Business Services Wage Assessment Tool Payment Scheme Amendment Bill 2016

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Law and Bills Digest Section

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Portfolio: Social Services
Commencement: Sections 1-3 on Royal Assent; Schedule 1 on the 14th day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
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Purpose of the Bill

The purpose of the Business Services Wage Assessment Tool Payment Scheme Amendment Bill 2016 (the Bill) is to amend the Business Services Wage Assessment Tool Payment Scheme Act 2015 (BSWAT Act) to:

• increase one-off payments from 50 per cent to 70 per cent of the difference between the actual wage paid to an eligible person and the amount they would have been paid had the Business Services Wage Assessment Tool (BSWAT) productivity-only component been applied
• provide a ‘top up’ payment for persons who have already received a 50 per cent payment under the BSWAT payment scheme
• remove the current compulsory requirement to obtain legal advice before any payments are made
• extend all relevant scheme dates by 12 months
• clarifying certain administrative arrangements, and
• enable a deceased person’s legal personal representative to engage with the payment scheme on their behalf.

Structure of the Bill

The Bill contains two Parts:

• Part 1 sets out the relevant amendments to the BSWAT Act and
• Part 2 contains application and transitional provisions.

Background

The Australian Government funds organisations to provide a range of employment services and support for people with disabilities. Relevant to this Bills Digest, one form of employment services for people with disabilities is supported employment services that provide support to, and employment for, people with disability within the same organisation. Supported employment services are provided through organisations known as Australian Disability Enterprises (ADEs).

Australian Disability Enterprises are 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 within a commercial context. 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. Currently, around 20,000 people with moderate to severe disability are employed by ADEs.

Use of the Business Services Wage Assessment Tool (BSWAT)

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 Supported Employment Services Award 2010. One of those tools is the Business Services Wage Assessment Tool (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. Around half of supported workers had their wages assessed using the BSWAT, making it the most commonly used assessment tool. 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). 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. Under the BSWAT, the productivity and competency components were scored separately and the results combined to determine the person’s pro rata wage rate. The rate was then applied to the most appropriate level of the most relevant award. It is the competency component of the BSWAT that was the basis of contention before the Full Court of the Federal Court in the case of Nojin v Commonwealth.

**Federal Court case**

The case was brought under the *Disability Discrimination Act 1992*. 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.

The Commonwealth agreed that if the employers were liable for discrimination it would bear that liability in accordance with the terms of section 122 of the *Disability Discrimination Act*. Essentially then, because the Commonwealth had devised the BSWAT and promoted its use, it was liable.

**Government response**

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’.

**Class action**

In December 2013, lawyers Maurice Blackburn lodged representative proceedings (commonly known as a class action) against the Commonwealth in the Federal Court of Australia to ‘recover lost wages for more than 10,000 workers’. The proceedings allege unlawful discrimination against 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) on or before 22 October 2013 and whose wage had been assessed using the BSWAT.

On 21 December 2015, Maurice Blackburn Lawyers announced an in-principle agreement to settle the class action.

The Bill is a direct response to the proposed agreement which still requires Federal Court approval.

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8. Ibid.
10. *Nojin v Commonwealth of Australia*, paragraph 166, per Flick J.
11. 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.
**Enactment of the BSWAT Acts**

The BSWAT Act which was established in response to the findings of the Federal Court in *Nojin v Commonwealth* commenced on 1 July 2015. It applies only to those persons who consider that their circumstances are equivalent to those of Mr Nojin and Mr Prior. Accordingly the BSWAT Act:

- established a formal Payment Scheme whereby a claimant would be paid 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
- allowed people who believe they have been similarly discriminated against to register their intention to apply for payment and to submit an application for payment
- provided 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
- provided for strict timelines to apply at each stage of the process.

As at 16 December 2015 the scheme had received more than 1,300 registrations.

The *Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Act 2015*:

- amended the taxation law so that payments under the scheme would be eligible income for the lump sum in arrears tax offset and
- amended the social security law so that the payments would not be income tested.

**Rationale for the Bill**

Introducing the Bill, the Minister for Social Services, Christian Porter, stated:

*On 16 December 2015, the Commonwealth announced that a settlement had been agreed with the applicant in the representative proceeding ... before the Federal Court. The amendments in this Bill will give effect to that settlement agreement.*

*If the Bill is passed, and the terms of the settlement are agreed by the Federal Court, the representative proceeding will be dismissed by the consent of the parties, and the supported employees concerned, along with their families and carers ...*

*In essence the parties have agreed to settle if, amongst other matters, the payments under the current scheme are calculated at 70 per cent of the difference between the wages the person was paid and the wages that would have been paid if only the productivity component of the Business Services Wage Assessment Tool had been used ...*

**Committee consideration**

**Senate Standing Committee for Selection of Bills**

At its meeting of 24 February 2016, the Senate Standing Committee for Selection of Bills determined that the Bill would not be referred to committee for inquiry and report.

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills reported on the Bill on 24 February 2016. The relevant comments are set out below under the heading ‘Key issues and provisions’.

