

Chapter 1

Introduction

1.1 On 19 June 2014, the Senate referred the Business Services Wage Assessment Tool Payment Scheme Bill 2014 (Bill) and the Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014 (Consequential Bill) to the Community Affairs Legislation Committee (committee) for inquiry and report by 26 August 2014.¹ The reporting date was subsequently extended until 27 August 2014.²

Background

1.2 Australian Disability Enterprises (ADEs) are generally not-for-profit organisations, which are funded by the Commonwealth to provide employment opportunities to people with moderate to severe disability (supported employees). Across Australia, there are 193 ADEs providing employment opportunities to approximately 20,000 supported employees.³

1.3 The wages of supported employees are assessed in accordance with the *Supported Employment Services Award 2010* (MA000103) (Federal Award). The Federal Award provides for:

- an employee to be graded by the employer on appointment, having regard to the employee's skills, experience and qualifications;⁴ and
- an employee with disability to be paid a percentage of the relevant grade rate, as assessed under an 'approved wage assessment tool' chosen by a supported employment service.⁵

1.4 The Business Services Wage Assessment Tool (BSWAT) is one of 30 'approved wage assessment tools',⁶ and the most commonly used wage assessment tool for supported employees. It assesses the productivity and competency of a

1 *Journals of the Senate*, No. 33—19 June 2014, pp 914–916.

2 *Journals of the Senate*, No. 46—26 August 2014, p. 1289.

3 Department of Social Services, 'Australian Disability Enterprises', available at: <http://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-service-providers/australian-disability-enterprises> (accessed 24 July 2014).

4 The employee is graded with reference to Schedule B—Classifications of the *Supported Employment Services Award 2010* (MA000103) (Federal Award): clause 14.1.

5 Clauses 14.2 and 14.4 of the Federal Award.

6 Clause 14.4(b) of the Federal Award.

supported employee, with the scores for each of these two components combined to determine an overall pro-rata wage rate.⁷

Federal Court of Australia challenge

1.5 In 2012, two supported employees with intellectual disabilities took action in the Federal Court of Australia (Federal Court), claiming that, by using the BSWAT to measure their work contribution and assess their wage, their employers were discriminating against them, compared to supported employees with physical disabilities (who, owing to a lack of intellectual impairment, could achieve higher scores under the BSWAT).⁸

1.6 The Full Court of the Federal Court agreed, holding that the ADEs concerned had contravened section 15 of the *Disability Discrimination Act 1992* (Disability Discrimination Act).⁹ In finding for the supported employees, Justice Buchanan found the criticisms of the BSWAT 'compelling':

I can see no answer to the proposition that an assessment which commences with an entry level wage, set at the absolute minimum, and then discounts that wage further by reference to the competency aspects built into BSWAT, is theoretical and artificial. In practice, on the evidence, those elements of BSWAT have the effect of discounting even more severely, than would otherwise be the case, the remuneration of intellectually disabled workers to whom the tool is applied. The result is that such persons generally suffer not only the difficulty that they cannot match the output expected of a Grade 1 worker in the routine tasks assigned to them, but their contribution is discounted further because they are unable, because of their intellectual disability, to articulate concepts in response to a theoretical construct borrowed from training standards which have no application to them.¹⁰

1.7 The High Court of Australia subsequently refused the Commonwealth's applications for special leave to appeal the Federal Court's decision, stating 'we see no reason to doubt the conclusions of the Full Court'.¹¹

Application to the Australian Human Rights Commission

1.8 In September 2013, the Department of Social Services (Department), which developed the BSWAT, applied to the Australian Human Rights Commission

7 Department of Social Services, 'Wage assessments in Australian Disability Enterprises', available at: <http://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/wage-assessments-in-australian-disability-enterprises> (accessed 24 July 2014).

8 *Nojin v Commonwealth of Australia* [2012] FCAFC 192 at para 1 per Buchanan J.

9 *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

10 *Nojin v Commonwealth of Australia* [2012] FCAFC 192 at para 142 per Buchanan J.

11 *Commonwealth of Australia and Anor v Prior; Commonwealth of Australia v Nojin and Anor* [2013] HCATrans 101 (10 May 2013) per Crennan J.

(AHRC) for a three-year exemption from the application of certain provisions of the Disability Discrimination Act.¹²

1.9 In its application, the Department stated that the exemption was being sought to address the implications of the Federal Court decision, and would apply 'while alternative wage setting arrangements are being considered, devised and/or established and implemented by [the Department]'.¹³

1.10 On 29 April 2014, following public consultations,¹⁴ the AHRC granted the Commonwealth and all ADEs a one-year exemption, to allow the payment of wages to supported employees, based on assessments already conducted using the BSWAT. The grant was subject to conditions, one of which was the requirement for the Commonwealth to:

- (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.¹⁵

Purpose and key provisions of the bills

1.11 The Australian Government is currently in the process of developing a new 'wage assessment process'.¹⁶ The bills therefore represent an interim measure, designed to reassure supported employees, their families and carers:

...by removing perceived liability that could impact the ability of [ADEs] to deliver ongoing employment opportunities.¹⁷

