

BSWAT PAYMENT SCHEME VS REPRESENTATIVE PROCEEDING

PREPARED BY THE DEPARTMENT OF SOCIAL SERVICES FOR THE SENATE STANDING COMMITTEE ON COMMUNITY AFFAIRS

ELEMENT	BSWAT PAYMENT SCHEME	REPRESENTATIVE PROCEEDING	ADDITIONAL COMMENTS
Impact on rights	<p>A person (or the person's nominee acting in accordance with the person's preferences) can freely choose to accept, or not accept, a payment under the Scheme.</p> <p>If the person does not accept a payment under the Scheme, they will remain in the representative proceeding (if they are a group member) unless they "opt out" of the representative proceeding.</p> <p>If the person accepts a payment under the Scheme by lodging an effective acceptance, by force of section 9 (1), they cease to 'be a group member in relation to the relevant representative proceeding'.</p> <p>The legislation also provides (section 10) that, if a person lodges an effective acceptance, the person:</p> <ul style="list-style-type: none"> (a) releases and forever discharges the Commonwealth, all ADEs and all other persons from all liability in relation to the use of the BSWAT to assess the 	<p>If, under any settlement reached in the representative proceeding, a group member was provided with an amount of money, this would result in the extinguishment of the group member's right to (a) accept a payment through the BSWAT Payment Scheme, and (b) to take any or further action against the Commonwealth or their employer in relation to wages paid using the BSWAT (assuming that a standard "release from liability" clause was a term of the settlement).</p>	<p>The BSWAT Payment Scheme and any settlement in the Representative Proceeding applying to the group member (assuming a standard "release from liability" clause was a term of the settlement) would have the same result on the rights of an individual in relation to the individual taking further action in relation to the BSWAT.</p> <p>If the whole representative proceeding was settled, and this was approved by the Court, the group member would be subject to the settlement (whether they agreed with it or not) unless they opted out of the representative proceeding before the settlement was approved by the Court.</p>

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	<p>minimum wage of the person; and</p> <p>(b) the person is unable to bring further action against the Commonwealth or any other person in relation to the BSWAT.</p>		
Timeliness of process	<p>Comparatively fast. Registrations and applications for payment can occur immediately after the commencement of the scheme. All acceptance of offers of payments must be made by 31 December 2016.</p>	<p>Unknown.</p> <p>If the representative proceeding went to trial, it may take years before the Court decides the claims of the Applicant and all the group members (each of which claims may contain individual issues that need determination by the Court). Further, the Applicant and the group members (or some of them) may not be successful in the representative proceeding, which would mean they would receive no award of compensation by the Court.</p> <p>If a settlement of the representative proceeding could be reached, this may take time. A settlement must be agreed to by the Court.</p>	<p>Representative proceedings can take years to be determined by the Court or resolved through a settlement.</p>
Impact on income support	<p>Exempt from means testing as income under social security law.</p>	<p>Payments received through a court ordered settlement are subject to means testing as income under social security law.</p>	
Impact on tax	<p>A person's payment will be increased to take into account any income tax</p>	<p>Any compensation awarded by the Court or payments received through</p>	

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	<p>that may be payable to allow the person the benefit of the full payment in hand. Section 8(3)(b) states that a principle that must be applied in the making of the rules is that the payment amount should be increased to take account of expected income tax 'to ensure that the person retains that amount after tax'.</p> <p>Payments received under the BSWAT Payment Scheme will be treated as a Lump Sum in Arrears Tax Offset for income tax purposes.</p>	any court ordered settlement would be subject to income taxation.	
Role and cost of lawyer	<p>An effective acceptance requires an applicant to provide a legal advice certificate that is in an approved form, which certifies the matters specified in the form, and is signed by a legal practitioner as defined within the Bill: see sections 35(3), 36 and 38(a). The BSWAT Payment Scheme will fund up to three hours at the Legal Aid rate for access to a legal representative.</p>	A group member in the representative proceeding may have to pay their own legal costs if they want individualised advice on the terms of any proposed settlement etc.	
Timeliness of payment	<p>After receipt of an effective acceptance, the Secretary is required under section 40(1) to pay the amount offered to the person on the earliest date on which it is reasonably practicable to do so.</p>	<p>Until either a settlement is agreed (and approved by the Court if necessary) or a judgment is given by the Court, a group member will not know whether they are to receive a payment and, if they are, the amount of the payment and when it</p>	

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		is likely to be received. In some cases, some individuals may not be aware of, or understand, the implications of being part of a representative proceeding.	
Knowledge of payment amount	<p>Section 8 sets out that the payment offered to eligible applicants will be 50 per cent of the excess of a productivity scored wage over an actual wage, in addition to an additional amount if tax is anticipated to be payable.</p> <p>Offers will be provided to an individual in writing so they will be aware exactly how much they will receive if a payment is accepted. After receiving a payment offer, individuals can still freely choose whether to accept the offer or reject the offer (and not be involved in the Scheme).</p>	<p>Until either a settlement is agreed (and approved by the Court if necessary) or a judgment is given by the Court, a group member will not know whether they are to receive a payment and, if they are, the amount of the payment and when it is likely to be received.</p> <p>If the representative proceeding went to trial, the Applicant and the group members (or some of them) may not succeed in establishing their claims of unlawful discrimination which means they would receive no award of compensation by the Court.</p> <p>If they were successful in establishing their claims, the Court may award individuals an amount less than, the same as or more than what they would receive under the BSWAT payment scheme. It is also possible that the Court may award an individual no compensation at all</p>	

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		(even if they were successful in establishing their claim of unlawful discrimination).	
Informed choice	<p>Information sessions for people with disability and supporting Easy English documentation about the Scheme (should the Court approve the Commonwealth providing such information sessions and information to group members);</p> <p>A nominee, family member or advocate can be involved at any stage</p> <p>Funded access to a financial counsellor;</p> <p>Funded access to a legal representative;</p> <p>Payment offers will be in writing and calculated on an individual basis – that is, applicants will know how much they will be paid</p> <p>Nominees have a positive obligation imposed on them by clause 46(1) to ascertain the preferences of the individual and to act in a manner that gives effect to those preferences</p>	<p>No known strategies for informed choice.</p> <p>Advocates or nominees may represent individuals at key decision points – for example, opting out.</p> <p>Individuals may not be aware they are currently part of a representative proceeding.</p>	
Review process	<p>Internal review (sections 23 and 24)</p> <p>External review (Division 5)</p> <p>Court has supervisory role (judicial review)</p>	Court has supervisory role (including the need for the Court to approve any settlement of the representative proceeding)	