

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

Introduction

The Business Services Wage Assessment Tool (BSWAT) was developed in 2003 and is administered by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). The tool's purpose is to determine the level of wages paid to people with disability employed in FaHCSIA-funded Australian Disability Enterprises (ADEs). The primary focus of FaHCSIA funding to ADEs is to give employment support to individuals with disability who may not be able to take part in work in the open labour market. ADEs are mostly not-for-profit organisations with a twin focus of supporting people with disability in work, and operating a viable business. 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.

Exemption being sought

- We seek an exemption to address the implications of the Federal Court judgment: *Nojin & Prior v Commonwealth [2012] FCAFC 192*.
- We seek an exemption for all existing ADEs from sections 15 and 24 of the DDA, and the Commonwealth (and officers of the Commonwealth) from section 29 for a period of three years.
- This exemption would apply to use of the BSWAT to:
 - (a) assess wages for employees; and
 - (b) pay wages to ADE employees based on assessments conducted under the BSWAT.
- The proposed exemption would apply while alternative wage setting arrangements are being considered, devised and/or established and implemented by FaHCSIA.

Current Situation

- In May 2013 the Full Federal Court declared that two ADEs unlawfully discriminated against two former employees with intellectual disability, Mr Nojin and Mr Prior, in contravention of section 15 of the *Disability Discrimination Act 1992* (DDA). This discrimination occurred by imposing a requirement or condition that in order to secure higher wages they had to undergo a wage assessment using the BSWAT.
- The majority judges said that the test of competency in BSWAT disadvantaged people with intellectual disability and that, by virtue of their intellectual disability, Mr Nojin and Mr Prior were not able to comply with the competency component of BSWAT in their particular circumstances.

- The use of BSWAT was found to constitute unlawful discrimination in the *particular circumstances* relating to Mr Nojin and Mr Prior. FaHCSIA considers that it may still be lawful to use the BSWAT (including paying wages assessed under BSWAT) in certain circumstances.¹
- However, having regard to the judgment, the use of the BSWAT may potentially be unlawful under the DDA in some circumstances.
- In addition to this, there is an emerging need to ensure that ADEs are able to meet legislated quality assurance requirements, particularly Standard 9, *Employment Conditions*. Failure to meet these requirements jeopardises the ability of organisations to continue to receive government funding to deliver supported employment.
- Around 20,000 people with disability are employed in ADEs across Australia, with roughly half of these individuals receiving wages assessed using the BSWAT.
- FaHCSIA has sought expert advice about the judgment to help understand the decision and has implemented a series of actions to work through the implications. These include:
 - The establishment of a specific taskforce to work through the implications of the judgment and take any appropriate action;
 - The establishment of an Inter-Departmental Committee to consider the ramifications across Government;
 - Completion of the first stage of an extensive consultation with people with disability, parent/carers, peak bodies, and Australian Disability Enterprises about potential ways forward, which may include a new approach to wage assessment;
 - Support for people with disability, their families and carers through the establishment of a phone line to provide reassurance to callers about their ADE employment arrangements; and

¹ For instance, it may be lawful to use the BSWAT (including pay wages assessed under BSWAT) in the particular circumstances of a case because:

- the assessment under BSWAT may result in a more favourable outcome to the employee than they would have received under any other available tools
- the assessment under BSWAT may reasonably measure the actual capacity of the employee in question to undertake or perform the requirements of their job
- there may be circumstances relating to the operational needs/demands of an ADE which justify the use of BSWAT despite any failure of the tool to accurately measure or assess the actual capacity of the employee to undertake or perform the requirements of their job
- an ADE may be required to use the BSWAT by an enterprise agreement or another industrial instrument (see s 47 of the DDA).

- Reconvening of the *Sustainable Supported Employment* Vision Advisory Group (including representatives of people with disability, academics, service providers, peak bodies and social enterprise experts) to provide advice on areas of priority as we work through this issue.
- It is proposed that FaHCSIA will again publicly consult before the end of 2013 with people with disability, their families and carers, peak bodies, providers and other stakeholders to test alternatives for wage determination for this workforce.
- A range of forums and discussions have also been facilitated on this issue, including by the industry peak, National Disability Services. It is understood that the Australian Human Rights Disability Services Commissioner has been involved in some of these conversations.

