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30 April 2015

The Hon Susan Ryan AO
Age and Disability Discrimination Commissioner
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Dear Ms Ryan

The correspondence of Finn Pratt, Secretary, Department of Social Services, 21 April 2015, seeking a further 12 months administrative exemption under section 55 of the *Disability Discrimination Act* 1992 is noted.

United Voice and the Health Services Union ask that a further 12 months exemption not be granted.

Both unions have today written to Deputy President Booth, Fair Work Commission, and asked that the issue of the continued use of BSWAT within the *Supported Employment Services Award* 2010 ('the Award') be determined within the proceedings brought by both unions to vary the Award (AM2013/30). A copy of the correspondence sent to DP Booth's chambers today is attached.

In light to the fact that the Fair Work Commission's determination of the matter may render a further 12 months exemption nugatory, both unions ask that you not grant the application made by the Commonwealth in its correspondence, dated 21 April 2015.

If the Commission is minded to make an interim exemption, it should be made referable to the determination of this matter by the Fair Work Commission.

We thank you for your assistance in this matter.

Yours sincerely,

Stephen Bull
Industrial Co-ordinator
United Voice



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30 April 2015

Ms Sophie Baartz
Associate to
Deputy President Booth
Fair Work Commission
Level 8, 80 William Street
EAST SYDNEY 2011

BY EMAIL: Chambers.booth.dp@fwc.gov.au

Dear Ms Baartz

**APPLICATION BY UNITED VOICE AND HEALTH SERVICES UNION TO VARY THE
SUPPORTED EMPLOYMENT SERVICES AWARD 2010 (AM2013/30)**

We note our application which has as its main objective the removal of the Business Services Wage Assessment Tool ('BSWAT') from the *Supported Employment Services Award 2010* ('the Award') as a consequence of the findings of the Full Federal Court in *Nojin v Commonwealth and Another* [2012] FCAFC 192 ('*Nojin*').

The Court noted in *Nojin* (at page 49):

The introduction and overlay of other theoretical considerations should not, in my view, be permitted to distract attention from this fundamental entitlement. The practical consequence of BSWAT appears to be that wages are reduced below the level that would otherwise be applied. The basic defect in the use of BSWAT is that it reduces wages to which intellectually disabled workers would otherwise be entitled by reference to considerations which do not bear upon the work that they actually do. ... that approach is not reasonable.'

On 15 May 2013, the High Court of Australia refused leave to the Commonwealth of Australia in an application for leave to appeal the judgment in *Nojin*. Her Honour Justice Crennan noted on transcript that there was '*no reason to doubt the conclusion of the Full Court.*'

Section 153 of the *Fair Work Act 2006* (the Act') notes:

A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual

orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

In 2003, the Full Bench of the Australian Industrial Relations Commission noted in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Unilver Australia Ltd* 132 IR 34 at 88:

... the Commission must be guided by the hierarchy of judicial precedent. Most particularly, it must apply principles that emerge from the judgments of the Courts that have the function of holding the Commission accountable by judicial review. A High Court or Federal Court construction of the Act is normally authoritatively declarative of the state of the law. Judgments in point about relevant principles must be headed by the Commission, at all levels.

The Commonwealth has sought and obtained an administrative exemption under section 55 of the *Disability Discrimination Act 1992* in relation to the BSWAT. The current exemption expired on 29 April 2015 and an interim and further 12 month administrative exemption is being applied for by the Commonwealth. A further exemption will in effect provide a further administrative stay to the judgment of the Full Federal Court in *Nojin*.

To date, there has been over 11 days of conferences in these proceedings. We do not share the view of the Commonwealth that 'good progress' is being made in the development of a new wage assessment tool. The principal focus has been on the replacement of BSWAT with the Supported Wage System. This matter is still contentious.

In light of the fact that the Commonwealth is seeking a further administrative exemption, the significant time that has elapsed since the Court's judgment in *Nojin* and the Commonwealth and Australian Disability Enterprises' ('ADEs') statements that BSWAT is being phased out, we ask that the issue of the removal of BSWAT from the Award be put to the parties on 6 May 2015.

If there is no consent, then the question of the removal of BSWAT should be listed for arbitration. We do not ask that the substitution of the Supported Wage System for BSWAT also be listed for arbitration.

The concerns of the Commonwealth and ADEs that they are ill prepared for the transition to another wages assessment tool are summarised in the submission document titled '*Application for temporary Exemption under section 55 of the Disability Discrimination Act 1992*' supplied by the Commonwealth with its most recent application for an exemption under section 55 of the *Disability Discrimination Act* are noted.

Justice Buchannan (with whom Justice Katzman agreed) noted in *Nojin* (at page 49):

Use of BSWAT represented a choice by each of Mr Nojin and Mr Prior's ADE employers from possible alternatives to measure remuneration in existing employment. There was no evidence that the employment of either Mr Nojin or Mr Prior in fact depended on the use of BSWAT. Under relevant award

arrangements that applied to the employment of Mr Nojin, Mr Prior and others in ADEs, a variety of possible methods were approved for measuring the work value of disabled employees. Use of an approved method was an important ingredient in securing support by way of Commonwealth funding but there was no suggestion in the present case that either of the ADEs in question would lose funding, or Mr Nojin or Mr Prior would lose their employment, if BSWAT was not used to measure their work value.

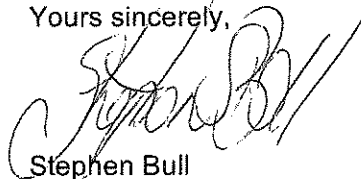
By seeking to have this matter determined by consent or arbitration, it is the Applicants' intention that ADEs will have an opportunity to adduce evidence to substantiate any concerns. If appropriate evidence is adduced, it would be the position of the Applicants that the removal of the BSWAT should be delayed or staged to ameliorate any identified concerns. In light of the Full Federal Court's clear judgment, it is not negotiable that BSWAT should remain a permanent feature of wage assessment for persons covered by the Award.

The problematic feature of the current state of affairs is that a group of citizens and workers are being denied the benefit of a clear judgment in their favour and their work continues to be undervalued in a discriminatory manner.

We would ask that this correspondence be distributed to all interested parties to the variation application.

A copy of this correspondence will also be provided to the Honourable Susan Ryan AO, Age and Disability Discrimination Commissioner, with a request that the Australian Human Rights Commission delay its consideration of granting a further 12 months exemption under section 55 of the Disability Discrimination Act until this matter is determined by the Fair Work Commission.

Yours sincerely,



Stephen Bull
on behalf of
United Voice

Yours sincerely,



Leigh Svendsen
Senior Industrial Officer
Health Services Union