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**Re – Application by the Department of Social Services
(formerly FaHCSIA)
For an exemption under the Disability Discrimination Act 1992**

Introduction

Latrobe Valley Enterprises lodges this submission in support of the application from the Department of Social Services (formerly the Department of Families, Housing, Community Services and Indigenous Affairs – FaHCSIA). The exemption is sought in relation to the use of the Business Services Wage Assessment Tool (BSWAT) that is used by Australian Disability Enterprises (ADEs). The BSWAT has been utilized since 2004 by at least 50% of ADE's to determine pro rata wages for their employees with a disability, known as supported employees. Many other ADE's use wage assessment tools similar to the BSWAT.

The application is made pursuant to section 44 of the Disability Discrimination Act 1992. The applicant seeks to exempt all Australian Disability Enterprises from sections 15 and 24 of the Disability Discrimination Act and the Commonwealth from section 29 of the Disability Discrimination Act. If the exemption was granted it would allow ADEs to continue to use the BSWAT to assess and pay pro rata wages for supported employees during the three year exemption period being sought by the applicant.

Background to the exemption application

Legal proceedings against the BSWAT.

The long running case hinged on whether the BSWAT unfairly disadvantaged two supported employees under the Disability Discrimination Act 1992. The majority decision of the Federal Court held that the BSWAT did discriminate unreasonably. Given that the BSWAT is owned by the Australian Government: and named in the Supported Employment Services Award, ADE's were confident in choosing the BSWAT as their wage assessment tool.

A requirement to suddenly change wage assessment tools that are used by a significant proportion of ADEs could seriously affect wage costs and organisational viability. This could seriously jeopardise the future employment prospects of thousands of supported employees.

Why the exemption should be granted – ensuring movement to a satisfactory outcome.

Should the court case lead to the disqualification of the use of the BSWAT in ADEs, there is a serious risk that an estimated 10,500 supported employees with quite significant disabilities would lose their jobs. It would be impossible for the ADEs to continue to provide employment if the costs of wages for supported employees blow out to be far greater than the income generated by their ADE.

This would result in a totally unsatisfactory outcome for many of the supported employees currently working in ADEs, who would have no other options but to access non – vocational day programs.

It should be noted that Australian Disability Enterprises are quite unique in the commercial business sector. Their purpose is to help employees with significant disabilities experience the dignity of going to work and doing a real job. ADE's create employment opportunities and support people, who have significant disabilities that prevent them from obtaining and maintaining jobs in mainstream industries. If ADE's operated strictly like mainstream businesses, most of the work would be mechanised to keep labour costs to a minimum in order to maximise profits.

Should the exemption be granted, this would enable the ADE sector and other relevant stakeholders the opportunity to actively pursue a solution during the period of the exemption. Latrobe Valley Enterprises advocates that a reference group be established in order to ensure widespread sector consultation and involvement in any review of wage tools.

A concurrent remedy – Strengthening the DDA

Latrobe Valley Enterprises believes that Section 47 of the Disability Discrimination Act should be amended to clarify its intent to cover authorised wage assessment tools that are named in the Supported Employment Award. This would help ensure that wage setting arrangements are reviewed and decided in the industrial arena and not in settings such as the Australian Human Rights Commission or the Federal Court.

Investigating alternatives to the BSWAT

The Supported Wage System is used to determine pro rata wages of people with a disability working in mainstream employment. The Supported Wage System measures the productivity of employees with a disability who can competently do the same work as other workers in mainstream industries. However, Latrobe Valley Enterprises believes strongly that the Supported Wage System assessment is not a suitable wage assessment mechanism for determining supported employee pro rata wages in a supported employment setting. Many supported employees are very limited in the required skills to complete a whole task from start to finish. Often supported employees can only perform one or two parts of a task. Most employees in ADE's require high level supervision and ongoing support from staff to remain focused on the work they are doing.

Latrobe Valley Enterprises would welcome and support the development of a new wage assessment tool for supported employment that would not be open to the type of criticism that has been directed at the BSWAT.

Conclusion

In regard to wage setting in Australian Disability Enterprises, Latrobe Valley Enterprises supports a sensible solution that is totally fair to supported employees in paying wages that reflect their contribution to the viability of the businesses they work in, but does not jeopardise the viability of their jobs or abruptly cut off their future employment opportunities.

Consequently, Latrobe Valley Enterprises strongly supports the Department of Social Services exemption application, as well as advocating for and supporting a comprehensive process that aims to resolve issues of wage determination for employees with a disability working in Australian Disability Enterprises.