Basis for exemption

- As described above there are still a number of unresolved issues in relation to the case and FaHCSIA are actively seeking to clarify these. There is a real risk that ADEs who continue to use BSWAT will be assessed as having not met legislated quality assurance requirements, particularly Standard 9, *Employment Conditions*. The *Disability Services Act* (1986) (Cth) requires funded organisations to hold a current certificate of compliance (against the current disability standards), to receive funding for supported employment. Having a major non conformity against any of the standards including Standard 9 may result in certification being revoked and funding being withdrawn.
- Moving towards any alternative wage setting model, such as that used by the Supported Wage System, would take time to develop and implement. It would be difficult to move immediately to alternative wage setting arrangements, as this may result in:
 - 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;
 - An inability for existing systems (for example, the Supported Wage System) to meet immediate demand for assessments.
- Consultations about the issue were undertaken in July and August 2013 with around 600 people with disability, their families and carers, stakeholders and providers. Points raised by this audience include:
 - Agreement with the goals articulated in Inclusive Employment (the Australian Government vision for supported employment);
 - Mixed views on the best way forward for a future wage tool;
 - The economic environment had impacted negatively on the hours of work on offer; and
 - Concern about the viability of their workplaces.

- FaHCSIA is acutely aware that the exemption may result in some ADE employees not receiving wages as high as they might if an alternative wage-setting tool were to be used. For this reason, it is proposed that three years be the maximum amount of time for the exemption to apply.
- An exemption for a 3 year period is needed to allow further consultation, investigation and determination of potential ways forward which may include a new wage setting approach, and to allow all parties to transition to, and implement, actions identified.
- Steps to move towards a new wage setting approach within the three year timeframe are proposed as follows:
 - Further consultations later in the year with people with disability, their families and carers, providers, representatives, peaks and stakeholders to test options;
 - Fast tracking of *Inclusive Employment 2012-2022: A vision for supported employment (the Vision)*. *The Vision* aligns with the DDA, in particular, ensuring people with disability employed at ADEs enjoy the same working conditions as other mainstream workplaces. This process will include consideration of assistance for ADEs to develop more financially sustainable business lines in order to pay the significantly higher wages expected from a new wage determining method;
 - Assessment of the impact of choice on supported employment in DisabilityCare Australia launch sites;
 - Support and training for people with disability, their families and carers, and service providers in any new requirements for wage assessment through appropriate industrial channels; and
 - Implementation of a new DDA compliant wage assessment approach in ADEs across Australia within 36 months.
- As part of this application FaHCSIA is prepared to consider any proposed terms or conditions which further the objects of the DDA. FaHCSIA suggests providing 6 monthly updates to the Australian Human Rights Commission on progress.
- While it is too early to develop an Action Plan in accordance with Part 3 of the DDA, however there is already a clear public statement in the Vision (**Attachment A**) which will be used as a basis for developing an Action Plan to ensure compliance with the DDA.



Australian Government

Inclusive Employment 2012-2022

A vision for supported employment

By 2022, Australia will have a supported employment framework that provides economic and social participation benefits for people with disability, and for Australia.

People with disability will have access to a supported employment framework that fully supports and enables their participation and inclusion in Australian society by providing services to obtain and retain quality employment.

The supported employment system will align with other national frameworks that exist to provide support to people with disability, such as the National Disability Agreement, the National Disability Strategy, and the National Disability Insurance Scheme.

Minister's foreword

The stories and experiences of Australians with disability, their families, carers and the people who work with them have been a driving force for my work as Minister. Because of the voices of people like you, this government has, step by step, worked to reform the system of disability care and support – from the ground up.

We have delivered historic increases to the Disability Support Pension and Carer Payment, and introduced new and up to date impairment tables for assessment. We have worked with our colleagues in the states and territories to negotiate a new National Disability Agreement, which sees a doubling of funding from the Australian Government for disability care and support, and the National Disability Strategy, a ten year plan to realise the rights of people with disability. And we have started work to build a National Disability Insurance Scheme.

