

NESA Submission to the Long Service Benefits Portability Act 2020 (Vic) Consultation



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About NESA

The National Employment Services Association established in 1997, is the peak body representing the employment services sector. NESA provides vision, voice and support to the sector working collaboratively with Government Departments, agencies and non-government stakeholders to support the effective delivery of labour market assistance and social policy. NESA's membership is extensive and inclusive encompassing for-profit, not-for-profit and public organisations involved in the delivery of employment services.

About the employment services sector

NESA's members are providers of Australian employment and labour market assistance programmes. The majority and most significant employment services and programmes are commissioned by the Commonwealth and include jobactive, Disability Employment Services (DES), the Community Development Programme (CDP), Transition to Work (TTW), Career Transition Assistance, Youth Jobs PaTH, ParentsNext, New Enterprise Incentive Scheme and Vocational Training & Employment Centres (VTEC). Our members are also engaged in the delivery of vocational training, apprenticeship and traineeship services.

Employers in the sector engage in business activities across the welfare, recruitment and vocational educational and employment industries. Employees of employment service providers work flexibly across programmes and business activities supporting jobseekers, apprentices, young people, school leavers, Aboriginal/Indigenous persons, older persons and parents re-entering the workforce as well as jobseekers with disabilities and persons who reasonably could be described as vulnerable, disadvantaged or in crisis.

Submission to the Consultation

- 1) NESA believes that while the intent of the Long Service Benefits Portability scheme has much merit, however the potential impact on business cash flow and the administrative complexity of its application in the employment sector raises serious concern and outweigh the potential benefits to employees.
- 2) The sector does not experience the high levels of short-terms and casual employment identified in the RIS and as such, the application of the law to employment services will not achieve the purpose of the legislation to improve employee access to long service leave benefits.
- 3) NESA members tender for and enter into, contracts with the Commonwealth for the delivery of services under each of the programmes listed above on the basis of fixed revenue and employment cost structures. There is no opportunity for our members to either renegotiate the terms of trade or pass on the additional cost of this scheme to job seekers, employers or suppliers. Financial burdens of the scheme are particularly of concern in the context of the impact of the COVID-19 pandemic and resulting impact on labour market and therefore revenue earning capacity of employers in the employment services sector.
- 4) NESA notes the Regulatory Impact Statement (RIS) did not specifically analyse potential adverse or unintended consequences for our sector. There was no active engagement or consultation with the employment services sector prior to implementation of the scheme and consultation since implementation has not achieved adequate resolution of issues.
- 5) The consultation period has been of an insufficient duration to undertake the significant level of research and analysis required to fully examine and evidence the potential impact of the proposed Long Service Benefits Portability Scheme on our sector. However, as the peak body NESA undertakes regular workforce surveys and has in-depth business intelligence regarding operational, financial and the structure of the sector, which we draw upon in this submission.

Response

Primary problem addressed through the LSBP Act

The Act seeks to address specific problems, which is as outlined in the Long Service Benefits Portability Regulations 2020 Regulatory Impact Statement¹:

***“In industries where certain types of employment structures are prevalent, employees are unlikely to accrue a sufficient number of years of continuous service with one employer to qualify for long service leave under existing legislation, including the Long Service Leave Act 2018. Existing research and stakeholder consultation suggests that these pockets of the workforce are missing out on long service benefits because of the nature of their industry and other factors which are beyond their control rather than because they are frequently choosing to change employers or industry. This results in an inequitable situation where employees are not able to accrue long service leave due to no fault of their own.*”**

As discussed above in section 1.2, the Portable Long Service Benefits Scheme was introduced under the LSBP Act to enable Victorian employees in the contract cleaning, security and community services industries to retain their entitlement to long service benefits when they change employers. Employees in the security and contract cleaning sectors rarely qualify for long service benefits due to the contract and project nature of the sectors in which they work. Employees in the community services sector face a similar issue, however this is due to the high levels of mobility in the sector driven by pressures on wages, short-term project-based funding arrangements, and a highly casualised workforce”.

The community services sector is however, diverse and the problems the Act seeks to remedy do not exist homogeneously within all segments of the sector.

In the schemes original Regulation Impact Statement 2018 it stated that *“According to existing studies and stakeholder consultations, the main causes of this situation (loss of long service leave benefits) are non-traditional forms of employment such as: fixed term contract work, casual employment and independent contract work”*

NESA’s Bi-Annual survey of Remuneration and Human Resource Management Performance 2018 report indicates that:

- Casual employment constitutes 11.6% of all employees – While not specifically detailed in the report NESA industry intelligence indicates casual employment is predominant in administrative rather than service delivery roles.
- Only 6.5% of employees were employed fixed term/temporary in 2018
- Permanent full-time employment is the main form of employment in the sector at 57%
- Permanent part-time employment as a percentage of all categories of employment is 16.1%
- 82% of staff turnover is voluntary
- The majority of employees are employed pursuant to modern awards.
- The modern award covering the majority of key position holders (56%) working in direct client service roles such as Employment Consultant/Case Manager is the Labour Market Assistance Industry Award 2010.
- 23% are employed under an Enterprise Agreement (Fair Work Act collective agreement)
- 5% are employed under an Agreement Based Transitional Instrument

¹ Long Service Benefits Portability Regulations 2020 Regulatory Impact Statement Department of Premier and Cabinet Victoria April 2020

- 16% are employed under a common law employment contract – This category includes mostly senior managers such as Chief Executive Officer, State Manager, Deputy CEO/Operations Manager, Chief Financial Officer and other non-client facing roles such as human resource management and IT roles.

