



AUSTRALIAN HUMAN RIGHTS COMMISSION

DISABILITY DISCRIMINATION ACT 1992 (Cth), Section 55(1)

NOTICE OF GRANT OF A TEMPORARY EXEMPTION

1. By this instrument, under section 55(1) of the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act), the Australian Human Rights Commission grants to the Commonwealth and all Australian Disability Enterprises (ADEs) using or proposing to use the Business Services Wage Assessment Tool (BSWAT) (the Applicants), an exemption from the operation of sections 15, 24 and 29 of the Disability Discrimination Act.

1 Background

2. On 29 April 2014, the Commission granted the Applicants an exemption from the operation of sections 15, 24 and 29 of the Disability Discrimination Act. The decision granting this exemption is available on the Commission website at <http://www.humanrights.gov.au/departments-social-services-dss>.
3. The exemption granted on 29 April 2014 expired on 29 April 2015. The Commonwealth has now applied for two further exemptions, in effect extending the exemptions granted on 29 April 2014.
4. On 21 April 2015 the Commonwealth applied for a temporary exemption for 12 months to ensure the transition from the use of BSWAT to an alternative tool approved by the Fair Work Commission is able to continue in an orderly manner and to provide reassurance to people with disability working in ADE's and their families and carers (Primary Application).
5. On 21 April 2015 the Commission advised the Commonwealth that it would not be possible to make a decision on the Primary Application by 29 April 2015 and that once the current exemption expired, there would be no exemption in place.
6. On 22 April 2015 the Commonwealth made an application for an interim exemption for the period between the expiry of the original exemption on 29 April 2015 and 'the date on which the Commission publishes its determination in relation to the application of 21 April 2015' (Interim Application).

2 Decision of the Commission

7. For the reasons below, the Commission has decided to grant a further exemption for a period of four months, or until such time as a decision is made with respect to the Primary Application, whichever is sooner.
8. The exemption is granted to allow the continuation of the payment of wages to ADE employees, based on current assessments already conducted with the BSWAT, subject to the conditions set out below.

3 Consideration and Reasons

9. In making its decision, the Commission had regard to the following:
 - a. the terms and objects of the Disability Discrimination Act;
 - b. the applications from the Applicants;
 - c. the reports provided pursuant to the original exemption; and
 - d. the submissions received in relation to the original exemption application.
10. As the Commission intends to call for submissions in respect of the Primary Application it has determined that it is not necessary to conduct consultations or call for submissions with respect to the Interim Application. In the circumstances, the Commission considered that it was not reasonably practicable to do so.
11. The Commission notes that numerous submissions were received with respect to the original exemption application, and relies on those submissions for the purposes of this Interim Application.

3.1 Necessity

12. The Commonwealth states that there are still approximately 5673 employees who are yet to be assessed with an alternative tool. The reasons they have not been reassessed include:
 - a. A number of ADEs identify a significant increase in wage costs as a barrier to moving to Supported Wage System (SWS).
 - b. There are some delays with the SkillsMaster and Greenacre assessments at some ADEs who have purchased these tools due to the volume of work for the two businesses that own and provide training for these tools.
13. The Commonwealth makes its Primary Application to ensure the transition from the use of BSWAT to an alternative tool approved by the Fair Work Commission (FWC) is able to continue in an orderly manner and to provide reassurance to people with disability working in ADE's and their families and carers
14. The Commission considers that the grant of an interim exemption is necessary to maintain the status quo and provide certainty of obligations for the Applicants and employees pending the Commission's decision with respect to the Primary Application.

3.2 Reasonableness of the exemption

15. The Commission has assessed the reasonableness of the Interim Application and has weighed the discriminatory effect of a further exemption against the reasons for the exemption. The arguments for and against the Interim Exemption are similar to those in relation to the original exemption. The arguments are as follows:

(a) *Arguments for the exemption*

Time to conduct new assessments and to transition to an alternative tool

16. The original exemption was granted to allow time for new assessments to be conducted. The Applicants claimed they needed 3 years to conduct the new assessments, but on the basis of the submissions received by the Commission it was decided that it was not appropriate to allow the discrimination to continue for 3 years.
17. It appears that while some progress has been made and 32% of employees have been assessed with alternative tools there are still numerous employees that need to be re-assessed.

