

**AUSTRALIAN HUMAN RIGHTS COMMISSION
DISABILITY DISCRIMINATION ACT 1992 (CTH), s 55(1)
NOTICE OF GRANT OF EXEMPTION**

Exemption

By this instrument, pursuant to section 55(1) of the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act), the Australian Human Rights Commission (Commission) grants an exemption from the operation of sections 15, 24 and 29 of the Disability Discrimination Act to the following Australian Disability Enterprises (ADEs):

1. Jiffy Services; and
2. Tasmanian Association of Disabled Persons Abilities Centre,

if at any stage, the Fair Work Commission grants that ADE a further transitional period pursuant to clause 14.6 of the Supported Employment Services Award 2010,

in the following terms:

Period of exemption

1. The term of the exemption is from the date of this instrument until the expiration of any further transitional period granted to the ADE by the Fair Work Commission pursuant to clause 14.6 of the Supported Employment Services Award 2010.

Conditions

2. It is a condition of the exemption that each ADE to which this exemption applies:
 - 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. Advise the Commission upon the filing of any application for a further transitional period pursuant to clause 14.6(b)(ii) of the Supported Employment Services Award 2010.
 - c. Advise the Commission of the outcome of any such application.
 - d. Provide such information to the Commonwealth to enable it to accurately and effectively report to the Commission as required under the conditions of the exemption granted by the Commission on 18 December 2015, attached as Annexure A.
 - e. Be compliant with any order of the Fair Work Commission in relation to the use of the BSWAT.

- f. Give consideration to ensuring that no disadvantage is suffered by any supported employee whose wages may be reduced as a result of the application of the Supported Wage System or alternative tool.

Dated this 22nd day of December 2015

A handwritten signature in black ink, reading "Gillian Triggs". The signature is written in a cursive style with a large, sweeping initial 'G' and a long, horizontal flourish at the end.

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

Reasons for Decision

1 Background

1. On 29 April 2014, the Australian Human Rights Commission (Commission) granted to the Commonwealth and all Australian Disability Enterprises (ADEs) using or proposing to use the Business Services Wage Assessment Tool (BSWAT), an exemption from the operation of sections 15, 24 and 29 of the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act) (Original Exemption). The decision granting this exemption is available on the Commission website at <http://www.humanrights.gov.au/departments-social-services-dss>.
2. The Original Exemption granted on 29 April 2014 expired on 29 April 2015.
3. On 21 April 2015 the Commonwealth applied, on its own behalf and on behalf of all ADEs, for a temporary exemption for a further 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 ADEs and their families and carers (Application).
4. On 21 April 2015 the Commission advised the Commonwealth that it would not be possible to make a decision on the Application by 29 April 2015 and that once the Original Exemption expired, there would be no exemption in place.
5. 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).
6. On 30 April 2015 the Commission granted an exemption to the Commonwealth and all ADEs using or proposing to use the BSWAT (Interim Exemption). The exemption was from the operation of sections 15, 24 and 29 of the Disability Discrimination Act for the period of four months, or until such time as a decision is made with respect to the Application, whichever is sooner, subject to certain conditions. The decision to grant the Interim Exemption was reviewed by the Administrative Appeals Tribunal (AAT) in a hearing on 14 July 2015.
7. Shortly after receipt of the Application the Commission published the Application and an Easy English explanation on its website and called for submissions. The date for submissions was ultimately extended to 23 October 2015. 35 submissions were received by the Commission. Most of the submissions were posted on the Commission's website.
8. On 15 May 2015 the Commission requested the Commonwealth provide further information in relation to specific aspects of the Application. Further requests for additional information were also made on 31 July 2015 and 1 September 2015.

9. These requests were published on the Commission's website and submissions were invited in response.
10. On 21 May 2015 the Commission received a request from National Disability Services (NDS) on behalf of its members to join the Application. The NDS is the peak industry body for non-government disability services. That request was granted. On 28 May 2015 the Commission received a submission from the NDS in support of the Application.
11. On 5 June 2015 the Fair Work Commission made an order by consent in proceedings AM 2013/30, an application to vary the Supported Employment Services Award 2010 (Award). The order provided for the variation of the Award to remove BSWAT as an 'approved wage assessment tool' under clause 14.4 of the Award and insert transitional provisions phasing out the use of BSWAT. The Award has been amended accordingly with the insertion of clause 14.6.
12. Clause 14.6 of the Award now provides as follows:
 - 14.6 Transitional arrangement
 - (a) The Business Services Wage Assessment Tool is no longer an approved wage assessment tool for the purpose of this clause. Continued use of the Business Services Wage Assessment tool under this clause is only permissible in terms of this transitional arrangement.
 - (b) A supported employment service that is using the Business Services Wage Assessment Tool may continue to use the Business Services Wage Assessment tool:
 - (i) until 31 October 2015 provided that within 1 month of the date of this variation the supported employment service indicates in writing to the Fair Work Commission its decision to transition to another approved wage assessment tool and the name of the tool it intends to transition to; and
 - (ii) for a further transitional period not extending past close of business, Monday 29 February 2016 granted by the Fair Work Commission following application in writing by the supported employment service.
13. On 19 June 2015 the Commission included notice of the Application in its e-bulletin emailed to all people signed up to the Commission's emailing list. The e-bulletin was also published on the Commission website.
14. On 25 June 2015, as a result of the Order of the Fair Work Commission, the Commonwealth amended its Application from a request for exemption for 12 months to an exemption to the close of business on 29 February 2016 to reflect the terms of that Order.
15. On 26 June 2015 the NDS provided further information in relation to the financial impact of the transition away from BSWAT on ADEs.
16. On 29 June 2015 the Commission was advised that NDS intended to commission KPMG to analyse the impact of increased wage costs incurred

