



Australian Government
Department of Social Services

Ms Michelle Lindley
Deputy Director, Legal
Australian Human Rights Commission

By email: michelle.lindley@humanrights.gov.au

Dear Ms Lindley

I am writing in response to your request of 4 September 2015 for additional information supporting the Department's Interim Application of 22 April 2015 for exemption from sections 15, 24 and 29 of the *Disability Discrimination Act 1992* (DDA). I have included your questions along with the Department's responses.

1. Advise if the exemption is sought on behalf of the Commonwealth or just the Department of Social Services.

The temporary exemption application is sought on behalf of the Commonwealth and Australian Disability Enterprises (ADEs).

2. Confirm the Secretary is authorised to make the application on behalf of ADEs that are still using the BSWAT and are not members of the NDS.

The Secretary may make the application on behalf of the Commonwealth and ADEs.

3. Advise the current reasons for why exemption is sought.

Along with the reasons set out in response to question 4, I confirm that the reasons for seeking an exemption have not changed from those set out in the Department of Social Services' application of 21 April 2015, its interim application of 22 April 2015, its request to amend the application of 25 June 2015, and responses to the Commission's requests for further information dated 26 June 2015 and 25 August 2015. These reasons have also been reiterated in quarterly reports to the Commission to provide updates on data on transition of wage assessments using alternative approved wage assessment tools.

- 4. Provide detailed submissions as to why the Interim Application should be granted given it will apply retrospectively. And in particular why an exemption in such circumstances is:**
- a. necessary, and
 - b. reasonable.

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On 30 April 2015, the AHRC granted an 'interim' temporary exemption from 30 April 2015 for four months or until the date on which the AHRC publishes its determination in relation to the primary application, whichever is sooner.

On 28 July 2015, the AAT set aside the AHRC's decision to grant the 'interim' temporary exemption and remitted it to the AHRC for reconsideration (*People with Disability Australia and Australian Human Rights Commission* [2015] AATA 548). The grant was set aside as procedural fairness was not accorded to the interested parties by the AHRC.

In reconsidering the decision to grant a temporary exemption, the Department's view is that the AHRC may decide to affirm the decision it made to grant an interim temporary exemption on 30 April 2015. The Department's view is that the Interim Application will not apply retrospectively or be back-dated as the decision made on 30 April 2015 would be confirmed.

Re-making the decision will allow the AHRC to cure the jurisdictional error in the original decision-making process. However, this can only occur if the AHRC accords procedural fairness to interested parties.

By remaking the interim exemption with effect from 30 April 2015, it will provide certainty for ADEs who may have relied on the existence of the interim exemption during the transition period. Affirming the decision is both reasonable and necessary as it will ensure that ADEs who organised their business affairs in accordance with the AHRC's decision of 30 April 2015 are not at risk of breaching the *Disability Discrimination Act 1992* (DDA). Currently there is no exemption from the DDA for the use of the Business Services Wage Assessment Tool (BSWAT) for ADEs.

Additionally, it will provide ADEs, supported employees, their families and carers with certainty and facilitate the continuing orderly transition of ADEs which paid wages assessed by the BSWAT to another approved wage assessment tool approved under clause 14 of the Award.

For these reasons, the Department is of the view that it is both necessary and reasonable for the AHRC to remake the decision.

Should you wish to discuss this matter further, please contact me via email at warren.pearson@dss.gov.au, or phone on (02) 6146 5720.

Yours sincerely,



Warren Pearson AM

18 September 2015