15. C Porter (Minister for Social Services) and A Tudge (Assistant Minister for Social Services), *Delivering certainty for the supported employment sector*, joint media release, 16 December 2015, accessed 23 February 2016.


Policy position of non-government parties/independents

At the time of writing this Bills Digest no comments had been made in relation to the current Bill. However, Australian Greens Senator, Rachael Siewert, expressed the following concerns about the Bill for the BSWAT Act:

> The Greens still oppose this bill. We do not believe it is fair; we believe that it in effect continues the discrimination that has occurred through this particular tool. One of our concerns with the Bill is the fact that people are forced to take one option or the other … people should not be forced to accept poor compensation for the loss, or underpayment, of wages or the loss of opportunity those wages would have afforded them.\(^{20}\)

Position of major interest groups

At the time of writing this Bills Digest no comments appear to have been made by stakeholder groups.

Financial implications

According to the Explanatory Memorandum to the Bill, its financial impact ‘will depend on the number of individuals who apply for the payment scheme, and the payment amounts determined for eligible applicants’.\(^{21}\)

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s 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 Bill is compatible.\(^{22}\)

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights (Human Rights Committee) commented on the Bill in its report of 23 February 2016 by drawing attention to its earlier comments in relation to the Bill for the BSWAT Act.\(^{23}\) In its report of 15 July 2014, the Human Rights Committee took the view that the Bill for the principal Act 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.\(^{24}\)

Adequacy of payment amounts

The Human Rights Committee drew attention to Article 2 of the International Covenant on Civil and Political Rights (ICCPR) which requires States Parties to ensure access to an effective remedy for violations of human rights.\(^{25}\) 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 to the Bill for the principal Act did 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).\(^{26}\)

In relation to the proposal to 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, the Human Rights Committee notes that:


\(^{21}\) Explanatory Memorandum, Business Services Wage Assessment Tool Payment Scheme Amendment Bill 2015, p. 1.

\(^{22}\) The Statement of Compatibility with Human Rights can be found at pages 1–4 at the end of the Explanatory Memorandum to the Bill.


\(^{26}\) Parliamentary Joint Committee on Human Rights, Ninth report of the 44th Parliament, op. cit., p. 3.
... 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.²⁷

Time frames

The Human Rights Committee was also concerned about the ‘strict time frames’ relating to registration, lodging an application, acceptance of an offer and applications for review.²⁸ The Human Rights Committee 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.²⁹

Key issues and provisions

Changes to time limits

Currently the BSWAT Act sets out the process for applying for a payment under the scheme and applies strict time frames to each step as follows:

- a person must register for the purposes of the scheme by 1 May 2016³⁰
- a person must make an application for payment on the approved form and in the manner prescribed before 1 December 2016³¹
- a person cannot make an application after 1 May 2016 if the person is not on the register³²
- a person cannot make an application on or after 1 December 2016³³
- if a person makes an application before 1 December 2016, the Secretary must determine the application by deciding whether the person is eligible for the scheme, and if so, what amount (if any) to offer the person³⁴— but the Secretary must not determine an application made after that date³⁵
- once the Secretary has calculated the relevant amount, the Secretary must make a formal offer to pay that amount³⁶ or must formally refuse the application.³⁷ However the Secretary must not make an offer or give a refusal to a person on or after 1 September 2017³⁸
- the Secretary must not make an offer of payment or give a refusal to a person on or after 1 December 2017³⁹
- the Secretary may, on written request, extend the acceptance period—but the extension period must end on or before 31 December 2017⁴⁰

²⁷. Ibid., p. 8.
³⁰. BSWAT Act, sections 13 and 14.
³¹. BSWAT Act, section 15.
³². BSWAT Act, subsection 16(2).
³³. BSWAT Act, subsection 16(3).
³⁴. BSWAT Act, section 17.
³⁵. BSWAT Act, section 18.
³⁶. BSWAT Act, section 19.
³⁷. BSWAT Act, section 20.
³⁸. BSWAT Act, subsection 21(2).
³⁹. BSWAT Act, subsection 21(3).
in addition, the Secretary may, on written request extend the periods for applying for a review of a refusal—but the extension period must end on or before 30 November 2017.

The Bill extends each and every time limit by 12 months so that, for instance, a person must register for the scheme by 1 May 2017, a person who is not on the register cannot make an application on or after 1 May 2017, a person cannot make an application on or after 1 December 2017 and all acceptances must be lodged by 31 December 2018.

**Change to amount payable**

Currently, section 8 of the BSWAT Act sets out the principles to be followed in calculating the payment amount for a person. One of those principles is that the amount a person should receive, if the person accepts an offer, should broadly reflect the amount that is 50 per cent of the excess (if any) of a productivity-scored wage over an actual wage which is then indexed. Item 7 of the Bill amends section 8 to increase the percentage of excess from 50 to 70. The application provisions in Part 2 of the Bill refer to this as the **70% amendment**.