by ADEs moving from the BSWAT to one of the other wage assessment tools available.

17. On 29 June 2015 the Commission published the amended application on its website and called for further submissions in relation to the Application and in response to the additional information provided by the applicants.
18. On 25 July 2015 the AAT set aside the Commission's decision to grant the Interim Exemption and remitted the matter to the Commission. The Interim Application has yet to be reconsidered by the Commission.
19. On 4 and 11 September 2015 the Commission received requests from two further ADEs to join the Application, namely Multitask Human Resource Foundation Ltd and Vincent Industries Inc. Those requests were granted.
20. On 11 and 15 September 2015 the Commission also received requests from Jiffy Services and Tasmanian Association of Disabled Persons Abilities Centre respectively. Those requests were granted.
21. On 15 September 2015 the Commission received an embargoed copy of the KPMG report, 'Assessing the impact of increasing wage costs on Australian Disability Enterprises'. The embargo was lifted on 30 September 2015 and the report loaded onto the Commission website with an invitation for further submissions on the report. No submissions were received. Submissions ultimately closed on 23 October 2015.
22. On 18 December 2015 the Commission granted a conditional exemption to the Commonwealth, National Disability Services on behalf of its members, Multitask Human Resource Foundation Ltd and Vincent Industries Inc, attached as Annexure A. The Commission omitted to include Jiffy Services and Tasmanian Association of Disabled Persons Abilities Centre in that exemption.

2 Consideration by the Commission

23. For the reasons set out in the decision of the Commission of 18 December 2015 in relation to the application for exemption dated 21 April 2015, it is reasonable to grant an exemption on the same terms as the exemption granted by the Commission on 18 December 2015, to Jiffy Services and Tasmanian Association of Disabled Persons Abilities Centre.

3 Avenues for review

24. 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 22nd day of December 2015

A handwritten signature in black ink, reading "Gillian Triggs". The signature is written in a cursive style with a large, sweeping initial 'G' and a long, horizontal flourish at the end.

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

ANNEXURE A

AUSTRALIAN HUMAN RIGHTS COMMISSION *DISABILITY DISCRIMINATION ACT 1992 (CTH)*, s 55(1) NOTICE OF GRANT OF EXEMPTION

Exemption

By this instrument, pursuant to section 55(1) of the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act), the Australian Human Rights Commission (Commission) grants an exemption from the operation of sections 15, 24 and 29 of the Disability Discrimination Act to:

1. the Commonwealth, and
2. the following Australian Disability Enterprises (ADEs):
 - a. members of the National Disability Services (NDS),
 - b. Multitask Human Resource Foundation Ltd, and
 - c. Vincent Industries Inc.

in relation to which the Fair Work Commission grants that ADE a further transitional period pursuant to clause 14.6 of the Supported Employment Services Award 2010,

in the following terms:

Period of exemption

1. The term of the exemption is for the following periods, whichever is applicable:
 - a. For an ADE in relation to which the Fair Work Commission has granted a further transitional period pursuant to clause 14.6 of the Supported Employment Services Award 2010, from the date of this instrument until the expiration of that further transitional period, and
 - b. For the Commonwealth, from the date of this instrument until the expiration of any further transitional period granted by the Fair Work Commission to any ADE pursuant to clause 14.6 of the Supported Employment Services Award 2010.

Conditions

2. It is a condition of the exemption that the Commonwealth:
 - a. Take all necessary steps to ensure the transition from the Business Services Wage Assessment Tool (BSWAT) to the Supported Wage System, or an alternative tool approved by the Fair Work Commission, as quickly as possible.

