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BILLS DIGEST

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

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Links: The links to the Bills, their Explanatory Memoranda and second reading speeches can be found on the Bills' home pages for the [Business Services Wage Assessment Tool Payment Scheme Bill 2014](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation) and the [Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation), or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

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The Bills Digest at a glance

This Bills Digest outlines the Government's response to a decision of the Full Court of the Federal Court (*Nojin v Commonwealth*).¹ The Court found that the employers of two men with intellectual disabilities had unlawfully discriminated against them by imposing a requirement or condition that, in order to secure a higher wage, they must undergo a wage assessment through the Business Services Wage Assessment Tool (BSWAT). The employers in both cases were Australian Disability Enterprises, which were funded by the Commonwealth to provide supported employment.

Although it was the employers who were liable for the discrimination, the Commonwealth agreed to bear the liability because it had devised the BSWAT and promoted its use.² That being the case, the Commonwealth has devised the Payment Scheme which is established by the Business Services Wage Assessment Tool Payment Scheme Bill 2014 (the principal Bill) to provide a legislative entitlement for those persons who have suffered discrimination in equivalent circumstances.

The companion Bill to the principal Bill makes consequential amendments to Commonwealth statutes to ensure that the amounts paid are not subject to taxation and will not interfere with existing pension entitlements.

The Bills Digest:

- sets out the background to the use of the BSWAT
- explains the decision of the Full Court of the Federal Court to which the Bills respond
- analyses other possible options for redress to those who are similarly affected
- sets out the terms of the Payments Scheme which is established by the principal Bill and
- explains the effect of the amendments in the companion Bill for those who receive payments under the Payments Scheme.

Purpose of the Bills

The purpose of the Business Services Wage Assessment Tool Payment Scheme Bill 2014 (BSWAT Payment Bill or principal Bill) is to enable the Government to provide a one-off payment (the Payment Scheme) to an estimated 10,000 people with intellectual disabilities who are in supported employment.³ This would apply to those employees of Australian Disability Enterprises (ADEs) who were paid wages which were calculated using the Business Services Wage Assessment Tool (BSWAT).

According to the Government, the purpose of the scheme is to remove the 'perceived liability that could impact the ability of ADEs to deliver ongoing employment support'.⁴

The purpose of the Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014 (Consequential Amendments Bill) is to make amendments to Commonwealth statutes to ensure that the amounts paid are not subject to taxation and will not interfere with existing pension entitlements of those who receive the relevant payment.

Structure of the Bills

The BSWAT Payment Bill, which was passed by the House of Representatives on 17 June 2014, comprises six parts dealing with different aspects of the Payment Scheme, including key elements of the scheme, how to obtain a payment, arrangements concerning nominees and administrative matters.

The Consequential Amendments Bill, which was also passed by the House of Representatives on 17 June 2014, makes consequential amendments to:

- *Income Tax Assessment Act 1936*⁵

1. *Nojin v Commonwealth* [2012] FCAFC 192, 21 December 2012, accessed 15 July 2014.

2. *Ibid.*, at [2].

3. Maurice Blackburn Lawyers, '[Workers with intellectual disabilities class action](#)', Maurice Blackburn Lawyers website, accessed 29 July 2014.

4. Explanatory Memorandum, [Business Services Wage Assessment Tool Payment Scheme Bill 2014; Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014](#), p. 1, accessed 15 July 2014.

5. [Income Tax Assessment Act 1936](#), accessed 23 August 2014.

- *Social Security Act 1991*⁶
- *Social Security (Administration) Act 1999*⁷ and
- *Veterans' Entitlements Act 1986*.⁸

Background

The Australian Government funds organisations to provide a range of employment services and support for people with disabilities. The two main forms of employment services for people with disabilities are:

- open employment services that provide assistance to people with disability in obtaining and/or retaining paid employment in the open labour market (Disability Employment Services)⁹ and
- *supported employment services* that provide support to, and employment for, people with disability within the same organisation.

The Payment Scheme proposed by the principal Bill is concerned with the latter form of support, defined by the Commonwealth *Disability Services Act 1986*¹⁰ as services to support people with disabilities for whom:

- competitive employment at or above the relevant award wage is unlikely and
- because of their disabilities, there is a need for substantial ongoing support to obtain or retain paid employment.¹¹

Supported employment services are provided through organisations known as Australian Disability Enterprises.

Australian Disability Enterprises

Australian Disability Enterprises are commercial, (generally) not for profit organisations funded by the Department of Social Services that employ and support people with a disability, often in specialist working environments, work crews or contract labour arrangements. Work is undertaken in areas such as packaging, assembly, production, recycling, screen printing, plant nursery, garden maintenance and landscaping, cleaning services, laundry services and food services.¹² Currently, around 20,000 people with moderate to severe disability are employed by Australian Disability Enterprises.¹³

As noted above, Australian Disability Enterprises are intended for people with disabilities requiring a higher level of ongoing support. They grew from what were originally known as 'sheltered workshops'—organisations originally established in the 1950s to provide vocational activity for people with disability. Sheltered workshops were 'generally located in large segregated settings, and their purpose was to provide a 'work-like' environment where people with disabilities could engage in activities outside their living environment'.¹⁴

Following the introduction of the *Disability Services Act*, sheltered workshops began to transform into Australian Disability Enterprises (known until 2008 as 'Business Services'), reflecting a change in focus towards meaningful paid employment for people with disability and a more commercial focus for providers.¹⁵

Wage assessment tools

Supported employees are paid a reduced (pro rata) wage intended to reflect their productivity and competence in performing a job. The level of the reduction is determined using a wage assessment tool stipulated in the

6. [Social Security Act 1991](#), accessed 31 July 2014.

7. [Social Security \(Administration\) Act 1999](#), accessed 31 July 2014.

8. [Veterans' Entitlements Act 1986](#), accessed 23 August 2014.

9. Open employment services are also known as *competitive employment training and placement services* in section 7 of the *Disability Services Act 1986*.

10. [Disability Services Act 1986](#), accessed 31 July 2014.

11. *Ibid.*, section 7.

12. Department of Social Services (DSS), ['Australian Disability Enterprises'](#), DSS website, accessed 28 July 2014.

13. *Ibid.*

14. *Nojin v Commonwealth* [2012] FCAFC 192, op. cit., paragraph 19.

15. The *Disability Services Act 1986* (*Disability Services Act*) was introduced with the aim of providing a coordinated approach to assisting people with disability gain and maintain employment. Its key objectives were to de-institutionalise long-established segregated services, increase the range of service options and to include people with disability in wider community life.

Supported Employment Services Award 2010.¹⁶ Under such a tool for example, ‘if someone with disability is only 80 per cent productive/competent at their job, they would get paid 80 per cent of the relevant Award for that job’.¹⁷

There are four main wage assessment tools used in Australian Disability Enterprises, two of which are owned by the Australian Government being the Supported Wage System and the BSWAT.¹⁸ Around half of all workers in Australian Disability Enterprises have their wages assessed using either of these tools.

People with disabilities in the open labour market may also legally be paid a pro rata wage intended to reflect their level of productivity. The only wage assessment tool permitted for use in the open labour market is the Supported Wage System. Under the Supported Wage System, the Australian Government funds qualified assessors to determine a worker’s productivity rate and the person’s wage may be reduced accordingly in relation to the award.¹⁹

The BSWAT

The BSWAT was introduced in April 2004 and has been used to assess the wages of some 15,000 workers in Australian Disability Enterprises.²⁰ Around half of supported workers have their wages assessed using the BSWAT, making it the most commonly used assessment tool. Like the Supported Wage System, the BSWAT is comprised of two components. The first is a productivity component intended to assess a worker’s output compared with a person who does not have a disability (based on an industry benchmark or a comparator).²¹

The second is a competency component, which is intended to measure an employee’s value to an organisation against a broader set of standards (or competencies) than can be obtained by simply measuring their capacity to perform the tasks associated with a job. It is the competency component of the BSWAT that was the basis of contention in *Nojin v Commonwealth*.

Competency component

The BSWAT competency assessment consists of eight units of competency.²² Four of these are core units against which all workers are assessed. There are also up to four ‘industry specific’ units that relate directly to the work being performed by the employee. Industry specific units are selected from the National Training Framework, the set of arrangements that form the basis of Australia’s nationally recognised, competency-based training system. Some employees are assessed against fewer than four industry specific units because their roles can be described in only one or two units. Nevertheless, their wage outcome is determined on the basis of a possible score of eight units.²³

In conducting assessments, a BSWAT assessor uses a variety of data to support their assessment decisions, including direct observation, responses to interviews and third party reports from supervisors/managers.²⁴ It is to be noted that reports from supervisors/managers are mediated through an ADE, and the ADE’s interests do not necessarily coincide directly with those of their clients. A rating of more significant disability results in lower pay for the individual but an improved financial outcome for the ADE, not just because the rate of pay for the individual is lower but also because an ADE needs and receives additional funding to work with individuals who are rated as needing greater support.²⁵

Examples of the kinds of questions asked of employees to measure core competencies include:

- What do you do if someone else hurts themselves at work?
- What would make your workplace unsafe?

16. [Supported Employment Services Award 2010](#), accessed 28 July 2014.

17. DSS, [‘Wage assessments in Australian Disability Enterprises’](#), accessed 28 July 2014.

18. Ibid.

19. Job Access, [‘Wages based on your productivity’](#), Job Access website, accessed 28 July 2014.

20. Explanatory Memorandum, op. cit., p. 3.

21. CRS Australia, [‘About the Business Services Wage Assessment Tool’](#), CRS Australia website (archived), accessed 29 July 2014.

22. Ibid.

23. Ibid.

24. Ibid.

25. Department of Social Services (DSS), [Disability Employment Assistance, Disability Maintenance Instrument Guidelines, appendix B](#), accessed 25 August 2014.

