**EXPLANATORY STATEMENT**

Issued by the Authority of the Minister for Social Services

*Business Services Wage Assessment Tool Payment Scheme Act 2015*

*Business Services Wage Assessment Tool Payment Scheme Amendment Rules 2016*

**Purpose**

The purpose of the Business Services Wage Assessment Tool Payment Scheme Amendment Rules 2016 (the Amendment Rules) is to give effect to the changes made by the Business Services Wage Assessment Tool Payment Scheme Amendment Act 2016 (the Amendment Act).

Section 106 of the Business Services Wage Assessment Tool Payment Scheme Act 2015 (the Act) provides that the Minister may, by legislative instrument, prescribe matters required or permitted by the Act to be prescribed or which are necessary or convenient to be prescribed in order to carry out or give effect to the Act.

The Business Services Wage Assessment Tool Payment Scheme Rules 2015 (the Rules) provides a framework for the operation of the payment scheme. They deal with matters such as eligibility, calculating the payment amount, acceptances, internal and external reviews, nominees, disclosure of protected information and legal and financial counselling services.

The Amendment Rules are a legislative instrument for the purposes of the Legislative Instruments Act 2003.

**Background**

The Amendment Act increases payment amounts from 50 per cent to 70 per cent of the difference between the actual wage paid to the eligible person and the amount they would have been paid under the productivity-only component of the Business Services Wage Assessment Tool.

The Amendment Rules will give effect to this increased payment by amending Chapter 3 of the Rules (Calculating the payment amount). This amendment will give effect to a mediated settlement agreement between the Commonwealth and the Applicant in a representative proceeding in the Federal Court of Australia (*Duval-Comrie v the Commonwealth* VID 1367/2013).

Paragraph 82(a) of the Act provides that the rules may make provision for and in relation to the exercise of the Secretary’s power to certify for the purposes of paragraph 81(1)(a) of the Act. The Amendment Rules insert an additional circumstance in which protected information may be disclosed by the Secretary for the purposes of making a public interest certificate.

The Amendment Act provides that any act that may be done under or for the purposes of Act by an eligible person may be done on behalf of a person who has died by the person’s legal personal representative. The Amendment Rules sets out the way in which a person can apply to be recognised by the Secretary as a deceased person’s legal personal representative.

The Amendment Rules also makes a technical amendment to fix a definition in the Rules.

**Commencement**

The Amendment Rules commence the day after these rules are registered or the day that Schedule 1 to the Amendment Act commences, whichever is later.

**Consultation**

As part of the mediated settlement the Department of Social Services consulted with the following:

* The Applicant, through Maurice Blackburn Lawyers (the Applicant’s legal representative) regarding settlement terms;
* AED Legal Centre regarding settlement terms;
* Department of Finance in relation to costings;
* Department of Prime Minister and Cabinet to seek their view on amendments to the legislation; and
* The Attorney-General’s Department in relation to amendments to the legislation.

**Regulation Impact Statement (RIS)**

The Office of Best Practice Regulation has been consulted and advised a RIS is not required.

**Explanation of the provisions**

**Schedule 1 - Amendments**

**Item 1** inserts a new definition in the Rules.

**Item 2** omits the definition of ‘Act’ and inserts a new definition to correct the title of the Act.

**Item 3** amends the steps for working out the payment amount to reflect the recent changes to paragraph 8(3)(a) of the Act. This amends the principle for calculating a payment amount to provide that a payment should reflect 70 per cent instead of 50 per cent of the excess of a productivity-scored wage over an actual wage.

**Item 4** inserts a new item in the table under subsection 8.03(1) of the Rules which provides that the Secretary may exercise the power to disclose information for the purposes of making a public interest certificate where the disclosure is reasonably necessary for the purposes of research or analysis into any of the following matters:

* calculation and payment of wages using the BSWAT; or
* the management, operation or administration of the Act or the Rules.

The Secretary must consider sections 8.02 and 8.03 of the Rules in exercising the power under paragraph 81(1)(a) of the Act to certify that it is necessary in the public interest for protected information to be disclosed.

**Item 5** sets out the rules in relation to deceased persons. Chapter 10 is made under subsection 97(3) of the Act (as amended by the Amendment Act).

Section 10.01 explains the purpose of the Chapter. Chapter 10 sets out the way in which a person can apply to be recognised by the Secretary as a deceased person’s legal personal representative.

***Making an application to be a legal personal representative***

Section 10.02 explains that a person may apply to the Secretary in the approved form for a determination that the person is a legal personal representative for a deceased person for the purposes of the payment scheme. The approved form should be accompanied by such information and documents that are specified in the approved form to be provided to the Secretary.