- b. Report to the Commission, on a monthly basis during the exemption period, as to:
 - i. The steps taken to ensure the transition from the BSWAT to the Supported Wage System, or an alternative tool approved by the Fair Work Commission, as quickly as possible.
 - ii. Whether any ADEs have applied to the Fair Work Commission for a further transitional period pursuant to clause 14.6(b)(ii) of the Supported Employment Services Award 2010.
 - iii. The status of any such application to the Fair Work Commission.
 - iv. The number of ADEs previously using BSWAT:
 - 1. with all workers using an alternative tool,
 - 2. with an alternative tool and some assessments completed,
 - 3. with an alternative tool, but have not commenced assessments,
 - 4. that have not identified an alternative tool,
 - 5. that no longer provide supported employment.
 - v. The number of supported employees who work at an ADE that had previously used BSWAT:
 - 1. that have been assessed under an alternative tool, and
 - 2. that are yet to be assessed by an alternative tool where the ADE:
 - a. has commenced assessments with an alternative tool, and
 - b. has NOT commenced assessments with an alternative tool.
 - vi. The percentage of supported employees who have transitioned to an alternative wage tool.
 - c. Give consideration to ensuring that no disadvantage is suffered by any supported employee whose wages may be reduced as a result of the application of the Supported Wage System or alternative tool.
3. It is a condition of the exemption that each ADE to which this exemption applies:
- 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. Advise the Commission upon the filing of any application for a further transitional period pursuant to clause 14.6(b)(ii) of the Supported Employment Services Award 2010.
- c. Advise the Commission of the outcome of any such application.
- d. Provide such information to the Commonwealth to enable it to accurately and effectively report to the Commission as required under this instrument.
- e. Be compliant with any order of the Fair Work Commission in relation to the use of the BSWAT.
- f. Give consideration to ensuring that no disadvantage is suffered by any supported employee whose wages may be reduced as a result of the application of the Supported Wage System or alternative tool.

Dated this 18th day of December 2015

A handwritten signature in black ink, appearing to read "Gillian Triggs". The signature is fluid and cursive, with a long horizontal flourish at the bottom.

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

Reasons for Decision

1 Background

1. On 29 April 2014, the Australian Human Rights Commission (Commission) granted to the Commonwealth and all Australian Disability Enterprises (ADEs) using or proposing to use the Business Services Wage Assessment Tool (BSWAT), an exemption from the operation of sections 15, 24 and 29 of the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act) (Original Exemption). The decision granting this exemption is available on the Commission website at <http://www.humanrights.gov.au/departments-social-services-dss>.
2. The Original Exemption granted on 29 April 2014 expired on 29 April 2015.
3. On 21 April 2015 the Commonwealth applied, on its own behalf and on behalf of all ADEs, for a temporary exemption for a further 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 ADEs and their families and carers (Application).
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11. On 5 June 2015 the Fair Work Commission made an order by consent in proceedings AM 2013/30, an application to vary the Supported Employment Services Award 2010 (Award). The order provided for the variation of the Award to remove BSWAT as an 'approved wage assessment tool' under clause 14.4 of the Award and insert transitional provisions phasing out the use of BSWAT. The Award has been amended accordingly with the insertion of clause 14.6.
12. Clause 14.6 of the Award now provides as follows:
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 - (i) until 31 October 2015 provided that within 1 month of the date of this variation the supported employment service indicates in writing to the Fair Work Commission its decision to transition to another approved wage assessment tool and the name of the tool it intends to transition to; and
 - (ii) for a further transitional period not extending past close of business, Monday 29 February 2016 granted by the Fair Work Commission following application in writing by the supported employment service.
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20. On 15 September 2015 the Commission received an embargoed copy of the KPMG report, 'Assessing the impact of increasing wage costs on Australian Disability Enterprises'. The embargo was lifted on 30 September 2015 and the report loaded onto the Commission website with an invitation for further submissions on the report. No submissions were received. Submissions ultimately closed on 23 October 2015.

2 Consideration by the Commission

21. The reasons for granting the exemption are set out below. In deciding whether to grant the exemption, the Commission considered all of the relevant circumstances to determine whether it is reasonable to grant the exemption. In doing so, the Commission has also considered the following:
 - a. whether an exemption is necessary;
 - b. the objects of the Disability Discrimination Act;
 - c. the applicant's reasons for seeking an exemption;
 - d. submissions by interested parties, including arguments for and against granting the exemption; and
 - e. all relevant provisions of the Disability Discrimination Act.
22. In making its decision, the Commission had regard to the following documents:
 - a. the application for exemption received on 21 April 2015,
 - b. quarterly reports provided to the Commission by the Commonwealth in compliance with the conditions of the Original Exemption,
 - c. responses to requests for further information from the Commonwealth in relation to the Application,
 - d. all documents relating to the Original Exemption application including:
 - i. the application for exemption,
 - ii. the submissions received by the Commission,
 - iii. the response to the Commission's request for additional submissions,

