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22 May 2015

Ms Michelle Lindley  
Deputy Director  
Legal  
Australian Human  
Rights Commission

Dear Ms Lindley

I note your correspondence of 19 May 2015.

I note United Voice's and the Health Services Union's correspondence of 30 April 2016 to the Honourable Susan Ryan AO and attachment. United Voice and the Health Services Union ask that this correspondence and the attachment be taken into account in relation to the application for a further 12 months exemption under section 55 of the *Disability Discrimination Act 1992* ('DDA') for the Business Services Wage Assessment Tool ('the BSWAT') made by the Department of Social Services.

United Voice and HSU do not consider that it is appropriate for a further 12 month exemption be made under section 55 of the *Disability Discrimination Act 1992*.

The decision of the Full Federal Court in *Nojin v Commonwealth and Another* [2012] FCAFC 192 ('*Nojin*') was delivered approximately 2 ½ years ago. The correctness of the decision was placed beyond doubt on 15 May 2013 when Justice Crennan dismissed the Commonwealth's application for leave to appeal to the High Court of Australia. Australian Disability Enterprises ('ADEs') that were using BSWAT have been provided with ample time to alter their practices. There are also alternatives. The *Supported Employment Services Award 2010* ('the Award') contains 29 alternative wage assessment tools and at least one, the supported wage system, is likely unimpeachable in terms of *Nojin*. Further, there is \$172.5 million available to assist ADEs transition to a wage assessment tool other than BSWAT and also assist in the development and implementation of a new productivity based wage assessment tool.

Affected parties have also functioned quite adequately for periods without any exemption.

Any '*crisis*' which may be occasioned by the failure to provide the exemption is entirely within the capacity of the Commonwealth to manage or avoid. As noted, there are significant funds available to ensure that ADE's transition to a new wage assessment tool and to supplement an increase in their costs associated with the use of a new wage assessment tool.

On 29 April 2014, the Australian Human Rights Commission ('AHRC') granted a 12 month exemption after an application by the Commonwealth. The Commonwealth initially sought a 3 year exemption which was refused on the basis of '*ongoing discrimination and the existence of an alternative tool that is able to be used immediately*'. The exemption was prospective and clearly targeted to providing a period for the Commonwealth and ADEs to transition to the supported wage system or another approved wage tool '*as quickly as possible*.'

The Commonwealth made its initial application on the basis that it considered the decision in *Nojin* to only concern the particular circumstances of the case and this is the public view expressed by many ADEs who have and will benefit from any exemption. The public position of many ADEs is that *Nojin* has no practical effect and by implication an exemption is not necessary.

The exemption therefore according to the Commonwealth concerns ensuring that intellectually disabled persons generally do not obtain access to justice in similar terms to Mr Michael Nojin and Mr Gordin Price.

Intellectually disabled people working in ADEs are deserving of the equal protection of the law. The AHRC by providing administrative exemptions against a clear judgment of the Full Federal Court is frustrating this fundamental entitlement.

The type of unlawful discrimination that is the subject of the exemption application concerns an industrial instrument that has unlawful discriminatory effect.

There is a current application before the Fair Work Commission to vary the *Supported Employment Services Award 2010* ('the Award') made by United Voice and the Health Services Union (AM2013/30) to, amongst other things, remove the BSWAT from the Award in light of the decision in *Nojin*.

The Applicants are participating in good faith in a conciliation process that is being conducted by Deputy President Booth. The role of the AHRC, to date, is unhelpful in facilitating an outcome in the Fair Work proceedings which protects the human rights of a vulnerable class of workers.

The Fair Work Act contains its own provisions that are clearly intended to deal with the unlawful discriminatory effect of industrial instruments. These powers are complimentary to powers provided to the AHRC. The Parliament intends that the Fair Work Commission deal with the unlawful discriminatory effect of industrial instruments and not the AHRC. This is a further compelling reason for the AHRC not to entertain a further exemption under section 55 of the Act in relation to BSWAT.

Section 153 of the Fair Work Act contains a clear requirement that modern awards should not contain terms that are discriminatory for a variety of reason including '*mental disability*'. This section provides a clear statutory basis for the Fair Work Commission to resolve complaints concerning unlawful discrimination in industrial instruments.

Section 46PW of the *Australian Human Rights Commission Act 1986* requires that the President 'must' refer a complaint in writing alleging that a person has done a discriminatory act under an industrial instrument to the Fair Work Commission. The effect of this section is that the Parliament intended that the Fair Work Commission should deal with the discriminatory effect of industrial instruments and not the AHRC.

Section 161 of the Fair Work Act then provides that the Fair Work Commission must review the modern award if there is a referral under section 46PW.

The proceedings AM2013/30 are occasioning a review of the Award by the Fair Work Commission as the Australian Human Rights Act and the Fair Work Act require.

An administrative exemption under section 55 of the DDA does not affect or lessen the obligation of the Fair Work Commission to remove terms within modern awards that are discriminatory. An exemption does give interested employer parties to the current award variation proceedings a disincentive to resolve the clear concern that the BSWAT and any competency based measure in an approved wage assessment tool is discriminatory in a timely manner. In this sense, the action of AHRC in exercising a general power given to it to grant exemptions is hindering the clear processes that the Parliament has established to deal with unlawful discrimination in industrial instruments.

Lastly, past exemptions made by the AHRC have been on the basis that no further assessments will be made under the BSWAT. Professor Twigg in the decision of 29 April 2014 noted:

*... 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 the assessment is current.*

The application of the Commonwealth is silent of the issue of whether any assessments will take place under BSWAT in the period of the new exemption. The decision of Professor Twigg of 30 April 2015 in relation to the interim exemption continues the *status quo* of the past exemption that only allows the continuation of the payment of wages at rates calculated under BSWAT assessments done prior to 29 April 2014.

The BSWAT requires that a person who has a current assessment must be re-assessed every 3 years (see: clause 14.4(g) of the Award). There are currently persons being paid wages under the BSWAT that have not been reassessed as required by the Award. The exemption of 29 April 2014 clearly aided, abetted and counselled these contraventions by explicitly allowing ADEs to continue to pay wages under the BSWAT but not allowing any re-assessments to take place. Section 45 of the Fair Work Act makes contravention of a term in a modern award a civil penalty provision. An exemption under section 55 of the DDA will not protect persons from the civil penalty regime of the Fair Work Act.

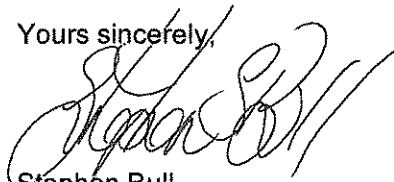
The exemption under consideration will necessarily facilitate further contraventions of the Award.

United Voice is considering civil penalty proceedings concerning contraventions of the Award in relation to non-compliance with the obligation to re-assess persons being paid wages under current BSWAT assessments.

An application for review by way of prerogative writ in the Federal Court of Australia is also being considered in relation to the past and contemplated administrative actions of the AHRC.

This correspondence can be published as a submission.

Yours sincerely,



Stephen Bull  
Industrial Co-ordinator  
**United Voice**

Yours sincerely,



Leigh Svendsen  
Senior Industrial Officer  
**Health Services Union**

CC: The Associate to  
Deputy President Booth  
Fair Work Commission