Each of these changes refocus the system of disability care and support to ensure that it's people with disability, their families and carers who come first. The ten year Vision outlined in this document is a critical first step in moving Australian Government funded Australian Disability Enterprises towards this person-centred future.

Inclusive Employment 2012-2022: a vision for supported employment articulates a significant change in the way the Australian Government supports people with disability in employment. *Inclusive Employment* will ensure people with disability control the assistance they get to support them in employment, and have real options and choices about their future working lives.

Intensive consultations and the report of an independent Advisory Group have informed our Vision. People with disability, their families, Australian Disability Enterprises, advocates, academics, and the broader community have all contributed. I wish to acknowledge the efforts of all stakeholders and thank you for contributing to an important debate about how to make sure people with disability get the support they need in employment.

In defining this Vision, we have looked long and hard at where we have come from. We have reflected our strong commitment to the United Nations Convention on the Rights of Persons with Disability, and the National Disability Strategy. These factors, along with our work toward a National Disability Insurance Scheme, mean we have had to come to terms with some of the challenging issues that lie at the heart of the current system of supported employment.

We believe that a fundamental priority is supporting individuals to reach their full potential in both economic and community life. At this point in time, the Australian Government invests more than \$220 million in Australian Disability Enterprises to deliver supported employment for people with disability. These organisations have a long and proud history and will continue to have a place in the Australian disability service system.

Inclusive Employment – our Vision - is about making sure that people with disability always get the best outcomes, and are supported to make good choices. People with disability will be at the centre of a National Disability Insurance Scheme. People with disability will also be at the centre of *Inclusive Employment*.

The Honourable Jenny Macklin MP
Minister for Families, Community Services and Indigenous Affairs
Minister for Disability Reform

Parliamentary Secretary's foreword

Over the past 18 months, many of you have been involved in the process of developing this new Vision for supported employment. I thank you all for your attendance at consultation sessions, your written feedback to the process, and your letters. In particular, I would like to thank the independent Advisory Group, chaired by Professor Lesley Chenoweth, for their hard work and effort in considering the issues raised at consultation, and the strategic advice provided in their report released in February 2012. The passion and commitment of all who are connected with the disability sector has been evident throughout the process, and I invite you all to work with the Australian Government in delivering the new Vision for Supported Employment over the next decade.

Since commencement of consultations I have had many conversations with people with disability, their families and carers, including workers at Australian Disability Enterprises. I have also had many conversations with managers at Australian Disability Enterprises, representative bodies, advocates and other stakeholders.

I have listened to the various points of view and it is clear all stakeholders express they want the best for people with disability. What this means, in my view, is that people with disability, as experts in their own lives, should have more control and get the assistance they want. Employment is about economic and social participation and people want good working conditions, including decent wages, hours that suit their lifestyles, and the ability to make social connections. I believe, from my conversations, that people with disability share their aspirations to work, but need some support to achieve this.

And so, the starting point for this vision is the right to work. As articulated in the United Nations Convention, people with disability have "the right to the opportunity to gain a living by work freely chosen in the labour market" (Article 27). For many people with disability they will choose to seek that employment in the open labour market, however I believe there is a continued role for Australian Disability Enterprises to provide supported employment to people with disability who choose to work in these enterprises. And there is no doubt that many people are happy with the current services provided by Australian Disability Enterprises.

However, we have a wonderful challenge and a wonderful opportunity ahead of us as we move together towards National Disability Insurance Scheme. The development of a National Disability Insurance Scheme challenges us all to ask the question: how can we provide genuine choice and control to people with disability about how they are supported in their employment?

Australian Disability Enterprises provide employment for more than 20,000 people with disability. For some people with disability, they take this option because there is no other. This will not be the case in a National Disability Insurance Scheme world. By 2022, a fully-fledged National Disability Insurance Scheme will have been up and running for some years, and its model of individualised, self directed funding will be a reality. In adapting to this new reality, we need our Australian Disability Enterprises to be employers of choice.

