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The Australian Human Rights Commission

[legal@humanrights.gov.au](mailto:legal@humanrights.gov.au).

Dear Sir or Madam,

Physical Disability Australia Ltd (PDA) is the national disability peak organisation representing the interests and views of people with physical disability in Australia.

PDA writes this letter regarding the application from the Department of Families, Housing, Communities and Indigenous Affairs (FaHCSIA) for an exemption relating to the use of the Business Services Wage Assessment Tool (BSWAT).

This matter is pursuant to section 44 of the *Disability Discrimination Act 1992* (Cth) (DDA). The applicant seeks to exempt all existing Australian Disability Enterprises (ADEs) from sections 15 and 24 of the DDA and the Commonwealth from section 29 of the DDA.

This exemption would apply to allow the ADEs to use the Business Services Wage Assessment Tool (BSWAT) to:

- (a) assess wages for employees; and
- (b) pay wages to ADE employees based on assessments conducted under the BSWAT.

The applicant seeks the exemption to address the implications of the Federal Court Judgment: *Nojin & Prior v Commonwealth* [2012] FCAFC 192.

PDA strongly objects to any exemption being given, on the basis that every person deserves a living wage that is commensurate with their abilities and not based on the profit or loss of an organisation purporting to be a not for profit organisation.

PDA canvassed members and stakeholders, who agree with the PDA statement that “this must not happen!” Further comments include:

- *The AHRC will grant them an exemption, they grant anyone exemptions on anything, I see no reason why this should be any different.*
- *It's all to do with assessing the competency of ID's using their Business Services Wage Assessment Tool (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.*

- *absolutely agree that this must be challenged.*

- *If I can add here there is at least one example of when an exemption application was thrown out ... This was the exemption of the Big 4 cinemas to increasing captioning ... There was a significant protest against this and the AHRC threw out the exemption so certainly if enough noise is made it is possible to sway the AHRC ... But it is true exemptions are generally handed out like confetti.*

- *The thing is if the BSWAT is not able to always give a reasonably accurate assessment of someone's ability then it needs to be thrown out. In the mean time employees need to be paid what is fair rather than what the ADEs think is fair (to them). The system would be too open to abuse whether intentional or otherwise if the exception was allowed.*

- *This should be challenged at the highest level. Paul Cain has written extensively about this issue. Look at the report of Disability Rights Now. The model of (BSWAT) is flawed to the core. We should be ashamed of our selves as A Developed Country to be still using this practice.*

- *This issue is too important for PDA not to discuss.*

PDA also recommends the article contained in the following link for futher information:  
<http://www.disabilitydirectory.net.au/.../#!>

PDA believes that the reputation of Australia at the UN level despite early signing by Australia is already compromised as seen by the UN Committee's questioning of Australia's compliance with the Convention. This followed criticism by Committee members of Australia's Interpretative Declarations, with Australian officials emphasising that these declarations were not an attempt to avoid compliance to articles in the Convention.

We therefore believe that the exemption should be refused and that immediate Human Rights work needs to commence in order to fully understand the principle of inclusion contained in the UN Convention article on employment.

Yours sincerely



Sue Egan  
Executive Officer  
Physical Disability Australia Ltd.