



23 July 2014

## **NDS Submission to the Senate Community Affairs Commission on the BSWAT Payments Scheme**

NDS appreciates the opportunity to comment on the Australian Government's proposed Business Services Wage Assessment Tool (BSWAT) payments scheme.

### **Australian Disability Enterprises – some background**

Australian Disability Enterprises (ADEs) are not-for-profit businesses established for a social purpose. They provide employment for 20,500 Australians with significant (mostly intellectual) disability, the large majority of whom would otherwise be excluded from the workforce. The organisations that operate ADEs receive funding from the Australian Government to subsidise the support costs of their employees with disability. More than 90% of supported employees receive Disability Support Pension.

Because of their community service mission, ADEs are restricted in their capacity to generate commercial revenue. Unlike businesses which recruit employees with the skills and qualifications required to respond to market opportunities, ADEs build their businesses and design their jobs around the competencies of their workforce. ADEs' overhead costs are higher and they have a reduced range of options to increase productivity - operating multiple shifts and importing sophisticated technology may not be options. They provide employee support services that go well beyond those provided by commercial employers - often including transport to and from work, counselling and help with income support matters.

### **The Business Services Wage Assessment Tool**

Following a period of industrial reform during the early 2000s, ADE wage setting arrangements were regulated and formally incorporated into the national industrial relations system. This culminated in the development of the Supported Employment Services (SES) Award 2010. ADEs pay their supported employees a proportion of the full Award wage determined by one of the authorised wage assessment tools named in Clause 14 of the Award. The payment of pro-rata wages for employees with disability is recognised in clause 47 of the Disability Discrimination Act (DDA).

The Australian Government developed the Business Services Wage Assessment Tool (BSWAT) for use by ADEs around a decade ago. The BSWAT was developed with the agreement of stakeholders (including unions) and was designed to determine pro-rata wages on the basis of a joint productivity and competency assessment. All BSWAT assessments are conducted by CRS Australia.

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Around half of all ADEs use the BSWAT, meaning that the BSWAT determines the wages of around 10,000 supported employees. The fact that the BSWAT was developed, owned and assessed by government agencies and therefore effectively came with a 'government guarantee' accounts for its high uptake across ADEs.

The legitimacy of the competency assessment component of the BSWAT is disputed by certain advocate groups, who mounted a legal challenge against the BSWAT culminating in the full Federal Court Nojin Decision of 21 December 2012.

The Australian Government applied to the Australian Human Rights Commission for a three-year period to replace the BSWAT and implement new wage setting arrangements. NDS supported the application. Several factors made the prospect of implementing change in any period less than three years impractical, namely:

- identifying or developing an acceptable wage assessment tool to replace the BSWAT would necessarily entail extensive consultation with the sector and industrial parties;
- the logistics of re-assessing 10,000 employees; and
- the potential financial impact of adopting a new wage assessment tool without any identified source of additional income to cover increased wage costs (a significant proportion of ADEs barely break even, financially).

On 29 April 2014, the Australian Human Rights Commission (AHRC) granted only a one-year period for ADEs to transition from the use of the BSWAT to another wage assessment tool. This decision effectively prevents an orderly reform process and perpetuates uncertainty about the future viability of ADEs and the security of jobs for supported employees. NDS has lodged an application to appeal the AHRC's decision and have the period of exemption extended to three years to allow orderly reform of wage setting arrangements to occur.

### **The BSWAT Payment Scheme**

The Australian Government has initiated the BSWAT Payments Scheme in response to the Federal Court Nojin decision of 21 December 2012, which found the BSWAT to have discriminated against two former Australian Disability Enterprises (ADEs) employees.

The Government's intention to establish such a Payments Scheme is welcome. In part, it responds to concerns from ADEs that they might bear the liability if unpaid wages were claimed as a result of the Nojin case. If ADEs had to carry this liability, many would be rendered unviable and have to close or retrench workers - a calamitous outcome for the thousands of supported employees who rely on ADEs and lack alternative employment options.

The Payments Scheme also provides some certainty for eligible current and former ADE employees, who will be able to receive payments in a timely fashion. NDS estimates that over 12,000 current and former ADE employees may be eligible for the Payments Scheme.

The Payments Scheme represents a sensible alternative to the diversion of time, effort and resources into prolonged and uncertain litigation, which may result in inferior outcomes for employees.

Certain features of the Bill and the consequential legislation are worth underlining. The Bill includes a broad definition of intellectual disability. To protect the interests of supported employees, the Bill requires eligible recipients to obtain independent financial and legal

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advice before accepting payment from the Scheme. For the purposes of social security law, any payments made will not be treated as income. A payment would be increased to reflect any income tax owed by the recipient as a consequence of the payment. The legislation also allows for both internal and external reviews. These are all positive features.

Communicating carefully and clearly about the BSWAT Payments Scheme will be important. Because eligibility for the Scheme is restricted to workers with intellectual disability, whereas ADEs may employ people with diverse disabilities, information about the Scheme could create confusion or a sense of inequity among some supported employees. In addition, because the Scheme is retrospective, there will be some supported employees who, at some point in their career, have been paid BSWAT-determined wages, but are no longer paid using that tool. Ensuring that information about the Scheme reaches workers in a form that they can easily understand will be important.

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### **About National Disability Services**

**National Disability Services** is the peak industry body for non-government disability services. Its purpose is to promote quality service provision and life opportunities for Australians with disability. Its Australia-wide membership includes 950 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.