



Administrative  
Appeals Tribunal

**DECISION AND  
REASONS FOR DECISION**

**[2015] AATA 548**

Division	<b>General Division</b>
File Number(s)	<b>2015/2158</b>
Re	<b>People with Disability Australia</b> APPLICANT
And	<b>Australian Human Rights Commission</b> RESPONDENT
And	<b>Secretary, Department of Social Services</b> <b>National Disability Services</b> <b>AED Legal Centre</b> JOINED PARTIES

**DECISION**


Tribunal	<b>Deputy President J W Constance</b> <b>Senior Member J F Toohey</b>
Date	<b>28 July 2015</b>
Place	<b>Sydney</b>

**IT IS DECIDED** that:

1. the reviewable decision, being the decision of the Australian Human Rights Commission, dated 30 April 2015, to grant an exemption from the operation of the *Disability Discrimination Act 1992* (Cth), is set aside; and

2. the matter is remitted to the Australian Human Rights Commission for reconsideration in accordance with these reasons.

.....  
[sgd]  
**Deputy President J W Constance**

The seal of the Administrative Appeals Tribunal of Australia is a circular emblem. It features a central shield with a kangaroo and an emu, flanked by the words 'AUSTRALIA' and 'AUSTRALIA' in Arabic script. The shield is topped with a seven-pointed star. The outer ring of the seal contains the text 'Administrative Appeals Tribunal' at the top and 'Administrative Appeals Tribunal' at the bottom.

## **CATCHWORDS**

*DISABILITY DISCRIMINATION – exemption from operation of legislation – supported employees – Business Services Wage Assessment Tool – whether Australian Human Rights Commission had power to grant an “interim” exemption – whether decision procedurally fair – decision under review set aside*

## **Legislation**

*Disability Discrimination Act 1992 (Cth) ss 15, 24, 29, 55*

*Fair Work Act 2009 (Cth) s 45*

*Australian Human Rights Commission Act 1986 (Cth) s 46PW*

## **Cases**

*Annets v McCann* (1990) 170 CLR 596

*Herring v Minister for Immigration and Citizenship* [2012] FCA 970

*Kioa v West* (1985) 159 CLR 550

*Nojin v Commonwealth* [2012] FCAFC 192

*Re Refugee Tribunal and Anor; Ex Parte Aala* [2000] HCA 57

*Twist v Council of The Municipality of Randwick* [1976] HCA 58

## **Secondary Materials**

Australian Human Rights Commission, *Temporary Exemptions under the Disability Discrimination Act 1992: Commission Guidelines*

## **REASONS FOR DECISION**

**Deputy President J Constance**  
**Senior Member J F Toohey**

## **Background**

1. This matter concerns a decision made 30 April 2015 by the Australian Human Rights Commission to grant the Commonwealth and certain Australian Disability Enterprises an exemption from the operation of provisions of the *Disability Discrimination Act 1992* (Cth).

Australian Disability Enterprises are organisations that provide supported employment opportunities for people with disabilities.

2. The effect of an exemption is that, during the period for which it is granted, actions that would otherwise be rendered unlawful by provisions of the *Disability Discrimination Act* are not unlawful.
3. People with Disability Australia (the Applicant) is an incorporated association whose objects include advocating on behalf of people with disability. Besides the Human Rights Commission, the other parties to the proceedings are the Secretary of the Department of Social Services, National Disability Services which represents Australian Disability Enterprises, and the AED Legal Centre, a community legal centre which provides legal advocacy to people with a disability in the areas of employment, education and training.
4. The Secretary of the Department of Social Services and the Commonwealth are referred to interchangeably in various documents. For convenience, we will refer to them in respect of the application before us as the Secretary.

