



**The Senate Standing Committee on Community Affairs
Inquiry on the 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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Job Watch Inc

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1. Introduction

Job Watch Inc (**JobWatch**) supports a Federal Government initiative to compensate disabled workers for the use of the discriminatory Business Services Wages Assessment Tool (**BSWAT**) to determine their wages in Australian Disability Enterprises (**ADEs**).

However, JobWatch has concerns regarding the Business Services Wage Assessment Tool Payment Scheme Bill 2014 (**the Bill**) and its impact on the rights of disabled workers.

These concerns are in regard to both particular provisions of the draft legislation, and the role of the proposed payment scheme (**the Payment Scheme**) as a whole. These concerns are as follows:

Particular provisions

- The adequacy of the time frames for registration, application and acceptance;
- The election of Nominees and its consequences for the rights of participants;
- The complexity of the application process;
- The adequacy of the payment amount; and
- The appropriateness of the extent of automatic exclusion from Court proceedings.

General concerns with the Payment Scheme

- Inappropriateness of the scheme for cases in which the worker's circumstances are clearly analogous to those of the plaintiffs in *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

The combination of these concerns affectively means that vulnerable and disadvantaged disabled workers who have already been discriminated against are being further discriminated against in the Bill. These concerns will be the focus of JobWatch's submission. JobWatch also broadly endorses the submission made by the AED Legal Centre.

2. About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by State and Federal funding bodies to do the following:

- a) Provide information and referrals to Victorian workers via a free and confidential telephone information service;
- b) Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;
- c) Represent and advise vulnerable and disadvantaged workers; and
- d) Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected over 163,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time. The contents of this submission is based on the experiences of callers to and clients of JobWatch and the knowledge and experience of JobWatch's legal practice.

3. Adequacy of Time Frames

The Minister for Social Services has stated in the Second Reading Speech that the time frames of the Payment Scheme are generous. However, JobWatch is concerned that the Payment Scheme may not allow adequate time for disabled workers to attain legal or other professional advice and to fully consider their legal and financial options and to decide whether or not to register in the scheme before 1 May 2015, as required by s14.

JobWatch is also concerned that the length of the acceptance period, as designated by s19(2)(e) to be a 'minimum of 14 days', is inadequate and may place great constraints on the ability of disabled workers to fully consider their payment offer.

The necessity of a longer acceptance period is heightened by the requirement of a financial advisor and legal practitioner's consultation, which may place further delays on the ability of participants to accept their offer within the designated time frame.

JobWatch is also concerned that these vulnerable and disadvantaged workers may also be vulnerable to exploitation by unscrupulous, conflicted and/or predatory advisors and/or nominees. To minimise the risk of this occurring, funding should be provided to Community Legal Centres, such as JobWatch, to provide free and independent advice on the Payment Scheme, professional fees and to examine workers' capacity to accept an offer provided by the Payment Scheme. The Community Legal Centres would then effectively act as a litigation guardian. This would help avoid any further costly and embarrassing allegations of disability discrimination being made against the Commonwealth of Australia.

In the Explanatory Memoranda, it is stated that 'it is anticipated that, during the life of the BSWAT Payment Scheme, most applicants will receive a period of at least 60 days' to accept their payment offer. JobWatch supports this 60 day acceptance period, and would recommend it being explicitly confirmed in the legislation.

Recommendation 1: An extension of time frames for registration, application and acceptance.

Recommendation 2: Funding for Community Legal Centres to provide free and independent advice on the Payment Scheme, professional fees, conflicted Nominees, and to examine workers' capacity to accept an offer provided by the Payment Scheme.

4. Appointment of Nominees

JobWatch supports the appointment of Nominees to assist people in participating in the Scheme so long as nominees are independent third parties with no vested interest in the outcome for the applicant and are acting as a nominee free of charge.

Nevertheless, JobWatch is concerned that a nominee can be appointed 'on the initiative of the secretary' to act for persons without that person's consent, as provided by s42 of the Bill.

Further, JobWatch is concerned that s46 may place the rights of participants at risk by deeming that a breach of duty by a nominee does not take place if the nominee 'reasonably' believes the participants preferences have been ascertained and been given affect. The broadness of this provision may allow participants' preferences to be easily jeopardized, especially where a disabled worker's capacity to make informed and rational decisions is compromised.

The rights of participants may also be limited by s48, which provides that any notice given to a nominee is taken to be given to the applicant and that any failure on behalf of the nominee to satisfy requirements is taken to be a failure by the applicant. This may unfairly disadvantage applicants who have not themselves been responsible for a failure to provide information or satisfy requirements.

The rights of disabled people may also be compromised by the broad terms of s46(4) which allows the rules to be modified if the participant is unable to formulate preferences.

Recommendation 3: JobWatch recommends that the terms of these provisions are narrowed in order to prevent any limitations placed on the rights of disabled people, or an action taken contrary to their preferences and refers to and repeats recommendation 2.