- What workplace meetings do you attend? What are these meetings for?
- What are some other jobs that people do here?
- How can you help others at work?
- If you had a disagreement with someone in the workplace, what would you do?²⁶

Industry specific competencies evaluate employee capacities in relation to such matters as reading and interpreting relevant written material, and understanding the correct use of relevant equipment and workplace procedures.²⁷

Under the BSWAT, the productivity and competency components are scored separately and the results combined to determine the person's pro rata wage rate.²⁸ The rate is then applied to the most appropriate level of the most relevant award.

The notion of 'hybrid' methods of assessment involving measures of both productivity and competencies, such as the BSWAT, has long been contentious. It has been supported by experts in the area of wage determinations for people with disabilities, unions and employers in Australian Disability Enterprises.²⁹ At the same time, many people with disabilities and disability sector representative groups have criticised the BSWAT as discriminatory on the grounds that, unlike other workers, it measures the theoretical competency of a worker, rather than their actual performance.³⁰

Federal Court decision

As noted above, these Bills represent the Government's response to the decision by the Full Court of the Federal Court in *Nojin v Commonwealth of Australia*. The case was brought under the *Disability Discrimination Act 1992*.³¹ Essentially, the Court declared that the employers of two men with intellectual disabilities, Mr Nojin and Mr Prior, had unlawfully discriminated against them by imposing a requirement or condition that, in order to secure a higher wage, they must undergo a wage assessment through the BSWAT. The employers in both cases were Australian Disability Enterprises, which were funded by the Commonwealth to provide supported employment.

Mr Nojin and Mr Prior were employed at the Grade 1 classification under the Supported Employment Services Award 2010 to perform basic and routine duties. The Court decided that the unlawful discrimination arose because competency assessment of the kind measured through the BSWAT placed intellectually disabled persons at a disadvantage compared with other workers. The disadvantage was that the BSWAT required the person being tested to have the capacity to articulate abstract concepts. According to Justice Buchanan:

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.³²

He further noted that:

The award makes clear what the Grade 1 rate of pay is fixed for. The rate of pay for a disabled worker is to be fixed by reference to that rate and as a percentage of it. The Grade 1 tasks are, by definition, routine, basic, repetitive

26. See examples provided in *Nojin v Commonwealth* [2012] FCAFC 192, op. cit., paragraph 66.

27. Examples of industry specific competencies are summarised from those applied to Mr Nojin and Mr Prior and listed in *ibid.*, pp. 26–31.

28. CRS Australia, op. cit.

29. *Nojin v Commonwealth*, op. cit., p. 17.

30. See for example: Australian Federation of Disability Organisations and others, [Joint response regarding DSS exemption application](#), 31 January 2014, accessed 29 July 2014; 'Disabled take on feds over pay injustice', *The Hobart Mercury*, 12 April 2011, accessed 29 July 2014; S Young, 'Short changed by discrimination', Ramp Up website, Australian Broadcasting Commission, 21 January 2014, accessed 29 July 2014.

31. *Disability Discrimination Act 1992*, accessed 29 July 2014.

32. *Nojin v Commonwealth* [2012] FCAFC 192, op. cit., paragraph 142.

and involve minimal judgment. On the evidence, neither the Grade 1 rate, nor persons employed on that rate, are assessed by reference to any notion of competencies of the kind measured by BSWAT.³³

The Commonwealth agreed that if the employers were liable for discrimination it would bear that liability³⁴ in accordance with the terms of section 122 of the *Disability Discrimination Act*.³⁵ Essentially then, because the Commonwealth had devised the BSWAT and promoted its use, it was liable. The Full Court of the Federal Court did not make any order that the Commonwealth make a payment to Mr Nojin or Mr Prior by way of compensation or damages.

The Commonwealth sought leave to appeal the decision to the High Court but leave was denied.³⁶

Continued use of BSWAT

On 29 April 2014, the Australian Human Rights Commission (AHRC) granted a 12 month exemption from the operation of certain provisions of the *Disability Discrimination Act 1992* to enable continued use of the BSWAT during the transition to an alternative assessment tool.³⁷ The Commonwealth had originally sought an exemption for three years.³⁸

The exemption was granted on the condition that the Commonwealth:

- take all necessary steps to transition from the BSWAT to the Supported Wage System (SWS), or an alternative tool approved by the Fair Work Commission (FWC), as quickly as possible
- take all appropriate steps to ensure ADEs using or proposing to use the BSWAT to conduct wage assessments immediately commence using the SWS, or an alternative tool approved by FWC, (other than the BSWAT) to conduct new and outstanding wage assessments
- report to the Commission, on a quarterly basis during the exemption period, as to the number of assessments conducted each quarter and the number of assessments still to be conducted and
- give consideration to ensuring that no disadvantage is suffered by ADE employees whose wages may be reduced as a result of the application of the SWS or alternative tool.³⁹

On 21 August 2014, the Government announced that it would provide \$173 million to:

- ‘develop and implement a new productivity based wage tool (including new assessments) for use across the supported employment sector’ and
- ‘assist ADEs with the additional wage costs associated with the suspension of BSWAT’.⁴⁰

According to the Government, ‘work on developing the new tool will commence shortly, in consultation with relevant stakeholders, including employers and unions’.⁴¹

Class action

The Bill is intended to provide a legislative remedy rather than a judicial one.

In December 2013, representative proceedings (commonly known as a class action) were lodged against the Commonwealth in the Federal Court of Australia.⁴² The proceedings allege unlawful discrimination against

33. Ibid., paragraph 143.

34. *Nojin v Commonwealth of Australia*, paragraph 166, per Flick J.

35. Section 122 of the *Disability Discrimination Act* provides that a person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1, 2, 2A or 3 of Part 2 of that Act is taken also to have done the act.

36. [High Court Bulletin](#), [2013] HCAB 04, (20 May 2013), p. 29, accessed 8 August 2014.

37. Australian Human Rights Commission (AHRC), ‘[Application for exemption from Disability Discrimination Act 1992 for Business Services Wage Assessment Tool \(BSWAT\)](#)’, AHRC website, 29 April 2014, accessed 16 July 2014.

38. Australian Human Rights Commission (AHRC), ‘[Commission decisions on applications for temporary exemptions](#)’, AHRC website, accessed 4 August 2014.

39. Ibid., p. 1.

40. M Fifield (Assistant Minister for Social Services), ‘[\\$173 million to support employees in Australian Disability Enterprises](#)’, media release, 21 August 2014, accessed 21 August 2014.

41. Ibid.

42. Australian Government, *Tyson Duval-Comrie (by his Litigation Representative Claudine Duval) v Commonwealth of Australia*, Commonwealth Courts portal, accessed 4 August 2014.

workers with intellectual disabilities who work in Australian Disability Enterprises. The action includes ‘anyone who is an intellectually disabled worker who was employed in an Australian Disability Enterprise (ADE) as at 22 October 2013 and whose wage had been, or at 22 October 2013 was proposed to be, assessed using the BSWAT’.⁴³

Nature of representative proceedings

Representative proceedings are governed by the rules set out in Part IVA of the *Federal Court of Australia Act 1976*.⁴⁴ The threshold requirements are that there must be seven or more persons with claims against the same defendant(s); the claims must be in respect of, or arise out of, the same, similar or related circumstances and the claims must give rise to at least one substantial common issue of law or fact. In the case before the Court, the substantial common issue is the use of the competency assessment in the BSWAT to determine the rate of pay for an intellectually disabled person.

In representative proceedings the claim is brought on behalf of all class members by one (or a small number of) representative plaintiff(s). It is not necessary to name members of the class nor to specify the number of people in the class or the total value of their claims.

Relevant to the Bills, representative proceedings are governed by an ‘opt-out’ regime—that is, every potential claimant who falls within the class definition is a member of the class unless they opt-out of the proceedings. A class may, however, be defined in a way that effectively requires members to opt-in to the class (including by entering into a retainer with a particular law firm or an arrangement with a particular third party funder).

Finally, once proceedings are commenced, any settlement must be approved by the Court—this requires the Court to be satisfied that the settlement is fair and reasonable and in the interest of class members.⁴⁵

Aims of the class action

The aims of the class action can broadly be gleaned from the submission of Inclusion Australia to the Senate Standing Committee on Community Affairs, that is:

- an apology from the Commonwealth and the ADEs for the disadvantage the use of the BSWAT has imposed on employees with intellectual disability⁴⁶ and
- the Commonwealth accepting liability and agreeing to payment of fair compensation.⁴⁷

However, the claims made may extend further. The AED [Association of Employees with Disability] Legal Centre commented on elements of the BSWAT Payment Bill as follows:

As a matter of fairness any employee who was underpaid under BSWAT should receive full compensation irrespective of their disability [and] eligibility should also apply to employees who have been assessed under other wage assessment tools which display the same deficiencies as BSWAT as determined by the Full Federal Court.⁴⁸

Other option for redress

In the absence of the Payment Scheme established by the BSWAT Payments Bill, or proceedings in Court, those persons who suffered unlawful discrimination in equivalent circumstances to Mr Nojin and Mr Prior (the relevant class of persons) have limited options open to them—merely to apply to the Commonwealth for an ad hoc payment such as an act of grace or other ex gratia payment.⁴⁹

43. Maurice Blackburn Lawyers, ‘[Workers with intellectual disabilities class action](#)’, Maurice Blackburn Lawyers website, accessed 29 July 2014.

44. *Federal Court of Australia Act 1976*, accessed 8 August 2014.

45. Allens Linklaters, *Class actions in Australia*, August 2014, pp. 1–2, accessed 8 August 2014.

46. Inclusion Australia, *Submission to the Senate Standing Committee on Community Affairs, Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014*, n.d., p. 17, accessed 4 August 2014.

47. *Ibid.*, p. 7.

48. AED Legal Centre, *Submission to the Senate Standing Committee on Community Affairs, Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014*, 23 July 2014, p. 8, accessed 4 August 2014.