I see the job of government and employers as making sure the supports are there to assist in making this happen. We all must unhook ourselves from our ideas of what we think is best for individuals, their families and carers. We must allow people with disability to make decisions about their employment future for themselves, to remake our role as facilitators and to unblock those 'disabling barriers' to full participation. Our job is to create the environment, the pathways and the supports that will assist people with disability achieve their employment goals in the role of their choosing. I look forward to the brave new world of an NDIS. One of the many measures of its success will be our ability to facilitate good careers for people with disability.

Senator the Honourable Jan McLucas
Parliamentary Secretary to the Prime Minister
Parliamentary Secretary for Disability and Carers

Introduction – why change is needed

The disability agenda in Australia has changed significantly in the past five years. The Australian Government has committed to the United Nations' Convention on the Rights of Persons with Disability. The Council of Australian Governments supports the development and monitoring of a National Disability Strategy to give practical effect to the Convention. In 2011, Council of Australian Governments also made a commitment to a National Disability Insurance Scheme and in 2012, the Australian Government announced the first stage of a National Disability Insurance Scheme will start in mid-2013. Internationally, we have seen the reform of disability employment systems in countries including the United Kingdom and New Zealand.

These commitments and developments provide very clear guidance about the way disability services should be delivered in the modern world, as well as affirming the rights of people with disability as citizens and as active, participating members of society.

Key themes influencing current disability policy thinking in Australia as a result include:

- choice should be a key feature in funding and service delivery: that is, people with disability should have control of their own lives and the services that support them
- specialist supports should deliver mainstream inclusion wherever possible.

While many people with disability, their families and carers, express satisfaction with the current supported employment system, this does not mean change is not desirable. While investment in supported employment has increased over time, wage outcomes have risen slowly, and hours of work for supported employees have actually decreased. In addition, people with disability are not always getting the right support at the right time. Some older workers, for example, are 'stuck' because of a lack of alternate supports outside their existing enterprise employment. Some people with disability have expressed boredom with their job, a desire to try something new, and to move into the open employment market.

In 2022, Australian Disability Enterprises will look different to what they do today. Organisations will have adapted to a new environment, where people with disability choose where they work, who provides their employment support, and how. ADEs will have changed the way they operate, and the supports they offer, to attract people with disability as purchasers of employment support from their organisation.

This document outlines a new Vision for *Inclusive Employment*. It recognises that the time has come, in line with other Australian Government commitments, to put people with disability front and centre of program delivery.

How we got here

In 2009, the Australian Government released a National Mental Health and Disability Employment Strategy. The development of an Australian Government Vision for supported employment was a key commitment as part of the Strategy.

In 2010, a discussion paper was launched, and an independent Advisory Group was appointed to provide strategic advice to the Australian Government on the development of a Vision. A consultation process was conducted with 39 worker meetings, nine family/carer meetings and 30 individual interviews. 270 workers were consulted face to face, along with nearly 90 family members/carers. Over 600 written submissions were received, with 80 per cent from people with disability.

Feedback canvassed a wide range of issues and concerns, including access, transitions into and out of work, wages paid, the type of work available, training and development opportunities, business viability, and other factors influencing participation in employment, including transport and income support.

The Advisory Group commenced their deliberations in December 2010 and a number of significant policy developments occurred during the period of their deliberations.

In February 2011, all Australian governments agreed the National Disability Strategy (NDS) through the Council of Australian Governments (COAG). The NDS aims to give practical effect to the United Nations Convention on the Rights of Persons with a Disability and includes a commitment to economic security, including employment for people with disability.

Six months later, the Australian Government released the Productivity Commission's report into Disability Care and Support in August 2011. The Commission's final report recommended that Australian Disability Enterprises be included within a National Disability Insurance Scheme. Therefore, the potential implications of a National Disability Insurance Scheme required significant consideration, resulting in an extension of the timeframe for delivery of the Vision.

The Advisory Group finalised its report to the Australian Government which was released in February 2012. In considering the report, the Australian Government has given particular consideration to the intersection between its recommendations for supported employment and the design of a National Disability Insurance Scheme.

Inclusive employment 2012-2022: a vision for supported employment

What is the Australian Government vision for supported employment?

By 2022, Australia will have a supported employment system that provides economic and social participation benefits for people with disability, and for Australia.