**Effect of a persons’ death**

Section 97 of the BSWAT Act currently provides that the Act does not apply to a person who has died unless the person had made an application for payment, and had not lodged an effective acceptance, before the date of their death. Item 35 of the Bill repeals and replaces section 97 to allow the legal personal representative of a person who has died to do all acts required by the Act on behalf of the deceased person, including registering and applying for a payment under the BSWAT payment scheme.

Consequent upon this change item 6 of the Bill inserts **proposed subsection 6(5)** which will ensure that a person who was eligible for a payment before his, or her, death or who would have been eligible if the BSWAT Act had been in force on the day he, or she, died continues to be eligible.

**Legal advice certificate**

The BSWAT Act operates so that a person who wants to accept an offer must do so in the approved form which must be accompanied by all of the following:

- a legal advice certificate
- a financial counselling certificate
- an acknowledgement that the person understands the effect of accepting the offer and
- any other information or documents prescribed by the rules.

Section 36 of the BSWAT Act further requires that the legal certificate which is to accompany the acceptance of the offer is in an approved form, certifies any of the matters which are specified in the form and is signed by a legal practitioner.

The Explanatory Memorandum to the original Bill states:

> The applicant will have access under the scheme to legal advice. The applicant will need to see a legal practitioner to seek advice on the impact of receiving a payment under this scheme and whether the offer made is consistent with the requirements of the Act. The form will set out the matters on which a legal practitioner should provide advice to an applicant. The legal practitioner will be required to certify that he or she has provided advice. An applicant will be able to have his or her nominee present at this meeting if he or she desires.

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40. BSWAT Act, subsection 22(2).
41. Item 15 of Part 1 of the Bill.
42. Items 2 and 18 of Part 1 of the Bill.
43. Items 1, 8 and 17 of Part 1 of the Bill.
44. Items 4, 14 and 31 of Part 1 of the Bill.
45. BSWAT Act, section 35.
46. Explanatory Memorandum, Business Services Wage Assessment Tool Payment Scheme Bill 2014, p. 27.
However, item 29 of the Bill amends section 36 so that it is no longer mandatory that the legal advice certificate is signed only by a legal practitioner. Instead, the person, or the person’s nominee may also sign the certificate. The rationale for this amendment is that it will:

... remove a current impediment to participants receiving their payments quickly, especially for those who receive small offers of payment. Access to these services continues to be funded under the scheme by the Commonwealth, and the Government remains committed to ensuring people are able to make informed choices about their access to payments as a result of previously having been assessed using the Business Services Wage Assessment Tool. 47

Scrutiny of Bills Committee comments

By way of context, the Scrutiny of Bills Committee first noted that, in respect of the class action currently before the Federal Court of Australia, class members have agreed to release the Commonwealth from liability which may otherwise be established if the amendments are made and the settlement is approved by the court. However the class members have the right to opt out of the representative proceedings and commence their own legal proceedings rather than accept an offer under the payment scheme created by the BSWAT Act.

The Scrutiny of Bills Committee acknowledged that item 29 of the Bill removes the requirement that a person obtain legal advice from a legal practitioner before he, or she, can make an effective acceptance under the payment scheme. Although a completed legal advice certificate (under section 36 of the BSWAT Act) will still be necessary, it need only be completed by a legal practitioner if the person elects to receive legal advice.

The Scrutiny of Bills Committee concluded:

The key change made by item 29 is thus to make legal advice prior to electing to opt into the BSWAT payment scheme (and thus forgo the right to pursue legal action) optional, not compulsory. The statement of compatibility emphasises that this provides ‘greater choice and control to applicants’ (at p. 2). The statement also suggests that making access to legal advice voluntary will ‘reduce the red-tape burden on an individual applicant’ and that requiring legal advice ‘may be an impediment to the take-up of offers under the payment scheme and, in any event, members of the representative proceeding who choose to accept a payment under the scheme may not require further legal advice’ (at p. 4).

The committee notes this advice, but is concerned about the removal of the existing requirement for compulsory legal advice (freely provided by the Commonwealth), especially as at least some persons affected suffer from a variety of disabilities. 48

That being the case, the Scrutiny of Bills Committee has sought a more detailed explanation of this change from the Minister.

Application provisions

Items 37–39 of Part 2 of the Bill operate so that the rules for working out a payment amount under section 8 of the BSWAT Act apply the 70% amendment from the commencement day. For those persons who have accepted an offer before the commencement day (that is, before the 70% amendment comes into effect), the Secretary must, as soon as practicable after the commencement day, work out the top up amount for the person.

Concluding comments

The effect of this Bill is to finalise the method of calculating the entitlements of those persons who suffered discrimination because of the application of the Business Services Wage Assessment Tool. Entitlement will be based on 70 per cent of the difference between the wages the person was paid and the wages that would have been paid if only the productivity component of the Business Services Wage Assessment Tool had been used.

It appears that if the Bill is passed, and the terms of the settlement are agreed by the Federal Court, the representative proceeding will be able to be dismissed by the consent of the parties.

47. C Porter (Minister for Social Services), "Second reading speech: Business Services Wage Assessment Tool Payment Scheme Amendment Bill 2016", op. cit.

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