49. Department of Finance, ‘[Act of grace mechanism](#)’, Department of Finance website, accessed 1 August 2014.

Act of grace payment

The conditions under which act of grace requests are authorised can broadly be characterised as where the Minister or delegate considers that there are special circumstances under which it is appropriate to provide redress because:

- the direct role of an agent/agency of the Australian Government has caused an unintended and inequitable result for the individual or entity concerned
- the application of Commonwealth legislation has produced a result that is unintended, anomalous, inequitable or otherwise unacceptable in a particular case or
- the matter is not covered by legislation or specific policy, but the Australian Government intends to introduce such legislation or policy, and it is considered desirable in a particular case to apply the benefits of the relevant provisions prospectively.

The advantage of such a claim is that it does not involve taking legal proceedings. However, there are significant disadvantages to seeking redress in this manner. For example, some claimants may be unsuccessful in their claim whilst others may receive amounts which are not uniformly calculated. Further, as the payments are not 'entitlements' there are only very limited rights of appeal. An example of act of grace payments being made to a class of persons is that of British nuclear test participants, some of whom received those payments under a scheme that was jointly administered by the former Department of Primary Industry and Energy and the Attorney-General's Department. This enabled those 'plaintiffs with common law actions issued and served on the Commonwealth from 1988 until September 1989 to have their cases settled outside of the Court system'.⁵⁰

Ex gratia payments

The authority to make ex gratia payments comes from the executive power of the Commonwealth under section 61 of the *Constitution*.⁵¹

Ex gratia payments enable the Australian Government to deliver financial relief at short notice. The Prime Minister and/or Cabinet decide, on a case-by-case basis, whether an ex gratia payment will be made.

An example of ex gratia payments being made to a class of persons is of Royal Australian Air Force F-111 deseal/reseal workers and their families. In that case lump sum ex-gratia payments of either \$10,000 or \$40,000 were made in recognition of the poor working conditions endured by those working in the F-111 fuel tanks or in support roles of the formal deseal/reseal program.⁵²

However, that scheme was criticised because it was considered to provide payment to a class of persons which had been cast too narrowly.⁵³

What the Bills do

BSWAT Payments Bill

The BSWAT Payment Bill:

- establishes a formal Payment Scheme
- allows people who believe they have been similarly discriminated against to register their intention to apply for payment and to submit an application for payment within specified time frames
- provides a staged process for calculating the amount that a person is eligible to be paid, offering to make the payment, allowing for the acceptance or rejection of the offer and finally paying the agreed amount and
- provides for strict timelines to apply at each stage.

50. I Campbell (Minister for Environment and Heritage), '[Answer to question on notice: Veterans](#)', [Questioner: L Allison], Question 1130, Senate, *Hansard*, 27 March 2006, p. 187, accessed 1 August 2014.

51. [Commonwealth of Australia Constitution Act](#), accessed 1 August 2014.

52. Australian Government, '[Ex-gratia lump sum payment scheme](#)', F-111 Fuel Tank Maintenance website, accessed 1 August 2014.

53. S Wardill, '[Air force compo blasted](#)', *The Courier Mail*, 6 October 2005, p. 7, accessed 1 August 2014.

Consequential Amendments Bill

The Consequential Amendments Bill:

- amends the taxation law so that payments under the scheme are eligible income for the lump sum in arrears tax offset and
- amends the social security law so that the payments are not income tested. This means that entitlement to pension will not have to be reassessed for the period that the payment covers.

Importantly, the payments are not treated as ‘compensation’ as defined in the *Social Security Act*.⁵⁴ In the normal course of events compensation recovery provisions in Part 3.14 of the *Social Security Act* apply when someone receives compensation. The *Act* requires compensation payments to be taken into account when determining the levels of payment and there can then be a consequent need to make deductions or repayments from the normal rate of payment. By treating the payments as outside of these rules, the Bill will confer a benefit on recipients.

Committee consideration

Senate Standing Committee on Community Affairs

The Bills have been referred to the Community Affairs Legislation Committee (Community Affairs Committee) for inquiry and report by 26 August 2014.⁵⁵ Comments of submitters to the inquiry are included under the heading ‘Key provisions and issues’ below.

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills raises a number of issues relating to the principal Bill, suggesting several possible breaches of the Committee’s terms of reference. These are dealt with in the Digest’s ‘Key provisions and issues’, but a quick summary includes concerns about possibly inappropriate:

- arrangements for merits review (including both a failure to include any option for review and, with respect to other provisions, not utilising the option of appeals to the Administrative Appeals Tribunal)
- delegations of legislative power whereby important issues are dealt with by rules rather than in the body of the legislation
- reversal of the onus of proof in an offence provision
- or inadequate protections of privacy – a question which can only be resolved by inspection of the eventual rules and
- other delegations of administrative and legislative power.⁵⁶

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights (Human Rights Committee) commented on the Bills in its report of 15 July 2014.⁵⁷ The Human Rights Committee took the view that the Payment Scheme Bill engaged:

... 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 disability to be recognised as persons before the law and to the equal enjoyment of legal capacity.⁵⁸

The detailed comments of the Human Rights Committee in relation to those rights are also included under the heading ‘Key provisions and issues’ below.

54. ‘Compensation’ is defined in section 17(2) of the [Social Security Act 1991](#).

55. Details of the terms of reference, the submissions to the Committee and the final report (when published) are available on the [inquiry website](#), accessed 1 August 2014.

56. Senate Standing Committee for the Scrutiny of Bills, [Alert Digest No. 6 of 2014](#), The Senate, Canberra, 18 June 2014, pp. 9–16, accessed 22 August 2014.

57. Parliamentary Joint Committee on Human Rights, [Ninth report of the 44th Parliament](#), The Senate, Canberra, July 2014, pp. 2–12, accessed 4 August 2014.

58. *Ibid.*, p. 2.

Statement of Compatibility with Human Rights

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government assessed the Bills' compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bills are compatible.⁵⁹

In relation to the BSWAT Payments Bill, the Statement of Compatibility acknowledges that 'there could be a perception that a human right to an effective remedy is being limited' because:

- the BSWAT Payment Scheme will not provide a payment to individuals who have sought redress through the courts or other systems and
- acceptance of a payment from the scheme releases the Commonwealth, Australian Disability Enterprises and all other persons from liability in relation to unlawful discrimination associated with the use of the BSWAT to determine the wages of that person.⁶⁰

However, it argues that the 'legitimate objective' associated with any such limitation is:

... to prevent the Commonwealth utilising taxpayer funds to pay more than once for the same, or similar, claims in relation to the payment of wages assessed using the BSWAT. Acceptance of a payment from the scheme, following consultation with a financial counsellor and receiving legal advice, simply means that an individual is unable to participate in the representative proceeding currently on foot or any other legal proceeding in connection with the BSWAT. Should an individual wish to continue in the representative proceeding, they have every right to do so. However, they will not receive a payment from the scheme.⁶¹

Further, the Statement of Compatibility suggests that 'any perceived limitation is proportionate' because the BSWAT Payments Bill 'works to increase the choice and control' of affected individuals through such mechanisms as allowing the provision of nominees, the requirement that individuals receive financial counselling and legal advice before accepting an offer under the scheme, and provision for review processes.⁶²

Policy position of non-government parties/independents

Australian Greens

The Bills passed in the House of Representatives with only Adam Bandt (Australian Greens) and Andrew Wilkie (Independent) voting against them. Mr Bandt's opposition to the Bills, as expressed in his Second Reading Speech, was largely related to the release and indemnity provisions:

It takes a lot of guts to stand up and be the first ones to go through a legal challenge, but they did it. They did it not just for themselves but also for all those other tens of thousands of workers with a disability who also feel that they are being underpaid at the moment. Those workers have begun a class action to say, 'Just as Mr Nojin and Mr Prior got their just entitlements by going through the courts, so too are we entitled to do that.' This class action, for up to 10,000 workers, is underway.

It is because of that class action that we are seeing this Bill. It is because the government now realises that, if Mr Nojin and Mr Prior were successful and were entitled to the basic principle of being paid in accordance with how good your work is, perhaps all of these other workers are as well. So, in what is nothing more than an attempt to derail this class action and disadvantage up to 10,000 workers with a disability in this country who are hoping for justice, the government has brought in this Bill. The solicitor representing these employees with a disability calls this an abuse of power—and she is right.

She says that it will mean that those up to 10,000 workers who have a disability are likely, if they are successful in their claim, to have their compensation and their payments, the wages for their productive work, cut by about half.

59. The Statement of Compatibility with Human Rights can be found at page 53 of the Explanatory Memorandum to the Bill.

60. Statement of Compatibility, p. 2.

61. Ibid., p. 3.

62. Ibid.

In other words, this Bill is being brought in to head off a class action being brought by up to 10,000 workers with a disability.⁶³

Australian Labor Party

Opposition members said the Bills were intended to provide reassurance to supported employees, their families and carers and would be supported by Labor in the House of Representatives.⁶⁴ They added that the legislation was complex and Labor would be seeking to have the Bills examined by a Senate inquiry. For example, according to Labor's Jill Hall:

I know that we on this side of the House want this to go to a Senate committee for an inquiry to look at all aspects of it. I think that is very prudent. I think that the overall emphasis of any legislation in the area of disability—and particularly in the area of intellectual disability—should be ensuring that the people who will be covered by the legislation will be advantaged, not disadvantaged. I think it should be ensuring that the legislation will provide protection, not promote discrimination or set up a situation where people with an intellectual disability are exploited and receive low wages for the job they do and for their level of productivity.⁶⁵

Position of major interest groups

Against the Payment Scheme

National disability advocacy organisation, People with Disability Australia, is opposed to the Payment Scheme, arguing that:

... the Business Services Wage Assessment Tool (BSWAT) Payment Scheme Bill (the Bill) should not proceed and that it is beyond saving through amendment. The Bill is a clear attempt on behalf of the Commonwealth to avoid implementation of the Nojin and Prior judgement, and to sabotage the current representative action for compensation by people with intellectual disability who experienced discrimination as a result of having their wages assessed using the BSWAT. In doing so, the Bill will exploit the vulnerable circumstances of people with intellectual disability who work in ADEs, by providing a payment in exchange for their consent to maintain a system of wage determination which has been proven to discriminate against them.⁶⁶

In particular, People with Disability Australia is concerned that the release and indemnity provisions effectively make it possible for discrimination through use of the BSWAT and other wage assessment tools to continue without any legal remedy for those affected; and with arrangements concerning nominees (discussed in a later section).