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- 12 On behalf of the Commonwealth, the application sought exemption from section 29 (administration of Commonwealth laws and programs) of the *Disability Discrimination Act 1992* (Disability Discrimination Act); on behalf of Australian Disability Enterprises, the application sought exemption from sections 15 (discrimination in employment) and 24 (goods, services and facilities) of the Disability Discrimination Act.
 - 13 Department of Social Security, 'Application for Temporary Exemption under Section 55 of the *Disability Discrimination Act 1992*', 5 September 2013, p. 1, available at: <https://www.humanrights.gov.au/sites/default/files/FaHCSIA%20-%20DDA%20Exemption%20Application.pdf> (accessed 24 July 2014).
 - 14 The consultations included a call for submissions and requests for further information. Over 100 submissions and four responses to requests for further information were received by the Australian Human Rights Commission (AHRC).
 - 15 AHRC, '*Disability Discrimination Act 1992* (CTH), s 55(1), Notice of Grant of a Temporary Exemption', p. 1, available at: https://www.humanrights.gov.au/sites/default/files/20140429_Notify_of_Exemption_BSWAT.pdf (accessed 24 July 2014). The Supported Wage System is the second 'approved wage assessment tool' owned by the Australian Government and used in mainstream employment.
 - 16 The Hon. Kevin Andrews MP, Minister for Social Services (Minister), and Senator the Hon. Mitch Fifield, Assistant Minister for Social Services, 'Payment scheme for workers assessed under the Business Services Wage Assessment Tool', Joint Media Release, 15 January 2014.
 - 17 The Minister, *House Hansard*, 5 June 2014, p. 1.

Business Services Wage Assessment Tool Payment Scheme Bill 2014

1.12 The Bill seeks to establish a payment scheme for supported employees with intellectual disability in ADEs, who previously had their wages assessed under the BSWAT (BSWAT Payment Scheme).¹⁸ This purpose is primarily achieved through:

- Part 2 of the Bill, which outlines the key elements of the BSWAT Payment Scheme; and
- Part 3 of the Bill, which sets out how a supported employee may obtain a payment under the BSWAT Payment Scheme.

1.13 Part 4 of the Bill describes the process by which a person can be appointed as a nominee for a supported employee who is participating in the BSWAT Payment Scheme.¹⁹

Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014

1.14 The Consequential Bill seeks to provide for consequential amendments related to the Bill in four Commonwealth Acts.²⁰ These amendments will:

- ensure that payments under the BSWAT Payment Scheme:
 - are eligible income for the lump sum in arrears tax offset;²¹
 - are not income for the purposes of income support payments;²² and
- allow protected (that is, personal) information to be obtained, recorded and disclosed for the purposes of administering the BSWAT Payment Scheme.²³

1.15 The Explanatory Memorandum states that the financial impact of the bills will depend on the number of supported employees who apply for a payment under the scheme, as well as the payment amounts determined for eligible applicants.²⁴ The Bill contains a standing appropriation in this regard.²⁵

18 Explanatory Memorandum (EM), p. 1. The bills refer to 'intellectual impairment' rather than 'intellectual disability' however this report uses the more common terminology.

19 Part 5 of the Business Services Wage Assessment Tool Payment Scheme Bill 2014 (Bill) outlines various administrative matters associated with the payment scheme; Part 6 of the Bill deals with miscellaneous matters.

20 These Commonwealth Acts are: the *Income Tax Assessment Act 1936*; the *Social Security Act 1991*; the *Social Security (Administration) Act 1999*; the *Veterans' Entitlements Act 1986*.

21 Clauses 1–2 of the Business Services Wage Assessment Tool (Consequential Amendments) Bill 2014 (Consequential Bill).

22 Clauses 3 and 6 of the Consequential Bill.

23 Clauses 4–5 of the Consequential Bill.

24 EM, p. 2.

25 Clause 99 of the Bill.

Consideration by other committees

1.16 The Bill has been considered by the Senate Standing Committee for the Scrutiny of Bills²⁶ and the Parliamentary Joint Committee on Human Rights (PJC-HR).²⁷ In its report, the PJC-HR stated:

The principal rights engaged by this bill are the right to an effective remedy, the right to just and favourable conditions of work and the right to equality and non-discrimination, including the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity.²⁸

1.17 Further advice has been sought from the Minister by the PJC-HR in relation to these rights, which might be affected by various provisions of the Bill.²⁹

Conduct of the inquiry

1.18 Details of the inquiry, including links to the bills and associated documents, were placed on the committee's website.³⁰ The committee also wrote to 20 organisations, inviting submissions by 23 July 2014. Submissions continued to be accepted after that date.

1.19 The committee received 23 submissions, which are listed at Appendix 1. All submissions were published on the committee's website.

1.20 The committee held a public hearing in Melbourne on 24 July 2014. A list of witnesses who appeared at the hearing is at Appendix 2, and the *Hansard* transcript is available through the committee's website.

Acknowledgement

1.21 The committee thanks those organisations who made submissions and who gave evidence at the public hearing.

26 Alert Digest 6/14, 18 June 2014, pp 9–16. Further information was sought from the Minister on a number of matters: provisions relating to external review; delegation of legislative power in clause 56 of the Bill; reversal of onus of proof in sub-clause 73(2) of the Bill; disclosure of 'protected information' in clause 81 of the Bill; broad delegation of administrative powers in clause 100 of the Bill; appropriateness of the delegation of legislative power in clause 102 of the Bill.

27 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Bills introduced 23-26 June 2014, Legislative Instruments received 7-20 June 2014, Ninth Report of the 44th Parliament*, 15 July 2014, pp 2–12.

28 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Bills introduced 23-26 June 2014, Legislative Instruments received 7-20 June 2014, Ninth Report of the 44th Parliament*, 15 July 2014, p. 2.

29 For example: calculation of the 'payment amount' in clause 8 of the Bill; release and indemnity provisions in clauses 9–10 of the Bill; nominee provisions in Part 4 of the Bill; timeframes set out in the Bill.

30 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs.

Note on references

1.22 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.