

**HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
AGE DISCRIMINATION ACT 2004 (Cth)
Section 44(1)**

NOTICE OF REJECTION OF APPLICATION FOR EXEMPTION

By this instrument, the Human Rights and Equal Opportunity Commission ('HREOC') declines to grant to University of Western Sydney ('UWS') a temporary exemption pursuant to s 44(1) of the *Age Discrimination Act 2004 (Cth)* ('ADA').

1. EXEMPTION APPLICATION

- 1.1 By email dated 18 July 2007, UWS applied to HREOC for a temporary exemption from s 18 and, in particular, s 18(2)(b) of the ADA. The temporary exemption was sought to allow UWS to offer three 'end of career transitioning schemes' ('the Schemes') to permanent academic staff. Expressions of interest in the schemes would be accepted or rejected on the basis of age.
- 1.2 The three Schemes proposed by UWS are:
- a. **Early Voluntary Retirement Scheme (EVRS):** academic staff who are at least 54 years of age at 31 December 2007 but less than 65 years of age at the proposed date of retirement may voluntarily retire and receive a compensatory payment with concessional tax benefits. UWS has obtained a ruling from the Australian Taxation Office (ATO) stating that the EVRS is an early retirement scheme for the purposes of the *Income Tax Assessment Act 1997 (Cth)* ('ITAA 1997') and acknowledging the availability of tax concessions for UWS employees who receive payment under the scheme. The EVRS is not available to:
 - i. 'Highly research productive' academic staff. 'Highly research productive' is defined as generating a minimum of \$100 000 of research income across the 2004-2006 triennium or publishing a minimum of five peer reviewed publications across the 2004-2006 triennium.
 - ii. All Deputy Vice-Chancellors, Pro Vice Chancellors, Executive Deans, Heads of School, Directors of Research Centres and Heads of Research Concentration/Groups.
 - b. **Pre-retirement Contract scheme:** academic staff aged 65 and over who were unable to apply for the EVRS will have the opportunity of taking a pre-retirement contract with compensatory salary loading.
 - c. **Reduction of Full Time hours to Part Time hours scheme:** academic staff aged 54 and over will be offered the option of reducing their hours but retaining the option to contribute to superannuation as a full time employee, with UWS also contributing at the employer full time rate.

- 1.3 Section 18 of the ADA relevantly provides:

Discrimination in employment

(1) It is unlawful for an employer or 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 age:

- (a) in the arrangements made for the purpose of determining who should be offered employment; or

(b) in determining who should be offered employment; or

(c) in the terms or conditions on which employment is offered.

(2) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's age:

(a) in the terms or conditions of employment that the employer affords the employee; or

(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or

(c) by dismissing the employee; or

(d) by subjecting the employee to any other detriment.

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1.4 HREOC has considered whether to grant UWS a temporary exemption from s 18 under s 44 of the ADA which gives HREOC the power to grant temporary exemptions.

1.5 HREOC's decision is based on information provided by UWS:

- a. in the exemption application dated 18 July 2007;
- b. in a letter from UWS to HREOC dated 9 October 2007; and
- c. at a meeting held between representatives of HREOC and UWS on 19 November 2007.

1.6 Relevantly, UWS has informed HREOC that:

- a. UWS is a tertiary education institution that employs a mix of academic staff and general staff. The academic staff deliver academic programs and conduct research. The general staff support the academic workforce and provide corporate services.
- b. UWS has an ageing academic staff workforce. According to 2006 staff data, 44 per cent of the staff of UWS are over age 50 and 77 per cent are over age 40. UWS faces the potential retirement of large numbers of staff around the same time.
- c. UWS has identified a need to realign the academic staff profile of UWS with the requirements of academic research at UWS. UWS considers the introduction of Schemes will enable UWS to recruit new academic staff with high levels of research productivity.
- d. Recruitment for new academic staff will be based on merit. Recruitment will not discriminate on the basis of age.
- e. The development of the Schemes involved staff consultation (through on line surveys and open campus forums). During the consultations academic staff expressed a desire for work-life balance and flexible working practices.
- f. Participation in the Schemes is voluntary.

1.7 UWS have also provided HREOC with a copy of a Class Ruling from the Australian Taxation Office (CR 2007/106) which states that the EVRS proposed by UWS is an early retirement scheme for the purposes of s 83-180 of the ITAA 1997.

2. FINDINGS ON MATERIAL QUESTIONS OF FACT

2.1 Based on the evidence referred to in paragraphs 1.5 – 1.7, HREOC makes the following findings on material questions of fact in relation to the application:

- a. UWS proposes to introduce three Schemes that will provide benefits to academic staff employed by UWS on the basis of age. In particular:

- i. The EVRS is available to academic staff between 54 and 65 years of age. The EVRS is unavailable to 'highly research productive' staff or staff who hold certain positions at UWS.
 - ii. The Pre-Retirement Contract Scheme is available to academic staff over 65 years of age.
 - iii. The Scheme to reduce fulltime hours to part-time hours while maintaining fulltime employer/employee superannuation contributions is available to employees over 54 years of age.
- b. Participation in the Schemes will be voluntary.
 - c. The Schemes will also create opportunities for UWS to recruit emerging research staff. The recruitment process for new academic staff:
 - i. will be based on merit; and
 - ii. will not discriminate on the basis of age.
 - d. UWS considers the Schemes will be beneficial to the target group of staff because they provide an end of career transitioning path from work to retirement, promote flexible work practices and offer financial benefits.
 - e. Under s 83-180 of the ITAA 1997 UWS can not make the benefits provided by the EVRS available to academic staff over 65 years of age.

