



31 October 2013

Bridget Akers
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By email: bridget.akers@humanrights.gov.au

Dear Ms Akers

Application for an exemption under the *Disability Discrimination Act 1992 (Cth)*

I refer to your 26 September 2013 letter to Mr Robert Evelyn, General Manager of Anuha Services, Peace Lutheran Church Gatton (Anuha), regarding an application that the Australian Human Rights Commission (AHRC) received from the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) for a temporary exemption for 3 years from provisions of the *Disability Discrimination Act 1992 (Cth)* (DDA).

FaHCSIA's application for a temporary exemption (FaHCSIA application) seeks to exempt 194 Australian Disability Enterprise's (ADEs), which includes Anuha, from sections 15, 24 and 29 of the DDA in relation to the use of the Business Services Wage Assessment Tool (BSWAT). The FaHCSIA application is a result of the Full Court of the Federal Court's decision in the case of *Nojin & Prior v Commonwealth* [2012] FCAFC 192 (*Nojin & Prior*), that the use of the (BSWAT) by ADEs discriminates against employees with an intellectual disability in its competency based testing. The High Court of Australia has since endorsed this decision in its refusal to grant special leave to the Commonwealth to appeal that decision.¹

Anuha is very concerned about the implications of the decision in *Nojin & Prior*. As an ADE, affected by *Nojin & Prior*, Anuha welcomes the opportunity to provide a submission to the AHRC in support of the FaHCSIA application for a temporary exemption to the DDA. Anuha requests that it be covered by any temporary exemption the AHRC may grant to FaHCSIA.

Background

1. Established in 1987, Anuha is a not for profit organisation that is operated by the Peace Lutheran Church in Gatton. Gatton is a small regional community located in the Lockyer Valley in Queensland.

Anuha's services

2. Anuha provides two types of services, a home and community support service and a supported employment service (SES). Anuha's home and community support service, provides support and access to community services for people with a disability who are over the age of 18. Anuha's staff provide support in the homes of clients with disabilities in order to assist them to maintain independent living.

¹ *Commonwealth of Australia and Anor v Prior & Nojin and anor* [2013] HCATrans 101.

3. Anuha's SES provides employment for up to 30 individuals (currently 25) who have a range of disabilities including cerebral palsy, downs syndrome, autism, spectrum, muscular degenerative conditions and intellectual disability (SES employees).
4. Anuha estimates that almost all of its SES employees have an intellectual disability.
5. Most of the SES employees work at either a Material Recovery (Recycling) Facility that Anuha operates under a contract of service, or as part of what Anuha refer to as "Cottage Industries". Cottage Industries involves SES employees making food products such as jams and chutneys, which, in turn, assists SES employees to acquire valuable hospitality and cooking skills.
6. Support workers are also employed by Anuha to assist the SES employees in their workplace. Support workers develop support plans for each SES employee, provide on the job training, and observe and supervise SES employees in areas where those employees may require additional support or assistance.
7. Anuha receives all of its funding from FaHCSIA for Anuha's SES. This FaHCSIA funding assists Anuha with its capital costs in relation to its SES. However, this FaHCSIA funding cannot be used for covering Anuha's ongoing business expenses, for example, the payment of wages to SES employees. These costs are covered by the proceeds of the sale of Cottage Industries products and revenue generated from the running of the Materials Recovery Facility.

Assessment of SES employees using the BSWAT

8. CRS Australia (CRS) conduct the wage assessments for SES employees using the BSWAT. CRS are part of the Federal Government Department of Human Services. The cost of CRS's assessments are covered by FaHCSIA.
9. To undertake an assessment, a qualified CRS assessor attends the site where the SES employee works. Following the assessment, Anuha is provided with a report detailing:
 - (a) the competency level the SES employee achieved in the assessment;
 - (b) the productivity capacity of the SES employee ;
 - (c) the SES employee's overall assessment score; and
 - (d) the applicable hourly wage rate for the SES employee.
10. CRS have suspended all assessments using the BSWAT at the request of FaHCSIA, following the *Nojin & Prior* decision. The BSWAT is the only wage assessment tool administered by CRS.