Financial Viability of ADEs

18. The Applicants continue to claim that increased wages arising from new assessments create a significant barrier to moving to an alternative tool.
19. While the Commission will expect additional evidence of the financial impact on the ADEs for the purposes of the Primary Application it is prepared to accept the submissions of the Applicants in the Primary Application for the purposes of the Interim Application.
20. While it is acknowledged that ADEs provide a number of services beyond the employment of the individual with a disability (including the ancillary benefits of that employment such as emotional and psychological wellbeing), training and development, care, accommodation and employment for support workers, these services should not come at the expense of those individuals who are not receiving a wage to which they are entitled. On balance, the Commission considers that an interim exemption is appropriate to allow the Applicants to continue to explore avenues to support the ongoing role of ADEs pending the outcome of the Primary Application.

(b) *Arguments against the exemption*

Continuation of discrimination

21. As with the original exemption, the use of the BSWAT has been found to be discriminatory, the interim exemption would allow discrimination against ADE employees to continue. This would be contrary to the object of eliminating discrimination and is the basis for many of the objections to the original application. The Commission considers that as the grant of an exemption will allow discrimination against ADE employees to continue, it is important to ensure the terms of the exemption are appropriately targeted to minimise the discriminatory impact. It is for this reason the exemption will be limited to four months or the date of the decision on the Primary Application, whichever is sooner. The Commission will endeavour to make a decision on the Primary Application as soon as possible.

4 Conclusion

22. On balance, the Commission considers that it is reasonable to grant a short further exemption for four months to allow the status quo to be maintained pending the outcome of the Primary Application.
23. To ensure that the discriminatory impact is minimised and that transition to a new wage-setting model is achieved as quickly as possible, it is appropriate to grant the exemption subject to conditions.
24. Accordingly, the Commission grants the Applicants an exemption from the operation of sections 15, 24 and 29 of the Disability Discrimination Act to allow the payment of wages to ADE employees, based on current assessments already conducted with the BSWAT, for a period of four months from the date of this instrument, subject to the following conditions:

The Commonwealth:

- a. Take all necessary steps to transition from the BSWAT to the Supported Wage System, or an alternative tool approved by the Fair Work Commission, as quickly as possible.
- b. Take all appropriate steps to ensure ADEs using or proposing to use the BSWAT to conduct wage assessments immediately commence using the Supported Wage System, or an alternative tool approved by the Fair Work Commission, (other than the BSWAT) to conduct new and outstanding wage assessments.
- c. Report to the Commission, on a quarterly basis during the exemption period, as to:
 - i. The number of assessments conducted each quarter; and
 - ii. The number of assessments still to be conducted.
- d. Give consideration to ensuring that no disadvantage is suffered by ADE employees whose wages may be reduced as a result of the application of the Supported Wage System or alternative tool.

The ADEs using or proposing to use BSWAT to conduct wage assessments:

- a. Take all necessary steps to transition from the BSWAT to the Supported Wage System, or an alternative tool approved by the Fair Work Commission, as quickly as possible
- b. Immediately commence using the Supported Wage System, or an alternative tool approved by Fair Work Commission (other than the BSWAT) to conduct new and outstanding wage assessments.
- c. Give consideration to ensuring that no disadvantage is suffered by ADE employees whose wages may be reduced as a result of the application of the Supported Wage System or alternative tool.

5 Application For Review

25. Subject to the *Administrative Appeals Tribunal Act 1975* (Cth), any person whose interests are affected by this decision may apply to the Administrative Appeals Tribunal for a review of the decision.

Dated this 30th day of April 2015.

A handwritten signature in black ink, appearing to read 'Gillian Triggs'. The signature is written in a cursive style with a large, sweeping flourish at the end.

Signed by the President, Professor Gillian Triggs,
on behalf of the Commission.