#### **The history of the application**

5. In December 2012, in *Nojin v Commonwealth* [2012] FCAFC 192 the Full Court of the Federal Court decided that the Commonwealth had engaged in indirect discrimination, contrary to the *Disability Discrimination Act 1992*, by applying the Business Services Wage Assessment Tool (BSWAT) to determine the rates of pay of two workers with intellectual disability.
6. The BSWAT is a means of assessing a disabled worker's rate of pay by reference to his or her productivity, and industry "*competencies*". Until recently, it was one of a number of wage assessment tools approved for the purposes of the *Supported Employment Services Award 2010*. Approximately half of the 20,000 supported employees of Australian Disability Enterprises had, and many still have, their wages fixed according to the BSWAT. Orders issued by the Fair Work Commission in June 2015 concerning the use of BSWAT for this purpose are discussed below.

7. On 10 May 2013, the High Court refused the Commonwealth's application for special leave to appeal from the decision in *Nojin*.
8. On 5 September 2013, the Secretary applied to the Human Rights Commission for a three year exemption under s 55 of the *Disability Discrimination Act* from the operation of ss 15, 24 and 29 of the Act. Those provisions make it unlawful to discriminate on the ground of disability, whether directly or indirectly, in employment, access to goods services and facilities, and in the administration of Commonwealth laws and programs. A number of the Australian Disability Enterprises using the BSWAT joined the application.
9. The application was posted on the Human Rights Commission's website. The Commission's notice of grant of the exemption shows that it received over 100 submissions, the majority of which recognised that some time was needed to transition to a new assessment tool, but many submitted that three years was too long; a number opposed the grant of an exemption outright, most of them on the basis that alternative tools were immediately available. Given the identification of alternative tools, the Human Rights Commission wrote to the Secretary and other stakeholders seeking further submissions on the appropriateness of the alternatives. This request was published on the Commission's website and a further five submissions dealing with this specific issue were received.
10. On 30 April 2014, the Human Rights Commission determined that it was not reasonable to grant an exemption for three years "*given the ongoing discrimination and the existence of an alternative tool that is able to be used immediately*". It granted an exemption for 12 months on condition that the Commonwealth:
  - 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;
  - take all appropriate steps to ensure Australian Disability Enterprises using or proposing to use BSWAT to conduct wage assessments immediately commence using the Supported Wage System or an alternative tool approved by the Fair Work Commission to conduct new and outstanding wage assessments; and
  - report to the Human Rights Commission on a quarterly basis as to assessments that had been conducted and were still to be conducted.

The Commonwealth was also to “[g]ive consideration to ensuring that no disadvantage is suffered by employees of Australian Disability Enterprises whose wages may be reduced as a result of the application of the SWS or alternative tool”. Save for the reporting provision, similar conditions were imposed in respect of Australian Disability Enterprises using or proposing to use BSWAT to conduct wage assessments.

11. We will refer to the 2013 application and April 2014 determination as the original application and the original exemption.
12. On 21 April 2015, eight days before the original exemption was due to expire, the Secretary wrote to the Human Rights Commission applying for “a *temporary s55 administrative exemption under the [Disability Discrimination Act]*” (the primary application). The decision which is the subject of these proceedings shows that, on 21 April 2015, the Human Rights Commission advised the Secretary that it would not be possible to make a decision on that application by 29 April 2015 and that, once the original exemption expired, there would be no exemption in place.
13. On 22 April 2015, the Secretary wrote a further letter to the Human Rights Commission seeking “an *interim exemption from sections 15, 24 and 29 of the Act for the period between the expiry of the existing exemption on 29 April 2015, and the date on which the Commission publishes its determination in relation to the application sent to you on 21 April 2015*”.
14. On 30 April 2015, the Human Rights Commission granted the exemption which is the subject of these proceedings (the “*interim*” exemption).