Supported Employment Services Award 2010

11. Anuha is covered by the Supported Employment Services Award 2010 (the Award) in regard to its SES employees.
12. The hourly wage rate for SES employees is determined by expressing the combined results of the BSWAT assessments as an percentage score. This percentage represents the percentage of the minimum hourly rate (grade 1) found in the Award that the SES employee is paid.

Submissions

Legal basis for exemption

13. Section 55 of the DDA provides that the AHRC may grant an exemption from the provisions of Division 1 or 2 of the DDA for a maximum period of 5 years.
14. An exemption may be granted subject to terms and conditions and may be expressed to apply in relation to particular activities. If an exemption is granted, it is then not unlawful to act in accordance with an exemption and an exemption will protect the party covered by the exemption from a claim being brought against it.
15. In considering a request for a temporary exemption, the AHRC provides Guidelines outlining the factors that the AHRC will have regard to when considering an application for an exemption. Anuha sets out the below submissions having regard to these factors and the Guidelines.

Exemption Sought

16. Anuha seeks to be covered by the FaHCSIA application for a period of 3 years or for such time as the AHRC determines suitable.
17. The relevant sections of the DDA from which an exemption is sought are:
 - (a) Section 15 – (Discrimination in employment) that provides that it is unlawful for a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability in the terms and conditions on which employment is offered, or on the terms and conditions of employment that the employer affords the employee;
 - (b) Section 24 – (discrimination in the provision of Goods, services and facilities), rendering it unlawful to discriminate against another person on the grounds of the other person's disability by refusing to provide the other person with those goods or services or to make those facilities available to the other person or in the terms and conditions on which the goods and services are made available or in the manner which the goods and services are provided; and
 - (c) Section 29 – (Administration of Commonwealth laws and programs), rendering it unlawful to discriminate against another person on the grounds of the other person's disability in the administration of Commonwealth laws and programs.

Activities that would be covered by the exemption

18. If the FaHCSIA application is successful, Anuha will use the BSWAT as a wage assessment tool for its SES employees on a temporary basis until an alternative tool is implemented.
19. Further, Anuha will continue to pay its SES employees in accordance with the wage level determined in their BSWAT assessment.

Who will be affected by the application?

20. The FaHCSIA application for a temporary exemption, if granted, may impact upon the ability of Anuha's SES employees to receive higher wages that they may be entitled to under an alternative assessment tool that tests their productivity only. This impact would be a temporary detriment until an appropriate alternative assessment tool can be implemented.

Is an exemption necessary?

21. In considering whether or not to grant an exemption, the AHRC is of the view that an exemption should not be granted where there is not at least an arguable case that the conduct sought to be exempt would, in the absence of an exemption, be unlawful.²
22. In the *Nojin & Prior* decision, the Full Court of the Federal Court determined that that the second respondents (being the ADEs) unlawfully discriminated against the Applicants (Mr Nojin and Mr Prior) by imposing on the Applicants, a requirement or condition that in order to secure a higher wage, the Applicants undergo a wage assessment under the BSWAT.³
23. Whilst the Full Court held that the BSWAT may be fair in its application in some cases, it was determined to be unfairly "skewed" against the intellectually disabled.⁴
24. On 10 May 2013, the High Court of Australia refused the Commonwealth's request for special leave to appeal, the decision in *Nojin & Prior*. In endorsing the decision of the Full Court of the Federal Court, the High Court noted that the unchallenged expert evidence was that the BSWAT produced a differential effect for intellectually disabled person and reduced their score; therefore, there was no reason to doubt the conclusions of the Full Court that the BSWAT was discriminatory.⁵
25. On 9 October 2013, Disability Discrimination Commissioner, Graeme Innes spoke at the National Disability Service Conference of the decision the *Nojin & Prior* decision as being one of the most significant decisions in ADEs since the passing of the DDA, confirming that the use of the BSWAT is now considered discriminatory and unlawful.⁶
26. There is therefore no doubt that the continued use of the BSWAT as a wage assessment tool will amount to unlawful discrimination under the DDA and expose any ADE who continues to use the BSWAT to claims of unlawful discrimination.
27. Threats have already been made by disability advocates that immediate legal will be taken against any ADE that continues to use the BSWAT to assess SES employees or continues to pay SES employees in accordance with their BSWAT assessment.