- iv. *Nojin v the Commonwealth* [2012] FCAFC 192,
 - v. *Commonwealth Of Australia v Stawell Intertwine Services Inc And Gordon Prior and Commonwealth Of Australia v Elizabeth Nojin On Behalf Of Michael Nojin Coffs Harbour Challenge Inc* [2013] HCATrans 157 (High Court of Australia, Crennan, Kiefel and, Keane JJ, 10.05.2013),
 - vi. the Supported Employment Services Award 2010,
 - vii. the Disability Discrimination Act 1992 as it stood at the date of the Nojin decision and at the date of the application,
 - viii. the Commission’s Guidelines on Temporary Exemptions under the Disability Discrimination Act,
 - ix. Concluding Observations of the Committee on the Rights of Persons with Disabilities: Australia 2013,
 - x. *Clarke v Catholic Education Office* (2003) 202 ALR 340,
 - xi. *Catholic Education Office v Clarke* (2004) 138 FCR 121,
 - xii. *Hurst v Queensland* (2006) 151FCR 562,
 - xiii. Disability Services Standards (FaCSIA) 2007,
 - xiv. Guide to Good Practice Wage Determination,
 - xv. CRS Australia. Business Services Wage Assessment Tool report – sample,
 - xvi. CRS Australia. Business Services Wage Assessment Tool – Supervisor’s Wage Tool Assessment Guide,
 - xvii. CRS Australia. Business Services Wage Assessment Tool – Supervisor’s Assessment Workbook, and
 - xviii. CRS Australia. Business Services Wage Assessment Tool – Worker Information Guide.
- e. documents filed in the Fair Work Commission proceeding AM2013/30 as set out in the Respondent’s schedule of documents,
 - f. Orders of the Fair Work Commission proceeding AM2013/30.
 - g. documents filed in the AAT proceeding 2014/2570 as set out in the Respondent’s schedule of documents,
 - h. documents filed in the AAT proceeding 2015/2158 as set out in the Respondent’s schedule of documents, and
 - i. the decision of the AAT in proceeding 2015/2158 [2015] AATA 548.

3 Relevant law

3.1 *Disability Discrimination Act 1992*

23. The Commission may grant exemptions from the provisions of Division 1 or 2 of the Disability Discrimination Act.¹ An exemption may be granted subject to terms and conditions, and may be expressed to apply only in particular circumstances, or to particular activities.² Exemptions are to be granted for a specified period not exceeding five years.³ It is not unlawful

¹ Section 55(1) *Disability Discrimination Act 1992* (Cth).

² Section 55(3)(a) and (b) *Disability Discrimination Act 1992* (Cth).

³ Section 55(3)(c) *Disability Discrimination Act 1992* (Cth).

for a person who has been granted an exemption to act in accordance with the exemption.⁴

24. It is unlawful for an employer to discriminate against an employee on the ground of the employee's disability, in the terms and conditions of employment that the employer affords the employee.⁵ It is also unlawful to discriminate on the ground of disability in the provision of goods and services⁶ and in the administration of Commonwealth laws and programs.⁷ The relevant provisions are located in Divisions 1 and 2 of Part 2 of the Disability Discrimination Act.

3.2 Technical aspects of the application

25. A number of submissions have objected to the exemption on the basis that:
 - a. the Commonwealth has no standing to seek the exemption on behalf of all ADEs, and
 - b. pursuant to s 46PW(3) of the *Australian Human Rights Commission Act 1986* (Cth)(AHRC Act), the Commission should refer the matter to the Fair Work Commission.

(a) Standing

26. Pursuant to s 55(1)(b) of the Disability Discrimination Act the Commission may grant an exemption on application by:
 - (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;
27. On 21 April 2015 the Commonwealth purported to make its Application for an exemption on behalf of all ADEs using BSWAT.
28. On 1 September 2015 the Commission asked the Commonwealth to 'confirm the Commonwealth is authorised to make the application on behalf of ADEs that are still using the BSWAT and are not members of the NDS'.
29. On 3 September 2015 the Commonwealth responded as follows:

The Secretary may make the application on behalf of the Commonwealth and Australian Disability Enterprises (ADEs).

⁴ Section 58 *Disability Discrimination Act 1992* (Cth).

⁵ Section 15 *Disability Discrimination Act 1992* (Cth).

⁶ Section 24 *Disability Discrimination Act 1992* (Cth).

⁷ Section 29 *Disability Discrimination Act 1992* (Cth).

The Department of Social Services has asked ADEs which were paying wages using the BSWAT on the date of the exemption application and which are not members of National Disability Services, to join the Commonwealth's application for a temporary exemption.