Josh Bornstein, a principal at Maurice Blackburn, and the lawyer leading the discrimination class action on behalf of the intellectually disabled workers assessed under the BSWAT has described the scheme proposed by the Bills as follows:

The government says the payment scheme is about providing certainty and reassurance to employees, their families and their carers. It says the scheme, which will not pay compensation, will deliver payments to workers as quickly as possible, and that it will help make sure disability enterprises can continue operating and afford to give people jobs.

What the government doesn't say is that the payment scheme is a blatant attempt to coerce some of our most vulnerable workers into signing away their legal rights, for a sum of money that is just half of what they should be

63. A Bandt, [‘Second reading speech: Business Services Wage Assessment Tool Payment Scheme Bill 2014, Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014’](#), House of Representatives, *Debates*, 17 June 2014, p. 62, accessed 17 July 2014.

64. A Rishworth, [‘Second reading speech: Business Services Wage Assessment Tool Payment Scheme Bill 2014, Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014’](#), House of Representatives, *Debates*, 17 June 2014, p. 55, accessed 17 July 2014; J Hall, [‘Second reading speech: Business Services Wage Assessment Tool Payment Scheme Bill 2014, Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014’](#), House of Representatives, *Debates*, 17 June 2014, p. 59, accessed 17 July 2014.

65. J Hall, *op. cit.*, p. 60.

66. People with Disability Australia, [Submission to the Senate Standing Committee on Community Affairs, Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014](#), 23 July 2014, p. 2, accessed 8 August 2014.

paid. Nor does it acknowledge that the scheme is not needed at all - if the government wanted to reassure workers, they could have simply come to the negotiating table and settled the case.⁶⁷

Similarly, disability advocacy group, Queensland Advocacy, has previously described the Government's plans for a one off payment scheme for people discriminated against through a BSWAT assessment as 'as sad indictment of their treatment of and lack of value for people with intellectual disability'.⁶⁸

For the Payment Scheme

National Disability Services, a peak body for non-government disability service organisations, says the Payment Scheme:

... provides some certainty for eligible current and former ADE employees, who will be able to receive payments in a timely fashion ... 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.⁶⁹

Financial implications

The Government has not provided a projected cost for the proposed BSWAT Payment Scheme. The Explanatory Memorandum says that the financial impact of the Bills 'will depend on the number of individuals who apply for the payment scheme, and the payment amounts determined for eligible applicants'.⁷⁰

Special appropriations

Clause 99 of the BSWAT Payments Bill provides that payments under the BSWAT Payment Scheme are to be made from the Consolidated Revenue Fund. The Explanatory Memorandum notes that the amounts to be paid out under the scheme will depend upon the number of people who choose to accept an offer under the scheme and that the last payments will be made in early 2017.⁷¹

Key provisions and issues

Part 1—Preliminary matters

Part 1 of the BSWAT Payment Bill includes formal matters such as the relevant definitions to be used (**clause 4**). For example, **BSWAT** is defined as 'the Business Services Wage Assessment Tool referred to in subparagraph 14.4(b)(ii) of the Supported Employment Services Award 2010 as in force on 1 January 2010 or any earlier version of that tool'.

Part 2—Elements of the scheme

Part 2 of the BSWAT Payment Bill (**clauses 5–11**) establishes the following elements of the scheme:

- eligibility criteria, including the definition of **intellectual impairment** to be used
- the amount payable under the scheme and
- the legal consequences of accepting a payment under the scheme.⁷²

Eligibility

To be eligible for the scheme, a person must satisfy all of the following:

- meet the conditions for having had an **eligible day**
- have received **ongoing support** in the workplace and

67. J Bornstein, '[Government takes fight to intellectually disabled](#)', *The Sydney Morning Herald*, 1 July 2014, accessed 18 July 2014.

68. Queensland Advocacy Incorporated, '[Federal Government Payment Scheme set to silence workers on slave pay rates](#)', media release, 22 January 2014, accessed 18 July 2014.

69. National Disability Services, '[Submission to the Senate Standing Committee on Community Affairs, Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014](#)', 23 July 2014, p. 2, accessed 4 August 2014.

70. Explanatory Memorandum, p. 2.

71. *Ibid.*, p. 49.

72. **Clause 5** of the Bill.

- have not accepted an **alternative amount** (subclause 6(1)).

Eligible day

A person will have met the conditions for an **eligible day** if, on at least one day in the period starting on 1 January 2004 and ending on 28 May 2014, the person:

- had an **intellectual impairment**⁷³
- was employed in an **Australian Disability Enterprise**
- was provided with employment support by the Australian Disability Enterprise and
- either:
 - was paid a training wage while waiting for a BSWAT assessment to be completed or
 - their minimum wage payment was worked out using a BSWAT assessment (**subclause 6(2)**).

Ongoing support

A person will be regarded as having received **ongoing support in the workplace** if they required ongoing daily support in order to maintain employment in the *Australian Disability Enterprise* (**subclause 6(3)**).

Alternative amount

A person will be regarded as having accepted an **alternative amount** (defined in **clause 4**) if:

- they have accepted money (other than in accordance with the BSWAT Payment Scheme Act) in settlement of a claim made in relation to a matter set out in **subclause 10(2)** or
- money is payable to them under a court order in connection with a claim made in relation to a matter referred to in **subclause 10(2)**.

Matters covered by **subclause 10(2)** are the use of BSWAT assessment to work out the minimum wage payable to a person which relates to:

- unlawful discrimination
- the contravention or breach of, or failure to comply with, a law whether written or unwritten, of the Commonwealth, a state or a territory or
- any other conduct or failure on the part of the Commonwealth, an Australian Disability Enterprise or any other person, that might give rise to a liability to the person.

Key issue—use of rules

Whilst the Bill defines the term **intellectual impairment**, it does not define ‘intellectual disability’. The Explanatory Memorandum notes that ‘every person is unique’ and ‘there is no single, agreed definition of intellectual disability’ but also that ‘there are a number of authoritative assessment methods for disability’.⁷⁴ However, **clause 7** provides that in order to meet the definition for **intellectual impairment**, a person may also be required to satisfy any conditions prescribed by the BSWAT Payment Act Rules. The Explanatory Memorandum is silent about the nature of those conditions.

The Senate Scrutiny of Bills Committee had a range of concerns about the reliance on yet-to-be-made rules. In particular the Committee flags concerns with the decision to rely on rules in **clause 56** (rules which would set out the conditions according to which a disabled person’s nominee will be appointed),⁷⁵ and a much broader range of concerns is articulated about **clause 102**, which provides for a wide ranging rule-making power. The Committee drew attention to its ongoing concern that legislative instruments allow a more limited level of executive scrutiny, ‘particularly as they usually come into effect before the parliamentary scrutiny process

73. **Clause 7** of the Bill provides that a person has an **intellectual impairment** if the person has any one of an intellectual disability, autism spectrum disorder, dementia, impaired intellectual functioning as a consequence of an acquired brain injury; and any other conditions prescribed by the rules as satisfied.

74. In this connection, the Explanatory Memorandum specifically cites the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders – (Fifth Edition) (DSM-5); Wechsler Adult Intelligence Scale (Fourth edition) (WAIS -IV); and International Statistical Classification of Diseases and Related Health Problems (ICD-10) (WHO 1992). Explanatory Memorandum, p. 6.

75. Senate Standing Committee for the Scrutiny of Bills, [Alert Digest No. 6 of 2014](#), op. cit., p. 10.

(disallowance) is undertaken'.⁷⁶ It also drew attention to concerns expressed by the Senate Standing Committee on Regulations and Ordinances regarding the prescribing of matters by 'legislative rules':

... including that the explanatory memoranda for recent examples of this approach did not provide a sufficient opportunity for the Parliament to identify and consider the potential consequences of the introduction of a general rule-making power in place of a regulation-making power.⁷⁷

The Scrutiny of Bills Committee concluded:

Noting the above concerns and, in particular, the fact that subordinate instruments usually come into effect before the parliamentary scrutiny process is undertaken, the committee requests the Minister's advice as to:

- whether general rule-making powers, such as clause 102, would permit a rule-maker to make the following types of provisions:
 - offence provisions
 - ...
 - provisions where the operation of an Act is modified
 - civil penalty provisions
 - ...
- whether there are any processes or procedures in place which provide for OPC [the Office of Parliamentary Counsel] to monitor compliance of all new legislative instruments with its drafting standards, including whether new instruments contain provisions (such as those outlined above) that may not be authorised by the enabling legislation or that would be more appropriately drafted by OPC (in accordance with the guidance at paragraphs 2 to 7 of Drafting Direction 3.8).⁷⁸

Stakeholder concerns

AED Legal Centre states:

We have great concerns that the Rules are not incorporated in the legislation yet this is a substantive element of the legislation that prescribes the method to be applied to determine the payment amount ... The rules should be clearly outlined in the Bill and describe how a payment amount will be determined.

AED is gravely concerned that this Bill seeks to impose a blatantly inequitable, unjust and unfair Rule, as the instrument to pay for only 50% of the underpayments suffered under BSWAT assessments.⁷⁹

Payment amounts

The **payment amount** for a person is to be worked out by a method set out in the BSWAT Payment Act Rules (**subclause 8(1)**). In making the rules, the Minister must have regard to the following principles:

- an amount paid under the Payment Scheme should be 50 per cent of the wages the person would have received had the person's wages been assessed using only the productivity component of the BSWAT assessment less the amount of actual wages paid (**paragraph 8(3)(a)**)
- to ensure the person retains the payment amount determined after tax, a supplement can be added to the payment amount which takes into account the likely effect of income tax (**paragraph 8(3)(b)**) and

76. Ibid., p. 14.

77. Ibid., p. 15.

78. Ibid.

79. AED Legal Centre, [Submission to the Senate Standing Committee on Community Affairs, Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014](#), op. cit., p. 9.

