

**AUSTRALIAN GOVERNMENT DEPARTMENT OF SOCIAL SERVICES:
SUBMISSION FOR THE SENATE LEGISLATIVE COMMITTEE – BUSINESS
SERVICES WAGE ASSESSMENT TOOL (BSWAT) PAYMENT SCHEME BILL**

ESTABLISHMENT OF THE SCHEME

1. Minister for Social Services, the Hon Kevin Andrews MP, and Assistant Minister for Social Services, Senator the Hon Mitch Fifield, jointly announced the establishment of the BSWAT Payment Scheme on 15 January 2014.
2. The Business Services Wage Assessment Tool Payment Scheme Bill establishes a payment scheme for supported employees with intellectual impairment in Australian Disability Enterprises (ADEs) who have had their wages assessed using the BSWAT, or been paid a training wage while awaiting a BSWAT assessment.
3. The Australian Government established the payment scheme to give reassurance to supported employees, and their families and carers, by removing a perceived potential liability for ADEs for alleged disability employment discrimination that may impact the ability or willingness of ADEs to deliver ongoing employment support for supported employees.

BACKGROUND: Supported Employment Sector, BSWAT and court proceedings

4. ADEs are businesses employing people with disability who need ongoing support to maintain their employment. Supported employees' wages are paid using revenue from ADEs' business activities.
5. 193 organisations operate ADEs across Australia; supporting 20,000 workers with moderate to severe levels of disability.
6. The *Supported Employment Services Award 2010* sets out the approved wage assessment tools to be used to determine the pro-rata wages of supported employees in ADEs. The BSWAT is one of these tools.
7. ADEs are required to comply with the same industrial relations laws as other Australian employers. Employees with disability have the same recourse to the Fair Work Commission as other workers.
8. The BSWAT was developed by the Australian Government in consultation with stakeholders, and was first used in 2004. The BSWAT was used to determine the wages of about half of all supported employees in ADEs.
9. The BSWAT measures a worker's productivity and competence in performing a job.
10. In 2012, the Full Federal Court found two supported employees experienced indirect discrimination when their employers used the BSWAT for the assessment of the employees' wages.
11. The two supported employees did **not** receive any monetary compensation. A claim for financial compensation was abandoned during the hearing of the appeal before the Full Federal Court.

12. The use of the BSWAT was suspended following the court's decision. The BSWAT has not been used for assessments since.
13. A representative proceeding has been commenced on behalf of all intellectually disabled workers who were employed in ADEs as at 22 October 2013 and had their wages assessed or, as at 22 October 2013, were proposed to have their wages assessed, under BSWAT.

CONSULTATION

14. Consultation with the following groups have informed development of the payment scheme:
 - People with disability, their families and carers, ADEs and other stakeholders were consulted about wage assessment processes and associated issues in July 2013;
 - Consultation across government departments, including Prime Minister and Cabinet, Treasury, Department of Finance, Attorney General's Department, Human Services Department, and the Department of Employment;
 - Discussions with public guardians in some jurisdictions.
15. Elements of the payment scheme in particular informed by consultation include the exemption of scheme payments from the income support test in social security law, the inclusion of Lump Sum Tax Offset in Arrears treatment of payments, and access to financial counsellors and legal representatives funded by the payment scheme.

BSWAT PAYMENT SCHEME DETAIL

16. A person is eligible for the payment scheme, if the person, at any time between 1 January 2004 and 28 May 2014:
 - had an intellectual impairment;
 - had been employed in an ADE and was provided employment support by the ADE; and
 - was paid a pro-rata wage determined using the BSWAT, or was paid a training wage while awaiting an assessment under the BSWAT.
17. The further eligibility conditions are that:
 - the person required daily support in the workplace to maintain employment in the ADE; and
 - the person has not accepted an amount of money in settlement of, or the court has not ordered payment of an amount of money to the person in connection with, a claim made relating to the use of the BSWAT to assess the person's wage.
18. People who would like to participate in the scheme must register their interest before 1 May 2015.

19. People who register may test their eligibility by making an application under the payment scheme's processes. Applications can be submitted up until 30 November 2015.
20. The payment scheme timeframes are generous; however they do require people wishing to access the scheme take required actions before set dates. Timeframes will be made very clear in all scheme materials.
21. If a person is found to be ineligible, the person will be able to have that decision reviewed.
22. The payment amount to be offered will be half of the difference between the amount the supported employee would have been paid had only the productivity element of the BSWAT had been applied *and* the amount the supported employee was paid, or the amount determined under the BSWAT assessment (whichever is the greater). To ensure the person retains the payment amount after tax, the amount will be increased to take account of expected tax.
23. The payment to supported employees who have had their wages assessed by the BSWAT is exempt from means testing for income support payments in the social security law and allows for any payment received under the payment scheme to be treated as a lump sum tax offset in arrears.
24. If the payment amount is greater than zero, the applicant will receive a letter setting out, amongst other things, an offer to pay that amount and the time in which the applicant may accept the offer. The minimum amount to be offered will be \$100.
25. An applicant must seek independent financial counselling and legal advice before accepting an offer. Certificates from the financial counsellor and the legal adviser must accompany the applicant's acceptance of the offer. Access to a legal adviser and a financial counsellor is funded through the scheme. An applicant may choose to have a nominee, advocate and/or a support person with the applicant at any stage of the process.
26. Payment will be made once an effective acceptance is lodged by an applicant.
27. It is the supported employee's choice whether he or she accepts a payment from the scheme.
28. The scheme provides internal and external review. External review will be undertaken by legal practitioners with at least ten years' experience or who are retired judges.
29. If the supported employee accepts a payment, he or she will automatically cease to be a group member in the representative proceedings, and will be unable to make any further claims in relation to the assessment of wages using the BSWAT.
30. People with disability have the choice and control to choose the option that best suits their preferences and personal circumstances.
31. The two supported employees who were the subject of the decision of the Full Federal Court in 2012 may register and apply for a payment under the BSWAT Payment Scheme.