30. Shortly thereafter the Commission received requests from two ADEs to join the Application.
31. The Commonwealth has not provided evidence of its authorisation to make Application on behalf of all ADEs using the BSWAT.
32. However, as indicated above, NDS sought and was joined as a party to the Application on the behalf of its members. The Commission is satisfied that the NDS has authority to bring the Application on behalf of its members. In addition, Multitask Human Resource Foundation Ltd, and Vincent Industries Inc. have been joined as applicants.
33. Therefore, the Applicants for the exemption are:
 - a. the Commonwealth on its own behalf,
 - b. the NDS on behalf of its members,
 - c. Multitask Human Resource Foundation Ltd, and
 - d. Vincent Industries Inc.

(b) Referral to Fair Work Commission

34. A number of submissions contend that due to the provisions of s 46PW(3) of the AHRC Act 'the matter' should be referred to the Fair Work Commission.
35. Part IIC of the AHRC Act provides for the referral of discriminatory awards and industrial instruments to other bodies. Section 46PW relates specifically to the referral of industrial instruments to the Fair Work Commission.
36. Pursuant to s 46PW the following is required before the President must refer an industrial instrument to the Fair Work Commission:
 - a. the making of a complaint, in writing, pursuant to s 46PW alleging a person has done a discriminatory act under an industrial instrument, and
 - b. it appears to the President that the act would be unlawful under Part 2 of the Disability Discrimination Act but for the fact it was done in direct compliance with an industrial instrument.
37. The Application is for an exemption pursuant to s 55 of the Disability Discrimination Act. It is not a 'complaint' within the meaning of AHRC Act and in particular, s 46PW of the AHRC Act. Section 46PW therefore does not apply and there is no obligation on the President of the Commission to refer 'the matter' to the Fair Work Commission.

38. Once an application is made under s 55 of the Disability Discrimination Act the Commission must consider the application and either grant an exemption in appropriate terms or refuse the application. The fact that the subject matter of the exemption is also being considered by the Fair Work Commission does not absolve the Commission of this obligation.

4 Necessity

39. For an exemption to be necessary there must be at least an arguable case that the conduct that is the subject of the application constitutes discrimination contrary to the Disability Discrimination Act.
40. In considering if an exemption is necessary the Commission has considered matters including:
- a. Whether the conduct is unlawful discrimination under the Disability Discrimination Act;
 - b. Whether any of the permanent exemptions to the Disability Discrimination Act apply.

4.1 Unlawful discrimination

41. In the Original Exemption decision the Commission found that:
- in light of the comments and findings of the Full Court, in relation to the unreasonableness of the competency aspect of the BSWAT,⁸ the Commission considers it is at least arguable that the use of the competency part of the BSWAT may discriminate against all supported employees. In these circumstances the Commission considers an exemption would be necessary to allow the ongoing use of the BSWAT for all supported employees.
42. The Commission remains of this view.

4.2 Permanent exemptions

43. Division 5 of the Disability Discrimination Act sets out a number of permanent exemptions, the effect of which is that discrimination covered by these permanent exemptions will not be unlawful.

⁸ *Nojin v Commonwealth of Australia* [2012] FCAFC 192 at [63], [70], [76], [91] [107], [109], [127], [134]-[139], [145], [254] [258].

44. One such permanent exemption is for ‘acts done under statutory authority’.⁹ Section 47 of the Disability Discrimination Act relevantly provides:
- (1) This Part does not render unlawful anything done by a person in direct compliance with:
- ...
- (c) an instrument (an industrial instrument) that is:
- (i) a fair work instrument (within the meaning of the Fair Work Act 2009);
45. The BSWAT was, and is relevantly, an ‘approved wage assessment tool’ under clause 14.4 of the Award. The Award is a ‘fair work instrument’¹⁰ and therefore an industrial instrument within the meaning of s 47(1)(c)(i) of the Disability Discrimination Act.
46. There is however conflicting judicial authority about the scope of this exemption and whether the discriminatory act must be mandated by the industrial instrument for it to apply.¹¹ The use of the BSWAT tool is not mandated under the Award and it is therefore at least arguable that its use is not in direct compliance with the Award and that the permanent exemption does not apply.

5 The objects of the Disability Discrimination Act

47. The Commission has had regard to the objects of the Disability Discrimination Act, set out in section 3. In broad terms, these objects are to:
- a. eliminate, as far as possible, discrimination against persons on the ground of disability in a range of areas, including work;
 - b. ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and
 - c. promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.
48. Where an exemption is sought that would allow conduct that is inconsistent with, or would undermine the objects of the Disability Discrimination Act, this weighs against the granting of an exemption. It does not of itself prevent the granting of an exemption. The very nature of an exemption is to allow conduct that is, or is likely to be, unlawful discrimination. The test in deciding if that conduct should be allowed to occur, is whether in all the circumstances it is reasonable to allow it to occur for a defined period.