- the payment amount should be nil if the person's productivity wages would have been the same or lower than the amount of actual wages paid (**paragraph 8(3)(c)**).

Despite the operation of **subclause 8(3)** the BSWAT Payment Act Rules may have the effect that where the payment amount for the person is at least \$1 but less than \$100, the payment amount the person should be offered is \$100 plus a supplement for tax if required (**subclause 8(4)**).

Key issue—adequacy of payment amounts

Human Rights Committee concerns

Article 2 of the International Covenant on Civil and Political Rights (ICCPR) requires States Parties to ensure access to an effective remedy for violations of human rights. States Parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law.

The Human Rights Committee noted that the Statement of Compatibility does not provide any 'substantive analysis' about how the method for determining payments under the Payment Scheme may be regarded as an **effective remedy** (understood as being fair and reasonable compensation). As such, it has sought the advice of the Minister as to whether the proposed scheme payment amount is compatible with that right.⁸⁰

The proposed Payment Scheme would provide payments of an amount equal to 50 per cent of what an affected person would have been paid had their wages been assessed under the productivity component of BSWAT. In addition, the Human Rights Committee notes that:

... to the extent that the payments provided for by the scheme would be less than what an affected person would have been entitled to had their wages been assessed by a non-discriminatory method, the bill may represent a limitation on a person's right to receive fair and just compensation for their work. However, the statement of compatibility provides no assessment of this potential limitation on the right to work and rights at work.⁸¹

It has sought advice from the Minister 'as to whether the basis for the calculation of the payment amount using these principles will allow for adequate remuneration compatible with the right to just and favourable conditions of work'.⁸²

In the case of *Georgiadis v Australian and Overseas Telecommunications Corporation*, the High Court held that extinguishing a person's rights of action constituted an acquisition of property which meant that it had to be done on just terms (under section 51(xxxi) of the *Constitution*).⁸³ In cases such as the present legislation, the Commonwealth is not directly extinguishing the right to take action, but is instead offering incentives for individuals to relinquish that right 'voluntarily'. Consequently the Commonwealth can make its offer of 50 per cent of the legal entitlements. There is no direct extinguishment so there is no constitutional requirement that the extinguishment be effected on just terms, simply a political decision as to the terms of the offer.

Stakeholder concerns

The proposed reduction of payments to those who have been unlawfully discriminated against by 50 per cent has been strongly criticised by some stakeholders.

For example, Grampians Disability Advocacy calls the reduction a 'grossly unfair outcome', urging that 'where employees with disabilities have been underpaid due to BSWAT they have a legal and moral right to be compensated in full'.⁸⁴

One submitter posed the question:

Does a 50% payment imply that people with an intellectual disability are only valued half as much as people without an intellectual disability? ... this is 50% of a wage that is already extremely low. Any compensation must be based on

80. Parliamentary Joint Committee on Human Rights, [Ninth report of the 44th Parliament](#), op. cit., p. 4.

81. Ibid., p. 8.

82. Ibid.

83. [Georgiadis v Australian and Overseas Telecommunications Corporation](#) (1994) 179 CLR 297; [1994] HCA 6; (1994) 119 ALR 629, (1994) 68 ALJR 272, accessed 22 August 2014.

84. Grampians Disability Advocacy, [Submission to the Senate Standing Committee on Community Affairs, Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014](#), July 2014, p. 1, accessed 4 August 2014.

a wage determination tool like the SWS that is fair and is already used widely, and must be paid in full not an arbitrary half.⁸⁵

On the other hand, National Disability Services notes that the Payment Scheme responds to the concerns of ADEs that they might bear the liability if unpaid wages were claimed. Their fear is that ‘if ADEs had to carry this liability, many would be rendered unviable and have to close or retrench workers’.⁸⁶ This concern does not seem to have assimilated the Commonwealth’s recognition of its liability in *Nojin v Commonwealth*. In that case it was commented, variously, that:

... the Commonwealth of Australia... has agreed that if [the relevant ADE] is liable for discrimination as alleged, the Commonwealth will bear the liability⁸⁷

and

The Commonwealth has agreed that if the employers are liable for discrimination it will bear the liability under [section 122](#) of the [Disability Discrimination Act](#)⁸⁸

and finally

The Commonwealth accepts that if the employers are liable, it is also liable, and it will bear the liability.⁸⁹

Effect on representative proceedings

Clause 9 of the Bill only applies if:

- a person lodges an **effective acceptance** (as defined by **clause 38** of the Bill) and
- immediately before lodging the acceptance, the person was a group member in relation to a **relevant representative proceeding (subclause 9(4))**.

In that case, **clause 9** operates so that the person ceases to be a group member in relation to the relevant representative proceeding at the time the acceptance was lodged. The rationale for such a provision is that once the person has accepted the offer of payment under the Payment Scheme established by the Bill, the person has accepted that they no longer have a cause of action for which the Court needs to declare a remedy.

The particular proceedings to which this applies are:

- the proceedings commenced in the Federal Court of Australia on 23 December 2013 as proceeding number VID1367/2013—that is the class action against the Commonwealth which was lodged by Maurice Blackburn Lawyers
- any other **representative proceeding**:
 - in which damages or compensation are claimed in connection with the use of a **BSWAT assessment** to work out a minimum wage payable to a person or
 - in relation to which a person may be a group member on the same or substantially the same basis as the conditions in **clause 6**
- any appeal, application for leave to appeal or application for special leave to appeal from any judgment in that proceeding referred to in either of the above and
- any appeal from any judgment in any such appeal referred to in either of the above (**subclause 9(4)**).

Within Part IVA of the *Federal Court of Australia Act*, section 33J **requires** the Court to set a date by which a person may opt out of representative proceedings. In order for the person to opt out, they must provide the Court with a written notice of that intention. The notice must comply with the Rules of the Court.

85. M Dimmock, [Submission to the Senate Standing Committee on Community Affairs, Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014](#), n. d., accessed 4 August 2014.

86. National Disability Services, [Submission to the Senate Standing Committee on Community Affairs](#), op. cit., p. 2.

87. *Nojin v Commonwealth*, op. cit., per Buchanan J, at para 2.

88. Ibid., per Flick J, at para 166.

89. Ibid., per Katzmann J, at para 224.

This Bill relieves a person who has accepted an offer under the Payment Scheme from that obligation. It is for the Commonwealth to give the relevant notice to the Federal Court (**clause 39** of the Bill). This provision stands in contrast to the rest of the proposed Act, which otherwise relies on applicants to initiate action.

Where a person is a group member in any of the proceedings listed above, the person will cease to be a group member at the time they lodge their acceptance of a payment (**subclause 9(1)**). The person will not need to individually opt out of the proceeding in accordance with section 33J of *Federal Court of Australia Act* (**subclause 9(2)**).

Statutory release and indemnity

A further consequence of accepting a payment under the Payment Scheme is that **paragraph 10(1)(a)** provides that the person releases and forever discharges the Commonwealth, each Australian Disability Enterprise and all other persons from all liability in relation to any matter referred to in **subsection 10(2)** (see above). In addition, under **paragraph 10(1)(b)**, the person will not, whether as an individual, a representative party or a member of a group, be entitled to bring or continue any claim against the Commonwealth or any other person in relation to any matter referred to in **subsection 10(2)**.

Key issue—effect on representative proceedings

Human Rights Committee concerns

The Human Rights Committee noted the release and indemnity provisions and the Government's intention that the Payment Scheme 'will not pay compensation' but rather will constitute 'a payment to eligible people'.⁹⁰ It suggests that, taken together, the provisions:

... give rise to a concern that the scheme does not contain the requisite elements of an effective remedy to the unlawful discrimination found to have taken place.

The committee notes that the proposed release and indemnity provisions would appear to operate so as to bar a person from accessing a legally effective remedy.⁹¹

That being the case, it has sought the further advice of the Minister 'as to whether the proposed release and indemnity provisions are compatible with the right to an effective remedy'.⁹²

A response to this question may also need to address the question of the automatic disqualification of an individual who has an 'alternative payment' available to them. It may be that the scheme could include an opportunity to evaluate the nature or quantum of the 'alternative payment' so as to determine whether it is appropriate for the alternative payment to automatically disqualify the recipient from a payment available under the proposed legislation. The legislation provides that an alternative payment includes a payment ordered by a court, but the court order may not be subsequently satisfied, which would leave an individual whose debtor defaults with no payment whatsoever.⁹³

Stakeholder concerns

According to Elizabeth Nojin (mother of Mr Nojin):

Employees are excluded from registering, making an application and having that application assessed if they have already received a settlement under litigation. The purpose of this legislation should be to compensate workers who have not received adequate payments. By not giving an applicant the opportunity to explore all possible avenues to seek their entitlements, the purpose is not being achieved. In the worst case scenario, an applicant may receive very little or no compensation through litigation (particularly after paying legal fees) and they are then precluded from making an application through the Scheme. By excluding access to the Scheme to anyone who has

90. Statement of Compatibility with Human Rights (Explanatory Memorandum), op. cit., p. 2.

91. Parliamentary Joint Committee on Human Rights, [Ninth report of the 44th Parliament](#), op. cit., p. 5.

92. Ibid.

93. See paragraph (b) of the definition of 'alternative amount' at **clause 4** of the Bill.

participated in litigation, the Scheme aims to reduce the amount of payments to be made to employees who are in fact entitled to compensation.⁹⁴

Australian Lawyers Alliance considers that the Payment Scheme:

... will actually short-change individuals, via stamping out their right to seek compensation and by offering a reduced amount of reimbursement ... [and that] ... specific reference to the representative proceeding involving 10,000 claimants, with citation of the proceeding number, could be seen as an intentional and wilful attempt to siphon individuals out of the claim.⁹⁵

Comments

It is a basic legal principle that a person cannot be compensated twice for the same loss, which can be referred to as 'double dipping'. A court would not allow a member of a representative proceeding to be compensated twice for the same loss. The issue of concern with the scheme, however, may be whether, by undermining representative proceedings, the legislation not only discourages a duplicated payment but also encourages people to settle for only 50 per cent of their lost wages. While a court would not allow a double payment it would also not be likely to award only half of their legal entitlements.