***Secretary may determine that a person is a legal personal representative***

Section 10.03 provides the rules the Secretary must have regard to in making a determination that a person is a legal personal representative for a deceased person. Generally, the Secretary may determine that a person is a legal personal representative for the purposes of the Act and Rules, if the person:

* is an executor of the deceased person’s estate; or
* is an administrator of the deceased person’s estate; or
* has control of the deceased person’s estate under a law of the Commonwealth or of a state or territory. For example, a Public Trustee that has elected to be a deceased person’s executor or administrator.

However, if there is no executor or administrator of the deceased person’s estate, the Secretary must have regard to the matters under subsection 10.03(3) to determine if it is appropriate for a person to be the legal personal representative of the deceased person.

Subsection 10.03(2) clarifies that there is no obligation on the Secretary to make inquiries about whether there is an executor or administrator of the deceased person’s estate. The Secretary will rely on the information provided by the legal personal representative applicant to make a determination.

Subsection 10.03(3) prescribes the matters to which the Secretary must have regard to in making a decision under paragraph 10.03(1)(d).

Subsection 10.03(4) clarifies that when the Secretary determines a legal personal representative applicant is the legal personal representative for a deceased person, that person will be considered the ‘approved legal personal representative’ for the deceased person.

***More than one Legal Personal Representative for a deceased person***

Section 10.04 clarifies that if the Secretary receives more than one application under section 10.02 in respect of the same deceased person, the Secretary may decline to consider the application because the Secretary believes that the matter should be dealt with by a court.

In the situation where there are joint executors or administrators of the deceased person’s estate, the Secretary will generally only determine the first application received in accordance with subsection 10.03(1). However, if the Secretary receives more than one application under section 10.02 from joint executors or administrators for the same deceased person, the Secretary may decline to consider the applications if the matter should be dealt with by a court.

***Cancellation of determination***

Section 10.05 inserts a provision dealing with the cancellation of a person’s approved legal personal representative status. This allows the Secretary to decide to cancel a person’s status if someone with a better claim comes forward under paragraphs 10.03(1)(a), (b) or (c) or if the Secretary is satisfied it is no longer appropriate for a person to be a legal personal representative of the deceased person.

Paragraph 10.05(1)(b) allows the Secretary to cancel a determination where the Secretary is satisfied that the person has not acted or is not acting in the best interests of the estate of the deceased person.

The Secretary is not required to provide notice to any person affected by a decision under subsection 10.05(1) or afford the opportunity to make submissions if the Secretary is satisfied that to do so is in the best interests of the estate of the deceased person. Also, the Secretary may decline to consider whether to cancel a determination under subsection 10.05(1) because the Secretary believes that the matter should be dealt with by a court.

***One approved legal personal representative***

Section 10.06 clarifies that there can be only one approved legal personal representative in respect of a deceased person at any one time. If there is an approved legal personal representative for a deceased person and someone else makes an application to be the legal personal representative in respect of the same deceased person, the Secretary will have to consider whether sections 10.04 and 10.05 apply.

***Effect of making a payment***

Section 10.07 explains the effect of making a payment. If the Secretary makes a payment under section 40 of the Act to an approved legal personal representative, no other person may make any claim or bring any action against the Secretary on account of a payment made under the Act to the approved legal personal representative.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Business Services Wage Assessment Tool Payment Scheme Amendment Rules 2016***

This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

**Overview of the legislative instrument**

The *Business Services Wage Assessment Tool Payment Scheme Amendment Rules 2016* (the Amendment Rules) is enacted to deal with matters consequential to the *Business Services Wage Assessment Tool Payment Scheme Amendment Act 2016* (the Amendment Act)*,* as a result of the agreed settlement terms, subject to Federal Court approval, of the representative proceeding, *Duval-Comrie v the Commonwealth of Australia VID 1367 of 2013.*

The Rules provide a framework for the operation of the Business Services Assessment Tool (BSWAT) Payment Scheme. The Rules address in more detail matters such as eligibility; calculating the payment amount; acceptances; internal and external reviews; nominees; disclosure of information; and legal advice and financial counselling services.

On 19 November 2015, the parties to *Duval-Comrie v Commonwealth* agreed to settle the representative proceedings on the basis the Commonwealth take all necessary legal and legislative measures to amend the Act to:

1. increase payments under the Act to 70 per cent;
2. extend the Payment Scheme dates by 12 months;
3. provide a top-up payment for individuals who have received a 50 per cent payment prior to amendments; and
4. any minor associated amendments that may be necessary or desirable to assist the Commonwealth to administer the BSWAT Payment Scheme.

**Amendment to BSWAT Rules**

The Amendment Rules will amend the *Business Services Wage Assessment Tool Payment Scheme Rules 2015* (Rules)*,* to adjust the calculation of the payment amount to 70 per cent of the difference between the amount the person actually received and the amount the person would have been paid had the wage been calculated using only the productivity scored component of the BSWAT. This will reflect the recently agreed settlement terms of *Duval-Comrie v Commonwealth* representative proceeding*.*

The Rules allow a deceased person’s legal personal representative, to engage with the Payment Scheme on their behalf. The money that would have been paid to the person (if any), if the person was eligible and the offer accepted, will be paid to the person’s estate.