### **Contentions**

15. The Applicant submits that the decision of Human Rights Commission is not correct in that:
  - (a) the Human Rights Commission has no power to entertain or determine applications for “*interim*” temporary exemptions;
  - (b) it contravenes, or results in the contravention of, the *Supported Employment Services Award 2010*, contrary to s 45 of the *Fair Work Act 2009*;

- (c) it was contrary to the obligation of the President of the Human Rights Commission under s 46PW(3) of the *Australian Human Rights Commission Act 1986* (Cth) to refer complaints of discriminatory acts under an industrial instrument to the Fair Work Commission;
  - (d) the Human Rights Commission failed to accord procedural fairness to parties directly affected by the decision, in particular supported employees of Australian Disability Enterprises;
  - (e) it granted an exemption to Australian Disability Enterprises when they were not parties to the Secretary's application and the Secretary was not authorised to make an application on their behalf;
  - (f) it operated contrary to the objects of the *Disability Discrimination Act*; and
  - (g) it was infected by actual or apprehended bias.
16. The Applicant further submits that the decision is not preferable on grounds including that:
- (a) it perpetuated a violation of the human rights of supported employees and was not concordant with the objects of the *Disability Discrimination Act*;
  - (b) the Secretary and Australian Disability Enterprises previously had the benefit of a 12 month exemption during which time they did not comply with the terms and conditions on which it had been granted, and any further exemption was unjustifiable;
  - (c) it resulted in both the Human Rights Commission and the Fair Work Commission concurrently exercising jurisdiction in relation to the same subject matter and it would be preferable for the Human Rights Commission to vacate the field, leaving it to be dealt with by the Fair Work Commission;
  - (d) there was no evidence to substantiate the assertions made by the Secretary and Australian Disability Enterprises in support of the interim exemption as to the adverse effect on them of not granting it;
  - (e) the fact that the Secretary and Australian Disability Enterprises did not lodge the application until days before the expiry of the existing exemption was no reason to

grant the “*interim*” exemption, and the Human Rights Commission failed to ascertain and consider the effects of the exemption on supported employees.

17. The Secretary disputes each of the grounds on which the Applicant says the decision was either not correct or not preferable.
18. It is unnecessary that we consider in detail all of the grounds on which it is said the decision should be set aside. For the reasons set out below, we have decided that the decision must be set aside for want of procedural fairness. We will deal with some of the other grounds in passing.

### **The power to grant an exemption**

19. Section s 55 of the DDA provides:

*(1) The Commission may, on application by:*

*(a) a person:*

- (i) on that person's own behalf; or*
- (ii) on behalf of that person and another person or other persons; or*
- (iii) on behalf of another person or other persons; or*

*(b) 2 or more persons:*

- (i) on their own behalf; or*
- (ii) on behalf of themselves and another person or other persons; or*
- (iii) on behalf of another person or other persons;*

*by instrument grant to the person or persons to whom the application relates, as the case may be, an exemption from the operation of a provision of Division 1 or 2, as specified in the instrument.*

- (2) The Commission may, on application by a person to, or in respect of, whom an exemption from a provision of Division 1 or 2 has been granted under subsection (1), being an application made before the expiration of the period to which the exemption was granted, grant a further exemption from the operation of that provision.*



- (3) *An exemption granted under subsection (1), or further exemption, from the operation of a provision of Division 1 or 2:*
- (a) *may be granted subject to such terms and conditions as are specified in the instrument; and*
  - (b) *may be expressed to apply only in such circumstances, or in relation to such activities, as are specified in the instrument; and*
  - (c) *are to be granted for a specified period not exceeding 5 years.*
20. The first thing to be observed is that, by virtue of s 55(3)(c), any exemption is necessarily temporary. Although the Secretary originally sought, and was granted, a “*temporary*” exemption, and the Human Rights Commission refers to “*temporary exemptions*” on its website and in other publications, that expression appears to be no more than a convenient, if unnecessary, reference to the limitation of five years.
21. Whatever the Secretary meant by seeking an “*interim*” exemption, and even though the Human Rights Commission decision states “*the grant of an interim exemption is necessary to maintain the status quo ...*”, it is clear, from the terms of its decision, that the Commission decided to grant “*a short further exemption for four months*” or “*until such time as a decision was made with respect to the primary application, whichever is sooner*” (emphasis added). The Commission had that power by virtue of s 55(2). The fact that it was an exemption pending the resolution of the “*primary application*” did not, in our view, deprive the Commission of the power to grant it.