⁹ *Disability Discrimination Act 1992* (Cth) section 47.

¹⁰ *Fair Work Act 2009* (Cth) section 12.

¹¹ See *Waters v Public Transport Corporation* (1991) 173 CLR 349, *Gibbs v Commonwealth Bank of Australia* (1996) EOC 92-977, [1996] HREOCA 34, *Howe V Qantas Airways Limited* [2004] FMCA 242 and *Nojin v Commonwealth of Australia* [2012] FCAFC 192 at [267].

49. In considering this issue, the Commission has regard to:
 - a. The reasonableness of the exemption sought – the Commission will weigh up the nature and extent of the discriminatory effect against the reasons advanced in favour of an exemption;
 - b. Whether an exemption could be granted subject to terms and conditions which further the objects of the Disability Discrimination Act (see below).

6 Reasonableness of the exemption

50. The Commission has assessed the reasonableness of the Application and has weighed the discriminatory effect of a further exemption against the reasons for the exemption.

6.1 Discriminatory effect of the exemption

51. The purpose and effect of an exemption is to make lawful, conduct that would otherwise be unlawful discrimination.
52. In the current circumstances, an exemption would make it lawful for the purposes of the Disability Discrimination Act, for an ADE to continue to assess the level of wages payable to a supported employee using the BSWAT tool in a manner that may be discriminatory.
53. Based on the reports provided to the Commission pursuant to the Original Exemption, there are still 3192 supported employees whose wages are assessed under the BSWAT tool that would be affected by the exemption.
54. Although the Commission requested details of the changes in wages of those who have been reassessed using an alternative tool, there is no direct evidence before the Commission as to the degree to which any of the 3192 employees whose wages are assessed under BSWAT have been or are being underpaid. Some evidence has been provided by the NDS as to the increase in the wages bill of a small sample of ADEs. The following evidence was submitted by the NDS:¹²
 - a. Organisation one – total wages bill has increased by 28% or \$154,440 per month.
 - b. Organisation three – estimates that total wage costs will increase by 20%.
 - c. Organisation four – The ADE has completed 166 Assessments. The annual wages bill has increased by \$70,000. If it is assumed the increase is from the assessments, it equates to an additional \$421 per assessment per year.

¹² NDS Additional Submission 26 June 2015 – Attachment B

- d. Organisation five – wage costs are estimated to increase by around 30%.
- 55. On this evidence it might be estimated that the average difference in payment of wages under the BSWAT when compared to tools is an underpayment of between 20%-30% and that this is reflective of the level of underpayment that may be experienced by supported employees being paid under BSWAT. It is however difficult to draw firm conclusions from this small sample of ADEs.
- 56. As submitted by those opposed to the exemption, an exemption would allow this unlawful discrimination to continue and in that regard would be contrary to the objects of the Disability Discrimination Act.
- 57. Submissions in favour of the exemption note that for some parents and their children, the discriminatory effect of underpayment of wages is not as important as the other services and benefits being provided by the ADEs.

6.2 Reasons for the exemption application

- 58. The reasons for the Application can be summarised as follows:
 - a. To enable the transition from BSWAT to an alternative tool to continue in an orderly manner and without the disruption that may flow if the conduct of assessing wages using BSWAT remains unlawful. This includes ADEs potentially being in breach of the National Standards for Disability Services and as such may lose funding and put jobs at risk;
 - b. To avoid the closure of ADEs due to additional financial pressure arising from the transition under tight/constrained timeframes; and
 - c. To provide reassurance and certainty for supported employees and their family and carers.
 - 59. These reasons were echoed by the submissions received in support of the Application. Of the 36 written submissions received by the Commission, 31 supported the Application. Of these, 24 were from ADEs and 7 were from family and carers of supported employees.
 - 60. Of the 36 submissions received, 5 disagreed with these reasons and submitted that the exemption should not be granted.
- (a) *Orderly transition to an alternative tool*
- 61. The Commonwealth and the NDS submit, and the Commission accepts, that while progress has been made in transitioning to an alternative tool, there is still work to be done and more time is needed to conduct the remaining assessments with an alternative tool.
- (i) *Time to conduct new assessments and to transition to an alternative tool*
- 62. 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.