People with disability will have access to a supported employment system that fully supports and enables their participation and inclusion in Australian society by providing services to obtain and retain quality employment.

The supported employment system will align with other national frameworks that exist to provide support to people with disability, such as the National Disability Agreement, the National Disability Strategy, and the National Disability Insurance Scheme.

By 2022 the Australian Government will:

- have launched a **National Disability Insurance Scheme** which will drive change in supported employment
- **focus on individuals** with disability to ensure that they get the supports needed
- **direct funding to individuals**, allowing them to select employment supports for themselves
- **allow people with disability to make choices about where they want to work, about who supports them in employment, and how.** Choices may include, working:
 - in a job of their own choosing in the public or private sector
 - in an Australian Disability Enterprise
 - in a social enterprise or similar environment
 - in their own micro-business, or
 - in a family run business.
- implement a new definition of supported employment as recommended by the independent Advisory Group: 'ongoing support, funded by government, that people with disability need in order to access and retain employment. This support is related to the nature of their disability'.
- remove the barriers between the terms 'open' and 'supported' employment for people with disability who need ongoing support to find and maintain work.

By 2022 the Australian Government expects:

- people with disability in supported employment will have **higher wage outcomes and higher average hours of work**
- there will be **increased community awareness and inclusion** of people with disability

- there will be **higher levels of employment of people with disability** in both the public and the private sector, and
- **there will still be specialised organisations that have their origins in Australian Disability Enterprises**, but they will have adapted to be more responsive to the demands of their employees with disability.

Areas of focus for the Australian Government in shaping the future of supported employment

The Australian Government has identified four key areas for transformation to achieve the Vision.

1. **Employment supports** for people with disability
2. **Employment outcomes** for workers with disability
3. **Removal of barriers** for people with disability
4. **Sustainable systems** to support people with disability

1. Employment supports for people with disability

Now

In 2012, Australian Government funding for supported employment is currently:

- fixed to a location – i.e, a physical Australian Disability Enterprise– which means equitable access across the country is currently not possible
- not tied to improving wage outcomes
- not tied to increasing hours of work
- inflexible at transition points, particularly at entry and exit points, and
- often not flexible enough to allow people with disability to choose what job they do.

The future

In 2022, employment supports will be:

- linked to the needs of eligible people with disability
- delivered through a range of organisations, businesses and environments
- chosen by the person with disability, and delivered in the environment of their choosing
- flexible and responsive over the life course of the individual
- outcomes focused – that is, aimed at maximising wage outcomes and hours of work
- assisting the accruing of superannuation for future retirement, and
- aimed at building a career path and assisting the person with disability to achieve their full potential.

How will we know we have achieved these goals?

By 2022 there will be:

- employment supports that meet the needs of people with disability
- a diversity of employment placements for people with disability
- expressed satisfaction of the person with disability with their employment supports in terms of flexibility, quality and career path
- increased average hours of work for program participants
- increased average wage outcomes for program participants.

2. Employment outcomes for workers with disability

Now

In 2012 the employment outcomes being delivered are:

- an average hourly wage rate for workers with disability in supported employment of \$3.65
- average working hours for people with disability in supported employment of 24 hours a week
- 300 people per year moving from supported employment for the open labour market
- working conditions range from very good to less than desirable
- few supported employees with Australian Qualifications Framework (AFQ) qualifications, and
- largely, places of employment where all workers are people with disability.

The future

In 2022 the employment outcomes that will be delivered include:

- average hourly wage rate for workers with disability will have increased
- average hours of work per week for people with disability in supported employment will be comparable to those without disability
- successful pathways between 'supported' and 'open employment'
- all workplaces employing people with disability will consistently be safe and comply with Occupational Health and Safety regulations
- the numbers of people with disability accessing supported employment holding AFQ qualifications will be comparable to the working age population without disability, and
- workers employed in environments of their own choosing.

How will we know we have achieved these goals?

By 2022:

- workers with disability will all receive a comparable hourly rate that increases over time in line with that of the general working population
- the average hours of work for people with disability receiving employment supports will be the same as the wider workforce (currently 33 hours per week)
- people with disability will be employed in a wide range of environments and industries across the labour market
- workplaces employing people with disability will comply with relevant OHS legislation
- the number of working age people with disability holding a AFQ qualification or higher will be the same as the general working age population.