5. Complexity of the Process

JobWatch believes that the process by which participants must register, apply for and accept offers may be unnecessarily complex and difficult for many vulnerable and disadvantaged disabled workers, and so may further disadvantage them.

JobWatch recommends that the registration and application could be incorporated into one stage rather than in separate stages. This would limit expenditure of financial resources and time for both applicants and the Government. JobWatch also recommends that an information brochure be provided free of charge to all relevant parties, in order to clarify the process and inform potential applicants of their rights.

That all applicants must provide a legal advice certificate and financial counselling certificate before accepting a payment offer may constitute a large financial burden. In the second reading speech, the Minister stated that 'access to a legal adviser and a financial counsellor are funded through the scheme'. JobWatch recommends that this statement, and further details of the funding, should be included in the legislation. Further, JobWatch recommends that Community Legal Centres be actively included in the Payment Scheme in order to better assist applicants and deal with their complicated and potentially stressful obligations. See recommendation 2.

Recommendation 4: Information brochures be provided free of charge to all relevant parties.

6. Adequacy of the Payment Amount

JobWatch is concerned that by leaving the method of determination of payment amounts to be prescribed by the rules, the legislation does not provide any certainty for participants in regards to the amount of their payment.

S8(3)(a) provides that payments should broadly reflect the amount that is 50% of the excess (if any) of a productivity-scored wage over an actual wage. JobWatch believes that this provision is inappropriate and unnecessarily vague, due to the ambiguity of the phrase 'broadly reflect', as well as the absence of details as to how the productivity-scored wage is to be assessed. As the Payment Scheme is essentially an offer of settlement, it must be clear and unambiguous otherwise how can advisors, nominees and/or Applicants make informed and rational decisions or obtain accurate advice?

Furthermore, if it is to be understood that the 'productivity-scored wage' is, in the light of the Federal Court's ruling in *Nojin v Commonwealth of Australia [2012] FCAFC 192*, the wage to which disabled workers are legally entitled, JobWatch submits that 50% of the excess is an inappropriately small payment which compromises the rights of disabled people and so is open to accusations of being, in itself, discriminatory. A more appropriate payment would be 100% of the excess because legislated minimum wages exist to provide a safety net for all workers and legislated minimum wages and entitlements, including wages due under the Productivity-Scored Assessment, should not be compromised.

Recommendation 5: Clarification with regards to how the productivity-scored test is to be determined.

Recommendation 6: A more restricted delegation of power to the rules to prescribe the payment measures.

Recommendation 7: Payments of 100% of the excess of a productivity-scored wage over the actual wage be provided.

7. Appropriateness of Exclusion from Court Proceedings

Exclusion from court proceedings is only acceptable if the time frame of the acceptance period is extended, as this will allow applicants to properly consider whether choosing to be permanently excluded from future court proceedings is the right option for them. See recommendation 1.

8. General Concerns

In light of *Nojin v Commonwealth*, in which it was held that that the BSWAT was in violation of the *Disability Discrimination Act 1992 (Cth)*, JobWatch submits that in cases in which a worker's circumstances are clearly analogous to the plaintiffs in that case (i.e. if they were employed in an ADE, had an intellectual disability and were paid a wage determined by the BSWAT) automatic eligibility for a payment is more appropriate than being subject to an involved process of registration, application and acceptance.

As a productivity-scored test was deemed an appropriate measure for determining wages by the Federal Court, JobWatch would recommend that this payment be 100% of the excess of a productivity-scored test over an actual wage, as per recommendation 6.

Anything less than 100% of the excess can be seen as a compromise of the full legal entitlements of disabled workers. Minimum entitlements exist to provide a safety net for all workers, including the most vulnerable and disadvantaged workers in Australia, and it is not legally possible to contract out of one's minimum entitlements. The Government's "offer" of 50% of the excess equates to an offer of less than the legal minimum wage for vulnerable and disadvantaged disabled workers and is an affront to the "fair go all round" basis for the Australian industrial relations system and a further act of discrimination against vulnerable and disadvantaged disabled workers already suffering from unlawful discrimination.

9. Conclusion

For the reasons outlined above, JobWatch suggests that this Bill is not in the best interests of the groups of Australians who have been discriminated against through the use of the BSWAT.

Indeed, JobWatch is primarily concerned that the Bill, while attempting to compensate for the discriminatory BSWAT, in fact continues to discriminate against some of Australia's most vulnerable workers. As outlined in this submission, this discrimination occurs in both the complexity and difficulty of participating in the scheme and in the payment offer of only 50% of the worker's full legal entitlements.

It should be noted that JobWatch is pleased by the Minister's announcement in the Second Reading Speech that 'in the longer term, a new wage assessment process will be developed for use in Australian Disability Enterprises'.

Thank you for considering our concerns.

Job Watch Inc.

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