Under the Bill, a person may apply for and be paid an amount which is quarantined from the compensation recovery provisions in Part 3.14 of the *Social Security Act*. In that case the person is deemed to have opted out of the representative proceeding on the day that the offer of payment is accepted.

There is no compulsion for the person to accept the offer, there are simply incentives given to accept the lesser, but possibly more secure, amount. If an eligible person does not wish to accept an initial offer made under the proposed legislation there are other options open. A person may seek internal and external review of the decision about the amount (although this comes with some attendant risks; see below). Alternatively the person may continue to participate in representative proceedings. In that case, the person may be awarded a higher amount than would otherwise be offered under the payment scheme established by the Bill, but a consequence may be that his or her pension will be recalculated to take this into account or that the compensation recovery provisions in the *Social Security Act* will operate in relation to the amount awarded. Legal processes also come with inherent risks, and the task of offering legal advice on the best options will not be an easy one (also see below).

The effect of **clause 9** is that it is for the Commonwealth to advise the Federal Court that the person has accepted a payment, thereby relieving the person of the obligation to do so.

One other matter arises from the provisions of the *Federal Court of Australia Act*. Section 33M of the Act provides that where:

- the relief claimed in a representative proceeding is, or includes, payment of money to group members (otherwise than in respect of costs) and
- on application by the respondent, the Court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the respondent of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts

the Court may, by order, direct that the proceeding no longer continue under this Part or it may stay the proceeding.

What this means in practical terms is that, under the *Federal Court of Australia Act*, it is open to the Commonwealth as the respondent to apply to the Court for an order that the proceedings be discontinued on the grounds that, if the proceedings were to be successful, the Commonwealth would still have to identify those

94. E Nojin, [Submission to the Senate Standing Committee on Community Affairs, Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014](#), 15 July 2014, p. 2 accessed 4 August 2014.

95. Australian Lawyers Alliance, [Submission to the Senate Standing Committee on Community Affairs, Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014](#), 23 July 2014, pp. 5–7, accessed 4 August 2014.

who should be paid and distribute the appropriate amounts to them. Such an application would only be successful if the Court considered the costs of doing so would be 'excessive' as regards the likely total of the amounts to be awarded.

Evidence of eligibility

The BSWAT Payment Act Rules may prescribe matters in relation to the evidence needed to establish a person's eligibility under clause 6; and to work out the amount of the payment to be offered to a person (**clause 11**).

Part 3—Obtaining a payment

Part 3 of the BSWAT Payment Bill sets out the arrangements for obtaining a payment under the Payments Scheme. The steps required of a person who is seeking a payment are:

- registering for the scheme
- making an application
- receiving an offer and
- accepting a payment.

Registration

In order to obtain a payment under the Payment Scheme, a person must first register their interest with the Department of Social Services by 1 May 2015 (**subclause 13(2)**). A person cannot be included on the register if they have an alternative amount (**subclause 14(1)**) or have attempted to register on or after 1 May 2015 (**subclause 14(2)**). A person has an 'alternative amount' if they have received payment in recognition of the BSWAT assessment being used to work out a minimum wage or if there is a court order that they are entitled to such a sum.

Application

The next requirement under the Payment Scheme is that the person must make an application between 1 July 2014 and 30 November 2015 (**subclause 15(1)**). A person cannot make an application if there is an alternative amount for the person (**subclause 16(1)**), the person has not registered for the scheme within the requisite time limit (**subclause 16(2)**) or the person has attempted to apply on or after 1 December 2015 (**subclause 14(3)**).

There is no right of review for those persons who have been deemed to be ineligible for the scheme because they have an 'alternative amount'.

Key issue—complexity of the scheme

Human Rights Committee concerns

The proposed Payment Scheme includes a number of 'strict timeframes' relating to registration, lodging an application, acceptance of an offer and applications for review.⁹⁶ The Human Rights Committee has indicated that these timeframes may amount to indirect discrimination, 'to the extent that they may have a disproportionately negative effect on people with an intellectual impairment':

For example, such people may need more time and flexibility in order to access necessary support and advice to facilitate the exercise of their personal choice and control in responding to an offer. The strict timeframes, and lack of opportunity for extensions to seek a review, may therefore limit the right of such persons to enjoy legal capacity on an equal basis with others, and to be provided with access to the support necessary to exercise that legal capacity and to avail themselves of their rights. However, the statement of compatibility provides no assessment of this potential limitation of those rights.⁹⁷

As such, it has sought the advice of the Minister as to whether the strict scheme timeframes are compatible with the right to equality and non-discrimination. The Human Rights Committee has also sought advice from the Minister in relation to provision of an assessment of the potential limitation of these rights.⁹⁸

96. Statement of Compatibility with Human Rights (Explanatory Memorandum), op. cit., p. 1.

97. Parliamentary Joint Committee on Human Rights, [Ninth report of the 44th Parliament](#), op. cit., p. 11.

98. Ibid.

Stakeholder concerns

Some stakeholders have criticised the Payments Scheme as being too complicated—particularly for applicants who have an intellectual disability.⁹⁹ It has been suggested that ‘registration and application could be incorporated into one stage rather than in separate stages [so as to] limit expenditure of financial resources and time for both applicants and the Government’.¹⁰⁰ There is also limited information about the mechanisms by which the Government will be assisting people with intellectual disabilities with information about the scheme or with assistance in navigating the process.

Determinations, offers and refusals

The Secretary of the Department of Social Services (the Secretary) must:

- make a determination as to whether the applicant is, or is not, eligible for the Payment Scheme (**subclause 17(2)**)¹⁰¹ and
- if the applicant is determined to be eligible, make a determination of an amount to be paid to the applicant (**payment amount**) (**subclause 17(3)**).

If it is determined that an applicant is eligible for the Payment Scheme and the amount to be paid is more than nil, the Secretary must make an offer in writing of a **payment amount** to the applicant (**subclause 19(1)**).

The offer must comply with all of the requirements listed in **subclause 19(2)**, including, but not limited to, specifying a period within which a person may accept the offer (the **acceptance period**). The minimum period cannot be less than 14 days, beginning on the date of the offer. The Explanatory Memorandum says that it is anticipated that:

... most applicants will receive a period of at least 60 days, with some applicants receiving more depending on their circumstances, regarding whether to accept an offer or not. This will allow the applicant time to consult with a legal practitioner and a financial counsellor ... However, as the 31 December 2016 deadline approaches, the period of time will be reduced for making an effective acceptance. A minimum period of 14 days will allow an applicant to receive an offer up to 15 days before 31 December 2016.¹⁰²

The offer must also include explanations relating to extensions of time to accept an offer and how to make an application for review of the offer. Offers made following review of a payment amount by an external reviewer are not to include information about extensions of time to accept an offer or seek a review (**subclause 19(3)**).

Refusals

If the applicant is determined to be ineligible for a payment under the Payment Scheme (including on review) or the **payment amount** is nil, the Secretary must refuse the application (**subclause 20(1)**). This must be done in writing and include such things as an explanation of the reason for the refusal and information about seeking a review (**subclause 20(2)**).¹⁰³ Refusals made following review by an external reviewer are not to include information about seeking a review ((**subclause 20(3)**)).

The Secretary must not make an offer or give a refusal to a person whose application has been determined:

- if, since the determination was made, there is an **alternative amount** for the person(**subclause 21(1)**)
- on or after 1 September 2016, except where it is made as a consequence of a review of a determination made before that date (**subclause 21(2)**) or
- on or after 1 December 2016 (**subclause 21(3)**).

99. E Nojin, [Submission to the Senate Standing Committee on Community Affairs](#), op. cit., p. 1.

100. Jobwatch, [Submission to the Senate Standing Committee on Community Affairs](#), *Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014*, July 2014, p. 7, accessed 4 August 2014.

101. Where it is determined that person is not eligible for a payment under the Payments Scheme, **clause 20** requires the Secretary to write to the person advising him or her of, amongst other things, the date of refusal and setting out the reasons for the refusal.

102. Explanatory Memorandum, op. cit., p. 15.

103. Applicants may seek a review of the refusal within 21 days of the refusal.

The Explanatory Memorandum notes that ‘applicants may have to make some difficult choices and may not be able to make these decisions in the time allowed’.¹⁰⁴ As such, the Secretary may, on request, extend the acceptance period for an offer (up to 31 December 2016) or the period within which to apply for a review of refusal (up to 30 November 2016) for no more than 28 days (**clause 22**).

A period may only be extended once (**subclause 22(5)**).

Reviews

Part 3 of the BSWAT Payment Bill provides for both internal and external review of determinations.

An **internal review** may be undertaken on the Secretary’s initiative (**clause 23**) or following a request from the applicant (**clause 24**). In each case the Secretary must either affirm the determination or set aside the original determination and make a new one (**subclauses 23(3)** and **24(6)**).

Arrangements for applications and withdrawal of applications for **external review** of a determination are set out in **clauses 26** and **31**, respectively. The review must be undertaken by either a retired judge or legal practitioner enrolled for at least 10 years (**subclause 27(2)**) as soon as reasonably practicable (**clause 28**). In conducting the review the reviewer is only enabled to examine material specified in **clause 29**, which is the relevant material provided by the Secretary and material provided by an applicant to the Secretary who is then required to pass this on to the reviewer as soon as reasonably practicable. There is also provision made for the reviewer to request further material (**clause 30**).

It should be noted that where an applicant has sought an internal or external review of the **payment amount** this carries some risks for the applicant. First, the reviewer could set aside the applicant’s eligibility for the scheme. Under **subclause 33(2)**, if the reviewer, while conducting the review, is satisfied that the applicant is not eligible for the BSWAT Payments Scheme, they must substitute a decision that the applicant is not eligible. As a consequence of any such decision, the applicant would receive no payment under the scheme.¹⁰⁵ Second, an applicant seeking a review of their **payment amount** may also have their amount reduced by a reviewer (**subclause 33(4)**).