Permanent exemptions, Defences and Special measures

28. There are no permanent exemptions, defences or special measures under the DDA that are applicable to FaHCSIA's application.

Why an exemption should be granted

Exemptions consistent with objects of the DDA

29. Broadly, the objects of the DDA, set out in Section 3 are to:
 - (a) eliminate, as far as possible, discrimination against persons on the ground of disability in a range of areas including work, education, access to premises, the provision of goods services and facilities;
 - (b) ensure, as far as practicable that persons with disabilities have the same rights to equality before the law as the rest of the community; and

² Australian Human Rights Commission, *Exemption Application, Queensland Rail Tilt Trains 2007*

³ *Nojin & Prior v Commonwealth of Australia* [2012] FCAFC 192.

⁴ *Nojin & Prior v Commonwealth of Australia* [2012] FCAFC 192.

⁵ *Commonwealth of Australia and Anor v Prior & Nojin and anor* [2013] HCATrans 101.

⁶ Australian Human Rights Commission, *National Disability Service Conference, 9 October 2013*.

- (c) promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.
30. Anuha (and other ADEs) assist to promote recognition and acceptance within the community for persons with a disability by providing access to employment and community services that otherwise may have been difficult for persons with disabilities to obtain in the open labour market.
31. Anuha's SES provides a platform for employees to develop valuable skills that assist them with independent living. Further, SES employees are provided with opportunities to develop strong relationships with their colleagues. These types of important interactions may not have been accessible to them if they were not participating in the SES.
32. Without the SES, SES employees would be at risk of being subjected to discrimination in the open labour market as they would be forced to compete in challenging economic conditions against job seekers who do not have a disability.

Alternative assessment tools

33. The evidence presented to the Full Court of the Federal Court in *Nojin & Prior* was that the BSWAT is the single most common wage assessment tool used in ADEs⁷ and relevantly, the trial Judge at first instance⁸ found that there has been a long history with the development of the BSWAT. It has been developed specifically for the purpose of assessing the wages of disabled persons employed in ADEs. It had the approval of the Commonwealth and was endorsed by the Australian Industrial Relations Commission (AIRC) (as it then was) and had been found to comply with Standard 9 of the legislated Disability Service Standards (DSS).⁹
34. Clause 14.4(b) of the Award sets out a number of "approved wage assessment tools". Similarly to the BSWAT, nearly all of these tools employ the use of the competency based assessment, as well as a productivity assessment, to determine the wage level for SES employees. Therefore, these tools have the same discriminatory effect for SES employees with an intellectual disability as the BSWAT because of their use of a competency based assessment.
35. The Supported Wage System (SWS) is the only exception to the approved wage tools in the Award, testing only productivity. However, the SWS is not an acceptable alternative to the BSWAT for ADEs. The SWS is a tool that is most commonly used to assess persons with less severe disabilities who are able to access employment in the open market. The SWS works by comparing the productivity of a person with a disability, against the productivity of a person without a disability performing the same job.¹⁰
36. ADEs provide employment to people with moderate to severe disabilities that in most cases would not otherwise be able to obtain employment in the open market, or be able to complete the more complex assessments required of the SWS. The jobs performed in ADEs have generally been simplified to such a degree that comparable roles would not exist in an open employment market.
37. Further, Clause 4.2 in Schedule D of the Award, provides that the amount paid to an employee assessed using the SWS must not be less than \$78.00 per week, this is irrespective of the hours worked. This is considerably higher than many of Anuha's SES employees, some of whom work only 8 hours per week. The additional costs associated with paying SES employees in accordance with the SWS would make the running of Anuha's services commercially unviable because of the increase in labour costs.