### **Was the decision to grant the exemption procedurally fair?**

22. There is no argument that, in granting a further exemption, the Human Rights Commission was making a decision that directly affected the interests of persons including supported employees and that it was bound to afford them procedural fairness.<sup>1</sup> In particular, an exemption extinguishes the right of supported employees to bring a complaint of unlawful discrimination under the *Disability Discrimination Act* against the Commonwealth or any Australian Disability Enterprise using, or proposing to use, the BSWAT to determine their

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<sup>1</sup> See *Annetts v McCann* (1990) 170 CLR 596, at para 2, per Mason CJ, Deane and McHugh JJ: “*It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment*”.

wages. The Secretary submits that, in the circumstances, the Human Rights Commission discharged its obligation.

23. For the following reasons, we are not satisfied that the Human Rights Commission did discharge that obligation.

24. The Secretary's letter of 21 April 2015 (the primary application) referred to the quarterly report for 1 November 2014 to 31 January 2015 which showed that "*significant progress has been made to date, although not all employees have made the transition within the 12 month period*" and that "*some ADEs have advised the Department it is unlikely that some of their employees will be transitioned to another wage assessment tool before the expiry of the AHRC exemption on 29 April 2015*". Further, that the Fair Work Commission was:

*... leading the development of a new productivity-based wage assessment tool" the design of which was currently being trialled and the conciliation conference was scheduled for 27 April 2015 to consider the results of the trial. The further exemption was sought "[t]o ensure the transition is able to continue in an orderly manner, and to provide reassurance to people with disability working in ADEs, and their families and carers.*

25. The Secretary's letter of 22 April 2015 shows that "*[t]he basis on which this interim exemption is sought is set out in the temporary exemption application*" submitted on 21 April 2015.

26. There is no argument, and the Human Rights Commission decision makes clear, that it did not seek the views of any party other than the Secretary (and, through the Secretary, the Australian Disability Enterprises).

27. The Human Rights Commission's Notice of Grant of Temporary Exemption, dated 30 April 2015, shows that, in making its decision, it 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.*

28. The Notice further records:

*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.*

*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.*

29. The Applicant submits that, in failing to seek the views of persons directly affected by the decision, in particular supported employees of Australian Disability Enterprises, the Human Rights Commission acted beyond its powers. Its decision was therefore invalid.

30. Ultimately, the content of the obligation to provide procedural fairness is affected by the statutory framework in which a decision is made and will vary depending upon the circumstances of the case.<sup>2</sup> As stated by Mason J, as he then was, in *Kioa v West* (1985) 159 CLR 550:

*What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting.*

31. The *Disability Discrimination Act* does not prescribe a process for considering an application for an exemption. The Human Rights Commission has published guidelines on *Temporary Exemptions under the Disability Discrimination Act 1992* which state that, in deciding whether to grant an exemption, it will consider:

- *Whether an exemption is necessary;*
- *The objects of the Disability Discrimination Act;*
- *The applicant's reasons for seeking an exemption;*
- *Submissions by interested parties; and*
- *All relevant provisions of the Disability Discrimination Act*

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<sup>2</sup> *Re Refugee Tribunal and Anor; Ex Parte Aala* [2000] HCA 57, para 17, 60.

32. The Guidelines state:

*The Commission's decision-making process will depend on the circumstances.*

*The Commission attempts, where practicable, to give persons who may be affected by the outcome of an exemption application an opportunity to comment on the application.*

33. Somewhat at odds with this statement, the criteria for deciding whether to grant an exemption are stated to include “*What are the views of persons or organisations who are interested in or who may be affected by the outcome of an application?*” and state:

*The Commission will consider submissions from interested parties.*

34. The Secretary submits that the views of interested parties were considered by the Human Rights Commission in that parties with an interest in the exemption in relation to the use of the BSWAT had the opportunity to make submissions prior to the grant of the original exemption in April 2014. Further, that while “*the time imperative*” meant it was not possible for the Commission to receive submissions on the interim application, the issues involved in that application substantially overlapped with those relevant to the grant of the original exemption and the primary application. It is argued that it was therefore not necessary to consider the views of interested parties on the interim application as they had been, and would be, taken into account by the Commission when making its decision on the primary application.
35. It is difficult to see how the Human Rights Commission could conclude that it was not *necessary* to seek the views of interested parties, in particular supported employees. The discriminatory effect of the BSWAT was not in dispute. The Commission itself considered with respect to the original application in 2013 that an exemption of only 12 months was reasonable in the circumstances.
36. As the notice of grant of the original exemption shows, there was some opposition to any period of exemption, and considerable opposition to the three years sought in the original application. Documents provided to the Tribunal by the Human Rights Commission show that many, if not most, of the submissions in response to the original application were written in October 2013. It could not be assumed that the views of the authors of these submissions remained the same, or that all interested persons made a submission at that

time. It could not be assumed that interested persons had no views with respect to the compliance of Australian Disability Enterprises with the conditions attached to the original exemption, a factor which may have been relevant to determining whether, and if so for how long, a further exemption should be granted.

37. The fact that the Human Rights Commission intended calling for submissions on the primary application (the closing date for which was 15 July 2015 according to the Commission's website) could not have any bearing on whether the views of interested persons should have been sought before a decision on the "*interim*" exemption was granted.

38. The original decision to grant an exemption for 12 months shows:

*There are currently 194 ADEs nationwide employing about 20,000 people with disability, in a range of industries including; packaging, manufacturing, catering, and horticulture. Of the 20,000 employees, approximately half are assessed using the BSWAT.*

39. Given that it appears that many Australian Disability Enterprises have now complied with the conditions imposed by the Human Rights Commission, the number of employees directly affected may have substantially reduced. However, it is reasonable to infer that a considerable number of supported employees remained potentially directly affected by the "*interim*" exemption.

40. The Applicant further submits, and it does not appear to be in dispute, that the Human Rights Commission had no evidence before it as to any adverse financial or other effect on the Secretary or Australian Disability Enterprises should the exemption lapse pending determination of the primary application. Nor did it have any evidence as to why it was unlikely that some employees would not be transitioned to another wage assessment tool before the expiry of the original exemption on 29 April 2015.

41. We accept that it was not *practicable*, in the time available, for the Human Rights Commission to seek the views of interested parties, but it was made so only because the Secretary did not seek a further exemption until 21 April 2015, eight days before the original exemption was due to expire. In circumstances where a considerable number of

individuals were potentially subject to continued discrimination, and the most recent submissions from those affected were over 12 months old, it is not proper for such considerations of practicability to effectively displace the responsibility of the Commission to give those individuals an opportunity to be heard on the application at hand.

42. The Secretary submits in the alternative that, even if the Tribunal finds the decision of the Human Rights Commission to grant the “*interim*” exemption invalid for want of procedural fairness, that defect has been cured by parties to the present proceedings participating in the hearing before the Tribunal in respect of the decision under review.
43. In support of this submission, the Secretary relies on the decision of Justice Flick in *Herring v Minister for Immigration and Citizenship* [2012] FCA 970. Mr Herring’s visa had been cancelled by reason of his substantial criminal record. In 2006, the Administrative Appeals Tribunal affirmed that decision. On the day that he was due to be deported, Mr Herring sought an extension of time in which to seek review by the Federal Court of the Tribunal’s decision. He asserted, among other things, a denial of natural justice. Flick J said at [18]:

*To the extent that Mr Herring seeks to rely upon an alleged denial of natural justice, any procedural unfairness that occurred in the initial decision making processes within the Department assumes little (if any) present relevance. Mr Herring exercised his right of review in the Administrative Appeals Tribunal and any former denial of procedural unfairness was thereby most probably cured.*

44. He went on to cite Mason J (as his Honour then was) in *Twist v Council of The Municipality of Randwick* [1976] HCA 58 where he said at [116]:

*[I]f the right of appeal is exercised and the appellate authority acts fairly and does not depart from natural justice the appeal may then be said to have cured a defect in natural justice or fairness which occurred at first instance.*

45. Flick J concluded that Mr Herring:

*... had every opportunity to contest before the Tribunal the factual basis upon which it was proceeding. There was no basis for concluding that he did not avail*

*himself of the “reasonable opportunity” to present his case for review by the Tribunal.*

46. Mr Herring’s case can be distinguished from the present case. He was the sole individual affected and, as Flick J said, had every opportunity to contest the matter before the Tribunal. In contrast, these proceedings concern a large number of individuals and organisations; it is by no means clear how many are aware of these proceedings.
47. Moreover, for reasons that are not clear, a submission and supporting documents filed by National Disability Services on behalf of Australian Disability Enterprises in these proceedings have not been provided to the Applicant or the AED Legal Centre and were only made available at the hearing of this application. They were filed with the Tribunal on 16 June 2015.
48. The National Disability Services’ documents describe the results of an “*NDS survey on ADE financial performance in 2013-2014*”; the “*cost impact of implementing the SWS in ADEs*”; and the results of an “*NDS survey of ADE members and their wage tool transition progress*”. Short of adjourning the present proceedings for sufficient time to enable the Applicant to consider and, if necessary, obtain its own expert evidence, the Tribunal could not be said to have acted fairly or to have cured any defect in the reviewable decision. In the context of an exemption that is due to expire no later than 28 August 2015, we do not propose to adjourn for that purpose.
49. We find that the Human Rights Commission did not accord affected persons a reasonable opportunity to be heard on the application for the “*interim*” exemption. It follows that the Human Rights Commission acted outside its jurisdiction and that its decision cannot stand.

**Did the decision contravene a provision of the *Supported Employment Services Award 2010* and was it beyond power for that reason?**

50. The Applicant contends that the decision contravenes, or in the alternative results in the contravention of, the *Supported Employment Services Award*, contrary to s 45 of the *Fair Work Act 2009*. We do not propose to deal with this argument in detail other than to say that we agree with the submissions for the Secretary that, even if the decision effectively

led to non-compliance with the Award (which is not conceded), that is a matter for the Fair Work Commission.

**Was the decision inconsistent with s 46PW(3) of the AHRC Act and beyond power for that reason?**

51. By s 46PW(3) of the *Australian Human Rights Commission Act*, the Human Rights Commission must notify its President if a complaint in writing is lodged with it alleging that a person has done “a discriminatory act under an industrial instrument”: s 46PW(1). If it appears to the President that the act is a discriminatory act, the President must, unless it is frivolous, vexatious, misconceived or lacking in substance, refer the industrial instrument to the Fair Work Commission.
52. The Applicant submits that, in failing to refer the application for an interim exemption to the Fair Work Commission, the President failed in her obligation and the decision cannot stand. We do not agree. Leaving aside whether an application for an exemption is a complaint that a person has done a discriminatory act, we do not read s 46PW(3) as affecting the President’s power either to inquire into a complaint or to grant exemptions from the operation of the *Disability Discrimination Act*.

**Was the decision biased?**

53. The Applicant submits that the decision to grant an “interim” exemption was affected by apprehended, if not actual bias. The Applicant submits that the Human Rights Commission invited the interim application with the intention of granting the exemption pending the resolution of the primary application. Further that, together with a letter dated 15 May 2015 in which the Commission advised the Secretary that it required further information in order to “fully consider” the primary application, it is clear that the Commission did not determine the application on its merits.
54. As we have found that the decision must be set aside for want of procedural fairness, it is not necessary to deal with this ground.