In circumstances where the review is into the applicant’s eligibility, if the reviewer is satisfied that an applicant is eligible for the Payment Scheme, they must set aside the original decision and determine that the applicant is eligible (**subclause 33(5)**). A note to the subclause says that the Secretary would then be required to determine a **payment amount** for the person under **subsection 17(3)**.

The initiation of an internal or external review also has the consequence that any offer or refusal made to an applicant is taken to have never been made and cannot be accepted (**subclauses 34(1)** and **34(2)**). This adds a further risk to applicants seeking a review, in that any previous determinations of eligibility or **payment amounts** would be voided. The exception to this is where a person withdraws an application for review, in which case the previous determination would resume its effect (**subclause 34(3)**).

Key issue—review mechanisms

Human Rights Committee concerns

The Human Rights Committee also raised concerns about the impact on the right to an effective remedy from the absence of:

- review provisions for people deemed ineligible for the Payment Scheme due to having received an alternative payment in respect of a claim related to the discriminatory BSWAT assessments and
- provision under the external review provisions in the Bill for access to merits review through the Administrative Appeals Tribunal.¹⁰⁶

In response, it has sought the advice of the Minister as to whether this is compatible with the right to an effective remedy. In addition, the Human Rights Committee noted that the Human Rights Statement included no

¹⁰⁴Explanatory Memorandum, op. cit., p. 17.

¹⁰⁵**Subclause 33(2)** does not apply if the determination that the applicant was eligible was made by an external reviewer (**subclause 33(3)**).

¹⁰⁶Parliamentary Joint Committee on Human Rights, [Ninth report of the 44th Parliament](#), op. cit., p. 6.

assessment of the compatibility of these apparent limitations on the right to an effective remedy and sought advice in relation to this from the Minister.¹⁰⁷

Scrutiny of Bills Committee concerns

The Committee raises a number of concerns, regarding the Bills' arrangement for merits review, commenting that under the Bill's scheme for 'external review':

... the Secretary is ... responsible for (1) the making of the decisions under review, (2) the appointment of the external reviewers, and (3) the remuneration and allowances enjoyed by external reviewers.¹⁰⁸

The Committee goes on to ask for:

... the Minister's advice as to why it has been concluded that this system of review has been preferred to conferring jurisdiction to review on the AAT, given its well-established reputation for the effective exercise of independent, external merits review functions in a wide variety of statutory contexts.¹⁰⁹

It comments that, pending an answer, the Bill may be in breach of the principle that legislation should not 'make rights, liberties or obligations unduly dependent upon non-reviewable decisions'.¹¹⁰

Acceptance of an offer

Requirements for accepting an offer are set out in **clause 35**. These include that an acceptance must be accompanied by:

- a legal advice certificate
- a financial counselling certificate
- acknowledgement that the person understands the effect of accepting an offer and
- any other information prescribed by the BSWAT Payments Act Rules (**subclause 35(3)**).

Arrangements concerning legal advice and financial counselling for the purposes of accepting an offer are provided for in **clauses 36** and **37**, respectively. It may be noted that a financial counselling certificate may be signed by the applicant's nominee (**subclause 37(1)(c)**).

The task of giving legal advice on the suitability of accepting a payment offered under the legislation may be challenging. It will presumably need to encompass an assessment of the likelihood of success under representative actions as well as an understanding of the necessary financial advice. This in turn could involve an evaluation of the likely impact of the tax offset on offer as well as the treatment of payments under the scheme in terms of the compensation provisions under the *Social Security Act*. It may be that arrangements can be made that ensure applicants can get advice on these matters inexpensively, because it otherwise may be a significant impost.

Whilst the Minister for Social Services has stated that 'access to a legal adviser and a financial counsellor are funded through the scheme'¹¹¹, the Bill is silent on this issue—although it may well be covered by the general rule making provision in **clause 102**.

An acceptance will have effect (termed **effective acceptance**) only if requirements set out in **clause 38** are met. These include that the acceptance is lodged before 1 January 2017 and that the person is not the representative party in a relevant representative proceeding (though, a person may first withdraw from a proceeding and accept the offer). If a person does not lodge an **effective acceptance** before the end of the acceptance period, the person will be taken to have declined the offer (**clause 41**).

107.Ibid.

108.Senate Standing Committee for the Scrutiny of Bills, [Alert Digest No. 6 of 2014](#), op. cit., p. 10.

109.Ibid.

110.Ibid.

111.K Andrews (Minister for Social Services), '[Second reading speech: Business Services Wages Assessment Tool Payment Scheme Bill 2014](#)', House of Representatives, *Debates*, 5 June 2014, p. 5690, accessed 25 August 2014.

Payment of amount

Arrangements for payment of amounts under the scheme are set out in **clause 40**. Despite strict timeframes which are imposed on applicants relating to registration, lodging an application, acceptance of an offer and applications for review, no such limitation is imposed by the Bill on the Commonwealth. Rather, the Secretary must pay the payment amount on the date that is determined by the Secretary to be the earliest date on which it is reasonably practicable for the payment to be made (**subclause 40(1)**).

In addition, **subclause 40(3)** makes it possible to pay the whole or part of an amount in a way other than into the person's bank account (as provided for under **subsection 40(2)**). The relevant example in the Explanatory Memorandum indicates that this is intended to enable the payment to be made to a person's guardian.¹¹²

Part 4—Nominees

Part 4 of the BSWAT Payment Bill provides for arrangements regarding nominees. Nominees are described in the Explanatory Memorandum as persons 'who can make decisions on behalf of a participant while ensuring that the rights, preferences and dignity of the person with disability are maintained'.¹¹³

Actions that may be taken by a nominee are set out in **clause 45**. A nominee may do things that can be done by a participant, though this may be limited by the instrument of appointment of the nominee. Also, if the nominee is appointed on the initiative of the Secretary, the nominee may only do something if they consider that the participant is not capable of doing it (**subclause 45(4)**).

Subclause 46(1) states that a nominee must ascertain the preferences of the participant and act in a manner that gives effect to those preferences. However, the BSWAT Payment Act Rules may modify this duty in relation to participants who cannot formulate preferences (**subclause 46(4)**).

Appointments of nominees are provided for under **clause 50** and may be at the request of the participant or on the initiative of the Secretary (**subclause 50(2)**). This is a largely unregulated process. The Bill sets out no capacity test or medical threshold to which the Secretary should have regard in exercising this power. The instrument of appointment of the nominee may establish limits on the matters in relation to which the appointee is the nominee of the participant (**subclause 50(3)**) and on the term of the appointment (**subclause 50(4)**).

Key features of the arrangements concerning nominees include:

- appointments may only be made with the written consent of the appointee, and after taking into account any preferences of the participant regarding the appointment (**subclause 51(1)**)
- if a nominee has been appointed at the participant's request, and the participant requests that the appointment be cancelled, the Secretary must cancel the appointment as soon as practicable (**subclause 52(1)**)
- if a nominee has been appointed at the Secretary's initiative, and the participant requests that the appointment be cancelled, the Secretary *may* cancel the appointment (**subclause 53(1)**). That request need not be in writing (**subclause 53(2)**). Where such a request is made, the Secretary must decide whether or not to cancel the appointment within 14 days after receiving the request. Where the Secretary decides not to cancel the appointment, he or she must give written notice to the participant of that decision (**subclause 53(3)**)
- the Secretary may suspend the appointment of a nominee if there are reasonable grounds to believe the nominee has caused, or is likely to cause physical, mental or financial harm to the participant, or has failed to fulfil their duties (**subclause 54(1)**). In that case the Secretary must give the person and the participant a written notice of the decision to suspend (**subclause 54(3)**)
- the term 'financial harm' is defined so that it does not include a decision of the nominee to act in accordance with the participant's preferences in relation to the BSWAT Payment Scheme (**subclause 54(2)**)

¹¹²Explanatory Memorandum, op. cit., p. 29.

¹¹³Ibid., p. 30.

- the Secretary may review decisions made in relation to nominees if satisfied there is good reason to do so (**clause 58**), and a person whose interest is affected by any such decision may apply to the Secretary for a review of that decision (**clause 59**) and
- a participant is not guilty of an offence relating to an act or omission of their nominee (**clause 65**), and a nominee is not subject to any criminal liability under the *BSWAT Payment Act* in relation to an act or omission of the participant or anything done, in good faith, by the nominee in their capacity as nominee (**clause 66**).

Key issue—use of nominees

The power of the Secretary to appoint a nominee on his or her own initiative has been widely criticised, and the capacity of the Secretary to refuse a request to terminate a nomination is likely to be similarly seen as problematic.

Human Rights Committee concerns

The Human Rights Committee expressed concern that the BSWAT Payment Bill may not, in a number of respects, ensure that nominees appointed to represent participants in the scheme ‘support, rather than substitute the decision making of the represented person’.¹¹⁴ In particular, it is concerned that arrangements for the appointment of nominees, and their associated duties and obligations are to be contained in as yet unpublished rules. This, it suggests, gives rise to ‘considerable uncertainty’ as to how the arrangements concerning nominees will ensure the effective choice and control of represented people is achieved under the scheme.¹¹⁵

As such, the Human Rights Committee has sought advice from the Minister ‘as to whether the decision making models in place are compatible with the right to equality and non-discrimination’.¹¹⁶ Further, it noted the absence of any assessment of the compatibility of the apparent limitations on these rights and sought advice on this from the Minister.

Stakeholder concerns

One stakeholder described the use of nominees as ‘a dubious system of department control in the appointment of nominees with broad powers that raises a clear conflict of interest which is seemingly without precedent’.¹¹⁷

AED Legal Centre believes:

... this part of the Bill erodes the fundamental legal rights of employees with disability. We are seriously concerned that the Secretary has the power of appointing nominees notwithstanding the fact that the Secretary has an obvious conflict of interest in doing so.