It is NESAs position that the problems the Act seeks to address are not predominant in the employment services sector. Inclusion of employment services in the scope of the Act has resulted in significant impact on organisations in the sector while arguably delivering limited contribution to realisation of the intent of the Act. In particular we note that a large proportion of staff leaving employment services do not transition to other community service roles. This means the scheme is unlikely to improve these employees' long service leave benefits.

The residual problems

Inconsistency with federal awards and enterprise agreements

The RIS recognises the Constitutional issues implied by such a scheme operating in parallel to the national workplace system under the Fair Work Act 2019. NESAs recognises that regulatory arrangements provide reimbursement of an employer for long service leave granted to the worker under a Fair Work instrument in respect of the same service period. Given the employment services workforce employment engagement is predominantly under such instruments the potential outcomes in relation to improving worker long service entitlements is low compared to the administrative burden of preparing quarterly reports and submitting frequent applications for reimbursement. This burden is increased as there is a predominance of organisations in the employment services sector that work across jurisdictions and will contribute to disparity of arrangements for their workforce.

Adverse impact on business costs

In addition to the administrative complexity and cost of the scheme will have significant impact on the cash flow of businesses within this sector for which they have had limited time to prepare. Australian employment services deliver programs and services under contract arrangements with the Commonwealth. The contracts are generally fixed price arrangements set by the purchaser and are of 3 - 5 year duration. In this monopsony, providers have no control over terms of trade and budget to ensure they can deliver prescribed requirements across the life of the contract. The impact of quarterly payments in contrast to balance sheet provision for long service leave is considerable with the median cost of employment in the sector according to NESAs 2018 survey being 53%.

In addition Australian Employment Services principally operate on a pay for performance basis. In essence program funding is designed to ensure providers do not yield margins unless they deliver satisfactory levels of performance. As such by design, in most cases providers will operate at a loss if they are unable to deliver sustainable employment outcomes. This is a very different funding model to that generally evident across the community services sector.

It is the sectors position that this scheme has an adverse impact which in the context of the current state of the labour market is particularly significant. To illustrate; NESAs surveyed its members in April 2020 and results indicated that consistent with ABS data people recently employed were amongst those displaced early in the onset of COVID containment measures. Survey responses indicated:

- The majority of job seekers placed into employment between December 2019 – March 2020 were displaced from work with around 55 - 65% of all placements made by DES and jobactive; and approximately 80% of those made by CDP were disrupted with job seekers either stood down, employment terminated or receiving zero rostered hours.
- The majority of job seekers placed during December 2019 – March 2020 that remained employed and working reported reduced and/or greater fluctuation of hours.
- New job placements significantly declined, reducing by approximately 65 - 75% compared to the previous year
- New job vacancies declined significantly

- Of new job vacancies lodged during March a high proportion were short term/casual roles (E.g. supermarket shelf fillers, cleaners and warehouse roles). Across all Employment Services Areas (ESA) the proportion of job placements that were short term/casual roles ranged from 24% to 100% with the majority of responses clustered between 70% and 80%.

The impacts of the COVID-19 pandemic on the labour market conditions are likely to be felt long-term therefore decreasing the likelihood of providers achieving employment outcomes and generating revenue. Experiences from previous economic shocks is that recovery can take a decade, however we note that nothing like the shock associated with COVID-19 has been experienced before. In a sector that minimal opportunities to reduce expenditure the costs of the scheme relating to both levies and administration place additional burdens on the sector and have potential to result in loss of employment.

Definitional issues

The RIS recognises the problem with the broad definition of 'community service sector'. The employment services sector does not sit entirely within the community services sector. Some employees (workers) will be covered by the law whilst others that they work alongside will not. The problems identified in the RIS in relation to health and community service employees working with different clients is in every sense identical to the impact that the law will have on employment services.

NESA considers the inclusion of "training and employment support, or employment placement, for persons with a disability or other persons who are vulnerable, disadvantaged or in crisis" within the Act to be a very broad description of the intended service recipient groups providing insufficient clarity to organisations.

Greater clarity regarding definition of vulnerable, disadvantage or in crisis is required for the employment services sector to ensure compliance with the intention of the scheme. These terms generally defined in within Australian employment services contracts vary for individual programs. Clarity regarding the intended definition of persons living with a disability applied such as that prescribed by the World Health Organisation or a narrower definition e.g. those requiring assistance with activity of daily living, is required.

Disadvantaged is a broad term. While it is clear that organisations delivering training, employment support or placement services targeted for the specific cohorts of service users are in scope, the position of generalist providers is less so. For example, one would not consider recruitment services to be community services organisations yet many predominately place unemployed people into work. If generalist training or placement services such as Apprenticeship services are in scope it would require these employers to analyse the composition of training groups or employment placements to identify if staff are delivering training or placement services predominately to persons with a disability or other persons who are vulnerable, disadvantaged or in crisis. This may necessitate the intrusive collection of additional personal information from students/apprentices and involve a significant administrative burden.

Recommendations:

- 1) NESA submits that the regulations (Clause 10 (1) of the Draft Regulations) should exclude employees to whom the Labour Market Assistance Industry Award 2010 applies. This will overcome the definitional uncertainty recognised in the RIS applicable to the employment services sector. The definition of the labour market assistance industry in the Award provides a convenient definition for the purpose of exclusion.²

² *Labour Market Assistance Industry Award 2010* s 4 defines 'labour market assistance industry means the provision of work placement, job searching, personal support, vocational training and related services in the welfare sector, delivered by arrangement or contract with federal and State governments, to assist persons seeking employment'.