63. It appears that while some progress has been made and 63% of supported employees have been assessed with alternative tools, there are still numerous employees that need to be re-assessed, 3192 as at 31 July 2015.
64. The submissions from ADEs indicate that logistically, conducting the number of assessments that needed to be done could not be done in the number of business days available in the last 12 months.
65. Further, it appears that many of the ADEs have transitioned to two tools, Greenacres and SkillsMaster, 45 of 60 that responded to an NDS survey. While evidence was not provided, the Commonwealth submitted that high demand for the two most popular wage tools, SkillsMaster and Greenacres, has meant extensive delays in the implementation of these tools by organisations seeking to use them.
66. The KMPG report indicates that of the 9293 supported employees in a sample of supported employees analysed by them in terms of hours worked, 55% are assessed under the Greenacres tool and 10% with SkillsMaster. However, these figures do not indicate how many have transitioned to these tools in the last 12 months.
67. In its third quarterly report to the Commission the Commonwealth indicated:

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.
68. On balance, although some submit that there is no evidence of delays with these two tools, it is reasonable to accept that the sudden increase in the numbers of assessments to be conducted with these tools would be likely to cause some delays in those ADEs that have chosen these tools.
69. As at 31 July 2015 there were still 3192 supported employees being paid pursuant to assessments originally conducted before the use of BSWAT was found to be unlawful. As the Commission found in the Original Exemption, while alternative tools are immediately available, new assessments can not be done instantly. In these circumstances it is reasonable to allow a further short period to allow the remainder of the assessments to be done.

(ii) Certainty and stability

70. The applicants note that in addition to the transition away from BSWAT, there are other ongoing processes impacting on ADEs. These include transition to the National Disability Insurance Scheme, continuing work in the Fair Work Commission for the development of a new wage assessment tool and the 4 yearly review of the Award. They submit that in

these circumstances an exemption will provide the necessary stability and certainty for ADEs to continue to focus on the transition without being distracted by the impacts of the payment of wages pursuant to BSWAT being unlawful discrimination.

71. The Commission also accepts there is a risk that an ADE without an exemption from the Disability Discrimination Act that continues to use BSWAT may be assessed as not conforming with legislated quality assurance requirements, namely the National Standards for Disability Services (Standards) and as such may lose its funding under the *Disability Services Act 1986* (Cth).
72. In its response of 24 August 2015 the Commonwealth clarified the situation in relation to the potential breach. The Commonwealth indicated that there are a range of possible responses or consequences to non conformance with the requirements of the Standards. One such response is for a declaration by the Minister that they are not meeting the standards and are consequently in breach of the condition of the grant.
73. While, the Commission is not satisfied the use of BSWAT without an exemption will necessarily translate into closure of the ADE and job losses, it does accept it will likely lead to uncertainty for the ADEs regarding their funding in circumstances where, on the evidence from the NDS, many are already operating in uncertain financial circumstances.

(b) *Financial viability of ADEs*

74. As indicated above, all submissions were received before the KPMG report was provided by the NDS. Although the Commission posted the report on its website and invited further submissions, no submissions were received.
75. The Applicants claim that transition from BSWAT has increased financial pressure on ADEs for the following reasons:
 - a. New assessments with alternative tools have increased wages payable by ADEs. On the evidence available, these figures may range from 20-30%.
 - b. Costs of adoption of a new tool including:
 - i. the cost of purchasing the new tool,
 - ii. adaptation of their information management systems,
 - iii. training of staff in use of the new tool, and
 - iv. conducting the wage assessments under the new tool.
76. It is not contended by those who oppose the exemption that the transition to a new tool will not lead to increased wage costs for the ADEs. Indeed the purpose of the transition is to ensure fair wages for those that have been underpaid due to assessments under BSWAT. Rather, those that oppose the exemption submit that:

- a. There is no evidence to substantiate the assertions made by the Commonwealth and some ADEs that non-discriminatory wage setting would threaten the viability of ADEs;
 - b. There are sufficient resources to assist with any reforms and transition to a non-discriminatory wage assessment tool;
 - c. Financial viability should not come at the cost of unfair/discriminatory wages.
77. The KPMG report, prepared at the request of the NDS, uses a range of scenarios to test the impact of a range of increases in supported employee wage costs on ADE's profitability and viability. The report does not examine the actual wage increases that arise from the transition, but assumes a wage increase of varying levels and uses those levels for the different scenarios. The report concluded the following:

It is evident that the majority of ADE providers are currently reporting losses and increases in supported employee wages would likely have a significant impact on the profitability of such organisations. Average supported employee wage costs have increased over recent years and this trend may be expected to continue as provider's transition from the BSWAT assessment tool to other wage assessment tools.

There is a direct relationship between supported employee wage costs and organisational profitability and with increased wage costs being likely in the future, ADE providers will need to successfully manage this by examining aspects of their business models, including examining their costs and cost structures to improve efficiency (costs of support and supervision, and costs of production) and examining their revenue sources and pricing of the goods and services they provide with a view to maximising revenues from a range of different sources. Broader examination of the profitability and sustainability of the suite of goods and service they offer to market may also be necessary with a view to moving to higher value and more sophisticated production. Any changes resulting from this examination may have implications for employment of people with disability, including the types of jobs that may be available, and the level of employment ADEs are able to offer.