3. REASONS FOR DECLINING TO GRANT A TEMPORARY EXEMPTION

- 3.1 In considering this application for a temporary exemption, HREOC has considered whether the proposed Schemes might constitute discrimination under the ADA. HREOC has also considered whether any of the permanent exemptions to the ADA may apply.
- 3.2 For the reasons set out below, HREOC is of the view that the exemption application does not demonstrate an arguable case that the Schemes will constitute unlawful discrimination under the ADA. Accordingly, it is not necessary for HREOC to grant a temporary exemption to permit the Schemes.
- 3.3 HREOC is of the view that the proposed Schemes fall within positive discrimination exemption in s 33(a) and/or s 33(b) of the ADA. Section 33 provides:

33 Positive discrimination

This Part does not make it unlawful for a person to discriminate against another person, on the ground of another person's age, by an act that is consistent with the purposes of this Act, if:

(a) the act provides for a bona fide benefit to persons of a particular age; or

Example: This paragraph would cover a hairdresser giving a discount to a person holding a Seniors Card or a similar card, because giving the discount is an act that provides a bona fide benefit to older persons.

(b) the act is intended to meet a need that arises out of the age of persons of a particular age; or

Example: Young people often have a greater need for welfare services (including information, support and referral) than other people. This paragraph would therefore cover the provision of welfare services to young homeless people, because such services are intended to meet a need arising out of the age of such people.

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- 3.4 The explanatory memorandum to s 33 of the ADA states:

The legislation exempts "positive discrimination", which refers to three different types of beneficial age-based treatment (which may in some circumstances overlap):

- (a) the provision of bona fide benefits to people of a particular age. This aspect of the positive discrimination provision recognises and permits a range of concessions and benefits that are provided in good faith to people of a particular age. ...

- (b) measures intended to meet age-related needs. This aspect of the positive discrimination provision recognises and permits measures that seek to address the needs of particular ages that are different to or more acute than the needs of people of other ages...

3.5 In HREOC's view, all three proposed Schemes are 'positive discrimination' as defined by s 33 of the ADA. This is because HREOC considers:

- a. The Schemes will provide a *bona fide* benefit to older academic staff (s 33(a)). The Schemes will offer older academic staff the opportunity to voluntarily make a dignified and financially beneficial exit from employment or to transition to more flexible working arrangements. Specifically:
 - i. staff who participate in the EVRS will be eligible for tax concessions;
 - ii. staff who participate in the pre-retirement contract scheme will be eligible for compensatory salary loading; and
 - iii. staff who participate in the reduction of full time hours scheme will be able to contribute to their superannuation as a full time employee with UWS contributing at a full time employer rate.
- b. The Schemes will meet an age related need (s 33(b)). Voluntary participation in the proposed schemes will assist older workers in making the transition from work to retirement thereby recognising the particular age-related needs of such workers.

3.6 In order for the proposed Schemes to fall within the s 33 exemption, the Schemes must be consistent with the purposes of the ADA. The objects of the ADA are set out at s 3 of the Act and relevantly (for the purposes of this application) include:

- (c) to allow appropriate benefits and other assistance to be given to people of a certain age, particularly younger and older persons, in recognition of their particular circumstances;

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- (e) to respond to demographic change by:
 - i. removing barriers to older people participating in society, particularly in the workforce; and
 - ii. changing negative stereotypes about older people.

3.7 HREOC is of the view that the proposed Schemes are consistent with the objects of the ADA and in particular s 3(c) and (e). HREOC has formed this view on the basis that:

- a. The Schemes will provide financial benefits to older academic staff who wish to transition from work to retirement;
- b. UWS has stated that the recruitment process for new academic staff will not discriminate on the basis of age; and
- c. UWS has stated that the Schemes will not operate to perpetuate negative stereotypes about older people.

3.8 HREOC is of the view that to the extent that the proposed EVRS is unavailable to persons aged over 65, the EVRS is permitted by the permanent exemption in s 40 of the ADA. Section 40 provides:

Taxation laws

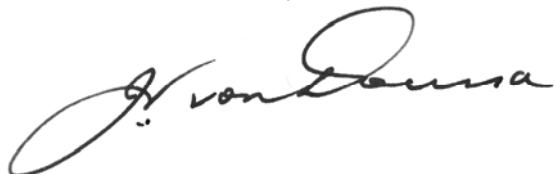
This Part does not make unlawful anything done by a person in direct compliance with a taxation law (within the meaning of the *Income Tax Assessment Act 1997*).

3.9 Under s 83-180 of the ITAA 1997 early retirement schemes that attract tax concessions can not be offered to persons aged over 65 years of age. HREOC notes ATO Class Ruling 2007/106 states that the EVRS is an early retirement scheme for the purposes of s 83-180 of the ITAA 1997.

4 CONCLUSION

- 4.1 For the reasons set out above, HREOC is of the view that all three proposed Schemes are permitted by s 33 of the ADA. To the extent the EVRS is unavailable to persons over 65 years of age it is permitted by s 40 of the ADA.
- 4.2 HREOC is of the view that because the present application does not disclose an arguable case of discrimination it is unnecessary to grant a temporary exemption under s 44(1). HREOC refuses the application by UWS for a temporary exemption.

Dated this 26th day of November 2007

A handwritten signature in black ink, appearing to read 'John von Doussa', written in a cursive style.

Signed by the President, John von Doussa QC, on behalf of HREOC.

Please note

Subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal for a review of the decision contained in this notice by or on behalf of any person or persons whose interests are affected by the decision.