3. Removal of barriers for people with disability

Now

In 2012 the barriers that exist for people with disability trying to access supported employment include:

- the way wages, income support payments and other supports (for example, public housing rent prices) work together means that some people with disability choose to not work, or decrease their working hours to minimise the risk of losing income support payments and other benefits
- the choices made by people with disability, families and carers are often based on concerns of risk and funding loss, meaning some people with disability do not have the opportunity to reach their full potential
- community expectations of employment for people with disability generally are low
- uneven transitions which frequently require the foregoing of one service type to access another, and
- geographical access: a person with disability must live near an Australian Disability Enterprise to access supported employment.

The future

In 2022 barriers will be removed to ensure that:

- income support, social supports and employment will work together to promote economic participation
- people with disability will prepare for, and expect, a working life like other Australians
- people with disability, their families and carers, will not see employment as a 'risky' choice
- people with disability will manage their own funding and will be able to organise their own transitions at a time when they are ready, and
- a person with disability assessed as eligible for supported employment will be able to identify their own employment opportunities within their local community, including in regional and rural locations.

How will we know we have achieved these goals?

By 2022:

- the numbers of people with disability participating in the labour force will have increased significantly
- education systems and community expectations will result in the increase of the proportion of people with disability in employment after school, and a decrease in the proportion of people with disability referred to non-employment options
- there will be increased expenditure on employment supports by people with disability, and the type of support that is procured
- there will be an increased variety of occupations and working environments people with disability engage with as a result of their employment supports.

4. Sustainable systems to support people with disability

Now

In 2012 the systems that operate in delivering supported employment require:

- organisations that deliver supported employment to have a funding agreement with the department, and to demonstrate compliance
- a determination of the price of support by the Australian Government
- no minimum qualification for disability support workers in Australian Disability Enterprises, and
- a determination of the quality of services by the Australian Government through an independent quality assurance system.

The future

In 2022 the systems that operate in delivering supported employment will:

- allocate funding to individuals. There will be a limited relationship between the Government and organisations providing employment support
- see the price for employment support determined between the person with disability and the supplier
- likely require a minimum qualification for support staff employed by people with disability
- still retain quality assurance, but the main assessor of quality will be the person with disability buying the service, and
- see that all levels of Government will have procurement policies in place to encourage buying quality goods and services from organisations and businesses employing people with disability.

How will we know we have achieved these goals?

By 2022:

- we will be collecting information on the expenditure on employment supports by people with disability, and the type of support that is procured
- we will be tracking expenditure on employment supports, including costs for comparable types of support
- disability organisations will be geared towards the provision of flexible services and self directed supports for people with disability
- we will see an increase in the number of disability support staff with qualifications
- we will hear expressed satisfaction of the person with disability with their employment supports in terms of flexibility, quality and career path
- we will see increased procurement from organisations employing people with disability at all levels of government.

Let's start

We know we have a lot to do to make these changes happen. We also know that if we do not start moving to make these changes, an National Disability Insurance Scheme is likely to force them over time.

We believe the best strategy is preparing to meet change through transition.

What will happen to achieve this future?

We will work closely with people with disability, their families and carers, their representative organisations, advocates and service providers.

We will work closely with all levels of government.

We will closely align supported employment with the structural and cultural changes as the foundations are laid for a National Disability Insurance Scheme.

We will test how supported employment might be better delivered through a wide range of environments, locations, and with people with different types of disability.

We will test how funding for supported employment might be directed by people with disability.

We will test how to best empower people with disability, their families and carers, to make informed choices about their employment future, and how those choices fit within the rest of their lives, and at different points in their life course.

We will evaluate how new ways of delivering supported employment might help people with disability achieve a career path, and achieve better employment outcomes.

We will provide ongoing information, education and advice to organisations, people with disability, their parents and carers.

We will create transition supports and strategies for organisations, people with disability, their families and carers.

We will use research to drive innovation and best practice and to implement a structure that supports this vision for the future.