### **Was it the preferable decision?**

55. The Applicant argues on a number of grounds that the decision should be set aside on the ground that it was not the preferable decision in the circumstances.
56. The Secretary submits that a continuing exemption is preferable as “*earnest and continuing efforts*” are being made to transition away from the use of the BSWAT and, in the meantime, there should be some level of protection from potential liability to ensure a successful transition to new assessment tools. The Secretary submits that this further short exemption ensures a greater level of certainty for Australian Disability Enterprises and their supported employees who are transitioning from the BSWAT and would prevent any perceived legal ambiguity by a reversal of the exemption.
57. We appreciate that continuity and certainty are important. However, it is difficult to see that circumstances were so pressing that a short period without an exemption in place, while views were sought on the primary exemption application, would have created the level of uncertainty and ambiguity claimed. Interested parties could have been given a short period in which to make their views known. In the short period during which the original exemption had lapsed, Australian Disability Enterprises would have been exposed to claims of unlawful discrimination. We are told by the AED Legal Centre, and there is no evidence to the contrary, that no such claims have been made since the decision in *Nojin*. In those circumstances, the uncertainty caused by deferring the exemption while interested parties’ views were sought was unlikely to be great or long-lasting.
58. In our view, the preferable decision, in all the circumstances, would have been for the Human Rights Commission to seek the views at least of the parties to the original application as quickly as possible and, if it then determined that a further “*interim*” exemption was reasonable, to have granted it. While this would have meant a short lapse in the exemption, it would have more fairly balanced the interests of the Secretary and Australian Disability Enterprises with those of supported employees.

### **Fair Work Commission proceedings**

59. On 5 June 2015, the Fair Work Commission made orders by consent varying the SES Award, the effect of which was to remove the BSWAT as an approved wage assessment

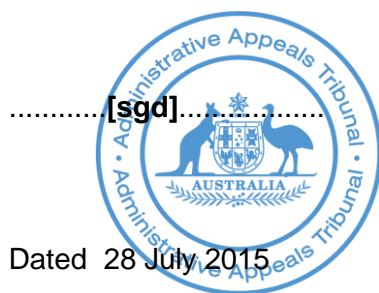
tool from the Award. The order required Australian Disability Enterprises, within one month, to inform the Fair Work Commission in writing of the approved wage assessment tool the Australian Disability Enterprises proposed to transition to. It allowed Australian Disability Enterprises to transition to that approved wage assessment tool by 31 October 2015. If an enterprise was unable to do so, the order provides that the Fair Work Commission may, on written application, grant an additional transitional period to close of business on 29 February 2016.

60. The effect of the consent order is to set a timetable for all Australian Disability Enterprises to transition to another approved wage assessment tool. On 25 June 2015, the Secretary of the Department of Social Services notified the Human Rights Commission that, as at 30 April 2015, only three Australian Disability Enterprises had not chosen an alternative approved wage assessment tool, down from 24 in the previous quarter; these three had informed the Department they had now chosen an alternative tool.
61. The Secretary advised that, in light of these developments, it wished to amend its application for a primary exemption by withdrawing its request for an exemption for a further 12 months and requesting instead an exemption to close of business on 29 February 2016, and that it be required to report on a quarterly basis up to and including that date.
62. Parties in these proceedings seemed to be in agreement that it is undesirable for two Commonwealth agencies to deal with the same subject matter at the same time. The Applicant contends that the Human Rights Commission should have vacated the field when it received the “*interim*” application. Be that as it may, we have to determine the application before us.

### **Conclusion**

63. For the reasons we have given, we find that the Human Rights Commission did not act in accordance with the requirements of procedural fairness in granting the exemption on 30 April 2015 and that its decision must be set aside.
64. The decision will be remitted to the Human Rights Commission for reconsideration in accordance with these reasons.

I certify that the preceding 64 (sixty-four) paragraphs are a true copy of the reasons for the decision herein of Deputy President J W Constance and Senior Member J F Toohey.



Date(s) of hearing	<b>14 July 2015</b>
Solicitor for the Applicant	<b>P French</b>
Respondent	<b>M Lindley</b>
Counsel for the Secretary	<b>P Knowles</b>
Solicitors for the Secretary	<b>H Dejean; Australian Government Solicitor</b>
AED Legal Centre	<b>K Wilson</b>
National Disability Services	<b>K Baker</b>