies which were set at the AQTF Certificate II level. That setting was adopted after the first trials of BSWAT using a lower competency level produced results that were regarded as being too high. The change to a Certificate II level resulted in a dramatic reduction in the test results and consequentially in the remuneration of the tested employees. The information about this can be found at [84] of Justice Buchanan's judgment in the Full Court.

22. The startling incongruity of setting the competency testing at Certificate II level is that it is above the competency level required of the Grade 1 employee under the Award, whose award wage is used as the base to which the test results are applied in calculating the wage of the disabled workers. Indeed, Richard Giles (who played a central role in the development of BSWAT) conceded in his evidence that if the non-disabled Grade 1 worker under the Award were to be paid on the basis of a BSWAT assessment, that worker's wage would be reduced below the minimum level

prescribed by the Award. His evidence is recorded at [105] of Justice Buchanan's judgment.

> "DR HANSCOMBE: *So it is the case that non-disabled workers in open employment have on average 2.8 industry competencies, is it not*?
>
> MR GILES: *Yes.*
>
> DR HANSCOMBE: *That means, does it not, that if you required the non-disabled worker to do the BSWAT, that their wage would be reduced*.
>
> MR GILES: *Yes*.
>
> …
>
> DR HANSCOMBE: *If the non-disabled worker performed three competencies, and had as a matter of fact about their training, three competencies, and they were assessed on the BSWAT, their wage would fall, would it not because they wouldn't be assessed against four industry competencies?*
>
> MR GILES: *Yes.*
>
> DR HANSCOMBE: *And if that person were the average worker, and in fact only had 2.8, so they only passed two, their wage would be again reduced, wouldn't it?*
>
> MR GILES: *If that was the way it happened, yes.*
>
> DR HANSCOMBE: *Well, that's how the BSWAT works, isn't it?*
>
> MR GILES: *Yes*."

23. Although the *Nojin & Prior* case was conducted by reference to the circumstances of those two men, a reading of the judgments makes clear that the findings of the Court apply to the application of BSWAT to all ADE employees with intellectual disabilities. See for example the following passages from Buchanan J's judgment at [110] and [111]:

> "110 In the extracts set out above, apart from criticising the artificiality of an assessment of competencies in relation to process-based work, both Mr Cain and Mr Tuckerman [expert witnesses for the applicants] referred to the difficulty presented to intellectually disabled workers, who inherently have problems comprehending abstract concepts and expressing themselves, by the need to respond to questions involving abstract concepts in a formal

interview environment. Evidence to a similar effect was given by the fourth expert, Ms Louise Boin, a neuropsychologist. Ms Boin went through the questions administered by BSWAT and explained the difficulties which would arise and the source of those difficulties.

111 The trial judge accepted Ms Boin's evidence, saying (at [79]):

> 79 It is clear that persons with intellectual disabilities are more likely to have difficulty demonstrating understanding of competencies, for the purposes of the BSWAT, than persons without intellectual disabilities. The expert evidence of Louise Boin, a clinical neuropsychologist, to this effect was unchallenged."

24. According to the evidence in the case, ADE employees with an intellectual disability represent over 70% of employees in ADEs, and a much higher percentage in particular enterprises. Thus, for example, Mr Prior's employer, Stawell Intertwine Services Inc had 95% of its employees with an intellectual disability (see evidence at [116] of Justice Buchanan's judgment).

25. Interestingly, in a speech delivered by Graeme Innes, Disability Discrimination Commissioner, to the NDS conference on 9 October 2013, he said about the *Nojin v Prior* decision:

> "I was not surprised by this decision. A decade ago, when BSWAT was being developed, staff at the Commission advised the Commonwealth and the ADEs that it probably breached the DDA."

Grounds of objection

26. The grant of the exemption is inconsistent with the objects of the DDA as set out in section 3 of the Act.

27. The Commonwealth makes no attempt to justify the Application by reference to the objects.

28. Clearly, to relieve the Commonwealth and ADEs from compliance with the Act in relation to a matter that has been held to be discriminatory by the Federal Court,

upheld by the High Court, with an impact on a most vulnerable section of the community, is grossly inconsistent with the objects.

29. And this is especially so where the exemption is proposed not to assist some other group of workers who are collaterally harmed by the decision of the Courts. Indeed no reason for seeking the exemption is proposed other than vague references to the need to consult for three years. In the absence of any other concrete reason being given, it is fair to infer that it is sought in order to relieve the Commonwealth and or the ADEs of the cost of meeting the lawful wage entitlements of the ADE workers.

30. The exemption would have the effect of leaving those workers to languish on pay rates that have been fixed under a discriminatory tool. The Commission is being asked to have them carry the burden of the discrimination rather than the perpetrators, when the latter are far better able to bear that burden.

31. The reasons, such as they are, that are advanced in support of the exemption do not come close to matching the burden of the continuation of the discrimination. And the assessment of the application should also take account of the fact that the Commonwealth was forewarned of the illegality of BSWAT at the outset, as disclosed by Commissioner Innes.

32. Thus, it appears that the exemption is being sought to gain a financial advantage, not for any reasons related to the objects of the DDA and this weighs strongly against the grant.

33. So far as the researches of AED have been able to establish, such a purpose is unprecedented and inconsistent with all other reported cases.

34. Further, the discontinuance of BSWAT has been called for by the United Nations Committee on the Rights of Persons with Disabilities in its Report in September 2013 (copy attached). At item 49 the Committee states:

> The Committee is concerned that employees with disabilities in Australian Disability Enterprises are still being paid wages based on the BSWAT.

The Committee goes on at item 50 to recommend the immediate discontinuance of use of BSWAT.