78. In relation to wage pressure the report specifically found:

In the event of a 20 per cent increase or by doubling supported employee wage costs:

- Total supported employee wage costs would increase from \$74.96m to \$89.25m for a 20 per cent increase and to \$146.42m in the event of doubling supported employee wages
- The average loss per organisation would increase from \$20.0k to \$188.1k for a 20 per cent supported wage increase and to \$860.7k by doubling wage costs
- The number of loss making organisations would increase from 56 per cent to 74 per cent for a 20 per cent increase and up to 93 per cent in the event of a doubling of wages

- The ADE providers average loss per supported employee would also increase considerably in the event of doubling supported employee wages
 - The number of employees in loss making organisations would increase from 41 per cent to 77 per cent for a 20 per cent increase in supported wage costs and up to 97 per cent if supported wages doubled
79. The Commission is satisfied that increased wages are likely to impact on the financial viability of the ADEs and that a 20% wage increase will:
- a. increase the number of ADEs making a loss to 74%,
 - b. increase the number of supported employees working in loss making ADEs to 77%,
 - c. require the ADEs to make the necessary adjustments to their business.
80. Those opposing the exemption submit that the Commonwealth has provided funding to assist ADEs with the increased costs. They point to the announcement by the Commonwealth on 21 August 2014 of the provision of a \$173 million funding package.
81. On 3 September 2015 the Commonwealth provided the following further information in relation to the funding package:
- The \$173 million funding package consisted of three components, of which \$141 million was set aside for wage supplementation. Wage supplementation will be provided to ADEs moving from a competency-based wage to the Supported Wage System (SWS) to cover wage increases. Once the new wage assessment tool is determined through the Fair Work Commission process, supplementation will be extended to cover this tool as well.
- No wage supplementation has been paid as yet as the implementation approach is still being finalised. Payments are expected to commence before the end of the 2015 calendar year.
82. The Commonwealth has advised the Commission that at the date of this instrument those payments have not commenced.

(c) *Certainty and clarity for supported employees and their family and carers.*

83. The Commission notes the submissions, made by some parents of children who are supported employees that the payment of a fair wage is of less importance to them and their children than the ancillary benefits of that employment. These benefits include emotional and psychological wellbeing, training and development, development of social skills, care, accommodation and respite for the parents.
84. All submissions in favour of the exemption believe the increased costs arising from transition to an alternative tool will risk the closure of ADEs and/or the loss of employment services provided by ADEs with consequent loss of those services for their children. Two of the submissions drew on personal experience as a past board member of an ADE and the current Acting Chief Operating Officer of an ADE. These views are supported by

the evidence from the NDS and the report from KPMG. The KPMG report suggests that with a 20% increase in wages, 74% of AEDs will be operating at a loss, without changes to their businesses. The report also notes that any changes made to deal with the increased costs:

may have implications for employment of people with disability, including the types of jobs that may be available, and the level of employment AEDs are able to offer.

85. One submission notes that reduction in these services will mean thousands of older parents will not be able to provide the care they currently do.
86. Many believe the cost of providing alternative services to their children will be significantly more than the cost of providing those employment services and that they or their children will be forced to pay for those services.
87. As indicated above, the Commission accepts that the transition from BSWAT to an alternative tool has likely had and will continue to have a significant impact on the financial viability of AEDs. The Commission notes that the Commonwealth has taken some steps to ensure wage supplementation is available to the AEDs so they may continue with their services. As at the date of this instrument, the funding had not been distributed. In these circumstances the concerns of the parents in relation to the possible closure of AEDs and/or loss of services is reasonable and accepted.

7 Conclusion

88. On balance the Commission considers it is reasonable to grant an exemption for a short period, subject to conditions, to reflect the terms of the Fair Work Commission's transitional provisions.
89. The Commission considers the exemption, on the terms granted, will provide the greatest level of certainty and clarity for all stakeholders, will allow additional time for new assessments to be conducted and will limit the discriminatory effect of the exemption.
90. The Commission is of the view that in the current circumstances it is reasonable to grant an exemption:
 - a. to an ADE that has been or is granted a further transitional period by an order of the Fair Work Commission pursuant to clause 14.6(b)(ii) of the Award, for such period as granted in that order; and
 - b. to the Commonwealth, for the period of any further transitional period granted to any ADE by the Fair Work Commission pursuant to clause 14.6(b)(ii) of the Award.
91. If no further transitional periods are granted by the Fair Work Commission there will be no exemption.

92. 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.

8 Avenues for review

93. 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 18th day of December 2015

A handwritten signature in black ink, appearing to read 'Gillian Triggs', with a stylized flourish at the end.

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