The Rules promote the following human rights:

* Rights to a fair hearing
* Right to protection against arbitrary and unlawful interference with privacy

**Human rights implications**

**The right to fair hearing: Article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 13 of the *Convention on the Rights of Persons with Disabilities* (CRPD).**

The right in Article 14 of the ICCPR provides that all persons shall be equal before courts and tribunals and be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 13 of the CRPD also requires States to ensure effective access to justice for persons on an equal basis, including through the provision of procedural accommodations.

The Amendment Act engages the right to a fair hearing but does not limit that right by implementing the settlement terms of *Duval-Comrie v Commonwealth* of 19 November 2015, including through increasing the rate payable under the Payment Scheme to 70 per cent. The Amendment Act does not affect a person’s ability to seek legal recourse separately.

Representative proceedings are governed by the *Federal Court of Australia Act 1976* and the *Federal Court Rules 2011*. The Amendment Act provides choice to individuals, and is only one option available to people with intellectual disability. Individuals can choose to accept an offer under the Payment Scheme, or commence their own legal proceedings against the Commonwealth if they think they have been unlawfully discriminated against.

Group members in *Duval-Comrie v Commonwealth* will release the Commonwealth from liability arising from the use of the BSWAT, if the Commonwealth amends the Act and the Rules, and the settlement is approved by the Federal Court. The parties to the representative proceedings agree that the Payment Scheme is the most appropriate vehicle for compensation. However, group members have been given an opportunity to “opt-out” of the representative proceeding.

On 21 December 2015, the Federal Court permitted the Applicant to amend the statement of claim to broaden group membership. These new group members have the additional benefit of knowing the proposed settlement and have an opportunity to “opt‑out” before 23 April 2016.

On this basis, the Amendment Act and the Amendment Rules engage and do not limit the right to a fair hearing.

It is the Australian Government’s position that the Payment Scheme is the most favourable outcome for employees, their families and carers and providers by removing any perceived liability on the part of supported employers that have used the BSWAT to assess the wages of their employees.

The Rules operationalise the Payment Scheme and provide participants with certainty of the method used to calculate the payment amount. Individuals are able to consider an offer made through the Payment Scheme and choose the option which they believe best suits their individual circumstances, including a person’s legal personal representative on behalf of a deceased person.

The amendment to the Rules revises the principle for calculating a payment amount, that will reflect 70 per cent of what a person would have been paid had the wage been calculated using only the productivity scored component of the BSWAT. The payment amount is calculated at 70 per cent of the difference between the two amounts.

The Amendment Rules also allow a deceased person, through their legal personal representative, to engage with the Payment Scheme on their behalf. This has the effect of broadening the group of people who are potentially eligible for the Payment Scheme. Deceased persons can be class members in *Duval-Comrie v Commonwealth* and the Amendment Rules ensure these people would not be disadvantaged.

The Amendment Rules up-hold the human rights of fair hearing of a living person to have legal recourse through the Payment Scheme, on behalf of a deceased person who would have been eligible for the BSWAT Payment Scheme.

The Amendment Rules provide details on how a deceased person’s Legal Personal Representative (LPR) can engage with the Payment Scheme on behalf of the deceased person’s estate, including:

* setting out the way in which a person can apply to be recognised as a deceased person’s LPR;
* the criteria the person must meet for the Secretary of the Department of Social Services to appoint that person as the LPR of the deceased person’s estate; and
* setting out the criteria for when an appointment may be cancelled.

**The right to protection against arbitrary and unlawful interference with privacy Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR), and Article 22 of the *Convention on the Rights of Persons with Disabilities* (CRPD).**

The Amendment Rules also engage and limit the right to arbitrary and unlawful interferences with a person’s privacy, family, home or correspondence in Article 17 of ICCPR and Article 22 of the CRPD.

The right may be subject to permissible limitations, provided they are authorised by law and not arbitrary. In order for an inference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted ‘reasonableness’ in this context to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The Amendment Rules will allow the Secretary of the Department of Social Services to issue a public interest certificate in accordance with the *Business Services Wage Assessment Tool Payment Scheme* *Act 2015* (Act) and Rules for the purposes of research and analysis which is in the public interest. The Rules have been amended to allow the Secretary to disclose protected information; it has collected for the purpose of administering the BSWAT Payment Scheme, to external consultants for research and analysis purposes. The Secretary must comply with the rules set out in Chapter 8 of the Rules in making disclosures in the public interest under paragraph 81(1)(a) of the Act.

 **Conclusion**

The Rules are compatible with human rights because it promotes the protection of human rights and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Minister for Social Services
Christian Porter**