⁷ *Nojin & Prior v Commonwealth of Australia* [2012] FCAFC 192 [47].

⁸ *Nojin & Prior v Commonwealth of Australia* [2011] FCA 1066.

⁹ *Nojin & Prior v Commonwealth of Australia* [2012] FCAFC 192 [86].

¹⁰ *Inclusive Employment 2012-2022, A Vision for Supported Employment: Future Wage Setting Arrangements, a discussion guide (FaHSCIA, July 2013).*

Funding and compliance implications

38. Under the *Disability Services Act 1986* (Cth), Anuha is required to hold a current certificate, demonstrating their compliance with the 12 Disability Standards legislated in the *Disability Service Standards (FaCSIA) 2007*.
39. In the absence of a suitable wage assessment tool, Anuha is concerned about its ability to demonstrate compliance with Standard 9, *Employment Conditions* which provides, broadly, that persons with a disability should be entitled to comparable terms and conditions as people without a disability, and that wages must be determined through a wage assessment tool that is compliant with legislation.
40. Continued use of the BSWAT without the FaHCSIA exemption, or a comparable alternative using similar assessment techniques, is likely to impact upon Anuha's ability to obtain a certificate of compliance, of which its funding is dependent upon. Without continued funding, Anuha could not continue to provide a SES.

Financial Hardship that would occur

41. If the FaHCSIA application is not granted, in the absence of a compliant tool that is comparable to the BSWAT, Anuha fears it will have no choice but to close its SES. If Anuha adopts the use of the SWS, it cannot sustain the SES with the increased labour costs.
42. The closure of the SES would mean that the SES employees would find themselves unemployed in a small regional community with an already challenging labour market.
43. It would also place strain on families who are reliant on the SES to assist them with supporting their family member with a disability. Closure of the SES would mean that many of the SES employees would require support at home 24 hours per day, jeopardising the abilities of their families to continue working in paid employment as they would be required to provide care at times where an SES employee would ordinarily be at work.
44. Support workers who are employed to support the activities of the SES would also lose their jobs as a result of the close of Anuha's SES.
45. The Lockyer Valley community has been devastated in recent years with the 2011 and 2013 Queensland floods. The employment market is currently very challenging for people who do not have disabilities and the impact of further having SES employees forced to look for alternative employment would have a significant negative economic impact on the community.

Future Direction

46. Anuha's view is that any alternative to the BSWAT should be developed as part of an industry wide initiative to ensure consistency in the assessment of SES employees.
47. FaHCSIA has already taken steps to initiate discussions on how wage setting in ADEs should be determined in the future.¹¹ In order to continue to provide an SES service, a balance needs to be struck between the ability of SES employees to obtain a higher wage against ensuring that Anuha and other ADEs can operate a viable and sustainable business.
48. A temporary exemption for 3 years will provide an adequate opportunity to engage with FaHCSIA, the community and industry experts in order to develop a lawful, fair assessment tool that is suitable for ADEs. With scarce resources and geographical challenges, this is not a process that can be expedited.

¹¹ *Inclusive Employment 2012-2022, A Vision for Supported Employment: Future Wage Setting Arrangements, a discussion guide (FaHSCIA, July 2013)*.

49. Anuha will be guided by terms and conditions agreed to by FaHCSIA as part of the seeking of the exemption on behalf of ADEs. Anuha understands that FaHCSIA have suggested providing the AHRC with six monthly updates on progress in respect of implementing a new wage-setting tool.

If there is any further information that we can provide in support of the FaHCSIA application, or any further information you require about Anuha, please do not hesitate to contact me.

Yours faithfully



Robert Evelyn

**General Manager
Anuha Services – Peace Lutheran Church Gatton**