35. The Commission should approach the submissions in support with some caution, The Commonwealth has published documents in the sector encouraging

submissions in support (copies attached) and declining to provide recipients with any information about AED or any other groups which are opposing the Application. AED has asked the Commonwealth to include such information in its publications but it has declined, thereby denying the sector, and the Commission when assessing the application, a balanced picture of attitudes to the Application.

36. Further, the Commonwealth has offered to provide substantial funds, in the order of 4 million dollars, to the ADEs to "*access expert advice, including developing strategies to help them navigate a changing industrial landscape following the outcome of the recent decisions by the courts relating to the Business Services Wages Assessment Tool*",[1] but again, has not afforded the same facility to the disabled workers (or their representatives) who would be directly affected by the proposed exemption to obtain independent advice on the application.

37. Despite many months having elapsed between the Full Federal Court handing down its decision, and nearly half a year since the affirmation of that decision by the High Court, the Commonwealth has countenanced the continuation of the use of BSWAT. In particular it has instructed the agency which carries out the accreditation of ADEs for compliance with the Disability Services Standards mandated by the Disability Services Act, that continued use of BSWAT is not to be regarded as non-compliance.

38. By the conduct set out above, the Commonwealth has shown that it has no intention, unless compelled to do so, of implementing a non-discriminatory productivity based wage assessment tool for use in ADEs. The disabled workers who rely on those enterprises for employment are thus entirely dependent on the Commission applying its own guidelines and refusing the exemption sought to achieve a fair and lawful wage outcome.

The Guideline Criteria

Necessity

39. There is no material whatever to show that the exemption is necessary. All that is said is that time is sought for consultation. In the absence of material, the Commission should assess the application on the basis that necessity has not been demonstrated.

[1] Department of Families, Housing, Community Services and Indigenous Affairs, *disability e-news*, 13 June 2013.

Objects of the DDA

40. AED relies on the matters set out above in support of the proposition that the application not only does not further the objects of the DDA, but it is antithetical to them.

Reason exemption is sought

41. As above, the only reason advanced with any force is that the Commonwealth seeks time to consult. However, there is no need for consultation. The way to redress the discriminatory effect of the use of BSWAT is clear; use the SWS or a similar productivity test to assess wages for employees in ADEs. The Commonwealth has given no reason at all that this cannot be done, and done now. This is all the more so now that it is revealed that the Commonwealth was advised by the Commission a decade ago that BSWAT was probably discriminatory. It apparently ignored that advice then; it should not gain a benefit by that wilful action.

42. The suggestion at page 3 of the Application that moving to a productivity-based assessment model would take time to develop and implement, is unexplained. The SWS exists and is one of the available assessment tools approved by the Award. Further, there is no explanation why, as an interim measure in keeping with the thrust of the Court's ruling, the wages of workers previously assessed under BSWAT cannot be recalculated using the results of the productivity testing carried out in the BSWAT assessment. Therefore this basis for exemption cannot be given any weight by the Commission.

43. The further suggestion that the change of assessment tool may result in ADE closure is also unexplained and unsupported by any evidence. This basis for exemption must therefore also be rejected by the Commission.

44. In any event, there is no indication from the Commonwealth that the purpose of the consultations is to bring itself and the ADEs into compliance with the decision of the Full Court. Compare, for example, the Commission's decision to grant a temporary exemption to Brisbane Transport on 16 April 2013 (Gazette Notice – C2013G00636).

45. An application for the grant of an extended exemption to allow for the development of new mechanisms to achieve the same discriminatory ends (as seems to be the case here) is completely inimical to the objects of the DDA and inconsistent with purpose of the exemption power.

46. Its invocation of the document referred to as the Vision is of little help; not only is this document the product of the previous government, with little indication that the present government intends to be bound by it, but more importantly, it contains no specifics in respect of wages. If wages need to be adjusted for some reason after the implementation of the NDIS, though it is not clear why they might need to be, then that can occur then. That is no reason meanwhile to keep employees out of proper wages now.

Submissions by interested parties

47. At the time of these submissions, AED is unaware of any other party having made submissions in support of the application. However, as above, should any submissions be made by any party, and in particular the Commonwealth, with any substance affecting the interests of AED's clients, AED will seek an opportunity to respond.

Relevant provisions of the Disability Discrimination Act

48. AED submits that all relevant provisions of the DDA were canvassed in the Full Court judgment, and relies upon that judgment. In particular it relies upon the Full Court's rejection of the attempt by the Commonwealth to raise a defence under s 45 of the DDA.

CONCLUSION

49. AED has examined over fifty exemption applications made to the Commission, some of them successful, some not. Those which the Commission has granted have the following characteristics in common:

    (a) they set out why the applicant is presently unable to comply with the DDA;

    (b) they set out a program to be implemented within the term of the exemption sought; and then most importantly

    (c) they show how that program is expected to result in **compliance** with the DDA by the end of that term.

    The present application is in stark contrast to these characteristics:

    (a) it does **not** state that the Commonwealth or the ADEs are not presently able to comply;

(b) it does **not** set out any sort of program to be implemented beyond consultation, nor for that matter does it even explain what has been done in the six months since the High Court affirmed the Full Court's decision;

(c) and most importantly, it does **not** say that at the end of the exemption term sought, and presumably at the end of the consultation, that whatever wage fixing tool it seeks to construct will comply with the DDA as interpreted by the highest court in the country.

In truth, the proposed exemption could achieve nothing but more delay.

48. AED submits that applying the criteria set out in the Guidelines results in the clear conclusion that the exemption application should be refused. There is nothing of any substance advanced in its support, and there is a strong balance in favour of (finally) allowing the employees working in ADEs to have the benefit of the Act.

DATED 29 October 2013

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