We are also worried by the fact that there is nothing in this part of the Bill that prevents the Secretary in appointing ADE staff or management as nominees when again they have a clear conflict of interest and influence on employees with disability.¹¹⁸

People with Disability Australia also raised concerns about conflict of interest associated with Australian Disability Enterprises, families and carers acting as nominees.¹¹⁹ It also argues that ‘the Bill does not specify that persons must be supported to make their own decisions, or that the will and preference of the person must be the basis of all decisions’.¹²⁰

114.Parliamentary Joint Committee on Human Rights, [Ninth report of the 44th Parliament](#), op. cit., p. 10.

115.Ibid., p. 10.

116.Ibid., p. 11.

117.Grampians Disability Advocacy, [Submission to the Senate Standing Committee on Community Affairs, Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014](#), op. cit., p. 2.

118.AED Legal Centre, [Submission to the Senate Standing Committee on Community Affairs, Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014](#), op. cit., p. 7.

119.People with Disability Australia, [Submission to the Senate Standing Committee on Community Affairs, Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme \(Consequential Amendments\) Bill 2014](#), op. cit., pp. 4–5.

120.Ibid.

Part 5—Administrative matters

Part 5 of the BSWAT Payment Bill provides for various administrative matters associated with the Payment Scheme, including information gathering, privacy and debt recovery.

Information gathering

Division 2 of Part 5 of the BSWAT Payment Bill contains provisions enabling the Secretary to request or require information in relation to the Payment Scheme, requirements associated with such a request, and failure to comply with a request.

For example, the Secretary may request that an applicant provide further information to the Department of Social Services if they believe the information would assist in determining the application (**subclause 68(1)**). The application need not be determined until the further information is provided (**subclause 68(5)**).

In addition, the Secretary will have powers to *require* certain persons to provide information in the following circumstances:

- where the person has information considered relevant to a determination of an application, whether there is an alternative amount for the person and/or whether a payment to an applicant results in a debt to the Commonwealth (**clause 69**)¹²¹
- where a person owes a debt arising due to the Payment Scheme to the Commonwealth under **clause 84** of the *BSWAT Payments Act* (see below) (**clause 70**) and
- where a person is believed to have information about a person who owes a debt to the Commonwealth under **clause 84** (**clause 71**).

Failure to provide information required under the provisions above will be considered an offence attracting a maximum penalty of 30 units (**clause 73**).¹²² The offence does not apply where the person has a reasonable excuse.

Scrutiny of Bills Committee concerns

The Scrutiny of Bills Committee is concerned at the reversal of the onus of proof in **subclause 73(2)**. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that a 'reasonable excuse' defence is 'open-ended' and it may be difficult for defendants to rely upon it 'because it is unclear what needs to be established'.¹²³ The Committee states:

The open-ended nature of the defence also means that it is difficult for the committee to determine whether the reversal of onus entailed by a defence is appropriate. More specifically, it is difficult to determine whether the matters on which the defendant must adduce evidence are 'peculiarly within the knowledge of the defendant' and 'would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter' ...¹²⁴

The Committee goes on to request:

... the Minister's advice as to the justification for reversing the onus of proof without providing further detail as to what would constitute a reasonable excuse defence.¹²⁵

Privacy

Division 3 of Part 5 of the BSWAT Payment Bill contains provisions concerning the protection of personal information obtained in connection with the Payment Scheme. The key concept used is '**protected information**',

121.If the information is requested in relation to a determination of an application, the application need not be determined until the information is provided (**subclause 69(2)**).

122.Under section 4AA of the [Crimes Act 1914](#), a penalty unit is equivalent to \$170. This means that the maximum penalty is \$5,100.

123.Attorney-General's Department (AGD), [Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), AGD website, September 2011, accessed 23 August 2014.

124.Senate Standing Committee for the Scrutiny of Bills, [Alert Digest No. 6 of 2014](#), op. cit., p. 12.

125.Ibid.

which is defined in **clause 4 of the Bill** as information about a person that was obtained for the purposes of the *BSWAT Payment Act* and that is, or was, held in the records of the Department of Social Services.

The clauses in Division 3 establish the following as offences:

- unauthorised access to protected information (**clause 76**)
- unauthorised use or disclosure of protected information (**clause 77**)
- soliciting disclosure of protected information (**clause 78**) and
- offering to supply protected information (**clause 79**).

However, the Secretary has the power to disclose protected information in certain circumstances—such as if the Secretary certifies that it is in the public interest to do so (**paragraph 81(1)(a)**). The Secretary may also disclose protected information to the head of a Department of State or authority of the Commonwealth (including Centrelink and Medicare) for the purposes of that Department or authority (**paragraph 81(1)(b)**).

Scrutiny of Bills Committee concerns

The Scrutiny of Bills Committee is concerned at the lack of detail, in the absence of the proposed rules, regarding the significance of ‘in the public interest’ which the Secretary can rely on to disclose information. The Committee is also concerned that:

... the authority under subparagraph 81(b)(i) to disclose information to the head of a Department of State or an Agency ‘for the purposes of that Department or authority’ is framed very broadly.¹²⁶

Consequently the Committee concludes:

In these circumstances, and in the absence of a comprehensive justification in the explanatory memorandum, the committee seeks the Minister’s advice as to why the clause 81 disclosure powers are considered necessary and, also, whether consideration has been given to including the constraining powers to be provided by the rules in clause 82 in the primary legislation rather than in the rules.¹²⁷

Debts

Divisions 4 and 5 of Part 5 of the *BSWAT Payment Bill* set out provisions relating to debts that arise under the *BSWAT Payment Act* and the circumstances in which such debts may be waived or written off as follows:

- when a debt to the Commonwealth will arise under the *BSWAT Payment Act* (**subclause 84**)
- that the Commonwealth may recover debts due by means of legal proceedings (**subclause 86**)
- that the Secretary may enter into an arrangement with the person owing the debt for the debt to be repaid (**subclause 87**) and
- that the Secretary may write off or waive debts owed to the Commonwealth under the *BSWAT Payments Act* in certain circumstances (**clauses 90–95**).

Miscellaneous matters

Part 6 of the *BSWAT Payment Bill* sets out a number of miscellaneous matters. These include that no admissions that may be used in litigation arise out of the following:

- the determination of a payment amount for a person
- the making of an offer to a person
- the paying of a payment amount to a person
- anything else done under the *BSWAT Payment Act* or the rules and
- anything in the *BSWAT Payment Act* or the rules.

¹²⁶.Ibid., p. 13.

¹²⁷.Ibid.

Similarly they do not constitute an admission that a particular method should be used in assessing damages or compensation in relation to a BSWAT assessment (**clause 98**).

Other provisions

Consequential Amendments Bill

The Consequential Amendments Bill proposes consequential amendments to Commonwealth legislation arising from the introduction of BSWAT Payments Scheme. This includes amendments to the:

- *Income Tax Assessment Act 1936* to ensure payments under the scheme are eligible income for the lump sum in arrears tax offset (**items 1 and 2**)¹²⁸
- *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to ensure that BSWAT Payment Scheme payments are not subject to income tests under each Act (**items 3 and 6**) and
- *Social Security (Administration) Act 1999* to adjust confidentiality provisions to enable persons to obtain, disclose and use personal information for the purposes of the BSWAT Payment Scheme (**items 4 and 5**).

Concluding comments

The measures proposed by these Bills are highly contentious. While the use of BSWAT for wage assessments has long been disputed, the extent of controversy surrounding the Payment Scheme has most likely been heightened by the absence of adequate explanation by the Government of fundamentally important issues such as:

- why payments have been set at 50 per cent of what a person would have been paid had their wages been assessed only on the productivity component of BSWAT
- whether it is fair and reasonable to make payment under the proposed scheme conditional on ceasing participation in representative action and
- whether the strict timelines in the proposed scheme are fair given the particular vulnerabilities of people with intellectual disabilities.

The Government argues that the Payment Scheme is necessary to ensure that Australian Disability Enterprises are able to continue to provide employment to people with disability. Disability services peak body, National Disability Services has described the Payment Scheme as providing certainty to eligible employees by providing them with a payment without the necessity of engaging in litigation.

However, disability advocacy organisation, People with Disability Australia, has argued that the Payment Scheme represents an attempt to sabotage the efforts of vulnerable people to obtain compensation for discrimination suffered as a result of a wages assessment using the BSWAT and that it should be opposed.

The Parliamentary Joint Standing Committee on Human Rights has also raised a number of substantial concerns with these Bills, including:

- there is no explanation as to how the method for determining payments under the BSWAT Payment Scheme may be regarded as an effective remedy, understood as being 'fair and reasonable compensation'
- the release and indemnity provisions give rise to a concern that the scheme does not contain the requisite elements of an effective remedy to the unlawful discrimination found to have taken place; and further, would appear to operate so as to bar a person from accessing a legally effective remedy
- the absence of review provisions for people deemed ineligible for the BSWAT Payment Scheme due to having an alternative payment available to them limits their right to an effective remedy, and the Government has provided for no assessment of the compatibility of this apparent limitation on the right

128. As the Explanatory Memorandum explains, 'when a person receives a lump sum in a single income year, it is likely that individual's total income for that year will be increased to the point where some or all of the money received is taxed at higher marginal rates ... Broadly, the lump sum in arrears tax offset places an individual, who receives an amount of eligible income in the form of an eligible lump sum, in the same tax position as if they had received the amounts as income over the period in which the entitlement arose'. Explanatory Memorandum, op. cit., p. 51.

- the absence of provision under the external review provisions for access to merits review through the Administrative Appeals Tribunal may not be compatible with the right to an effective remedy
- to the extent that the payments provided for by the scheme would be less than what an affected person would have been entitled to had their wages been assessed by a non-discriminatory method, the Bill may represent a limitation on a person's right to receive fair and just compensation for their work
- the decision making models in the BSWAT Payments Scheme (including provisions for nominees) may not be compatible with the right to equality and non-discrimination and
- timeframes applying to the BSWAT Payments Scheme may amount to indirect discrimination, to the extent that they may have a disproportionately negative effect on people with an intellectual impairment.

The Committee has asked the Minister for advice in relation to its concerns, some of which have been echoed by stakeholders, including People with Disability Australia, the Australian Lawyers Alliance, AED Australia and Elizabeth Nojin.

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