

BSWAT Questions & Answers

What is this scheme?

The Business Services Wage Assessment Tool (BSWAT Payment Scheme) will deliver a one-off payment of \$100 or more in certain circumstances to eligible supported employees with an intellectual impairment whose wages were assessed and paid using the BSWAT.

Why has this scheme been established?

The scheme was established by the Australian Government following the Federal Court finding in December 2012 that the BSWAT indirectly discriminated against two Australian Disability Enterprises (ADEs) employees with an intellectual disability.

It will provide a one-off payment to eligible employees in certain circumstances and provide certainty to employees about their future employment with ADEs.

Amendments to the scheme

The Amendment Act made several changes to the scheme, including:

- increasing payments to eligible participants;
- extending all deadlines for the scheme, including for registration and application, by 12 months;
- making the requirement to seek legal advice before participants can accept a payment offer optional; and
- allowing the personal legal representative of a deceased person who would have been eligible for the scheme to apply on their behalf

The amendments give effect to a settlement agreement between the parties in the representative proceeding, *Duval-Comrie v the Commonwealth*. The settlement was previously announced by the Minister for Social Services, the Hon Christian Porter MP, on 16 December 2015.

How much will payments be?

The payment amount to be offered will be 70 per cent of the difference between the amount the supported employee would have been paid had only the productivity element of the BSWAT 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.

To account for the rising cost of living, the payment amount will also be indexed to reflect increases in the Consumer Price Index.

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.

Do I need to talk to anyone before I accept a payment?

Some participants may be required to seek independent financial counselling before they can accept an offer of payment.

FMC Mediation & Counselling (1800 639 523) is an eligible financial counselling agency.

Optional financial counselling and legal advice, paid for by the Government, is available to everyone who receives an offer of payment to help them make an informed choice. Payment for financial counselling and legal advice is subject to limits, being a maximum of \$435 for financial counselling and \$850 for legal advice.

An applicant may choose to have a nominee, advocate and/or a support person at any stage of the process.

Will the scheme pay compensation?

The scheme will not pay compensation.

The scheme will deliver a one-off payment in certain circumstances to former and current eligible employees in relation to work they have performed in the past.

What about the BSWAT class action?

In 2013, a man named Tyson Duval-Comrie started a class action (also known as a representative proceeding) against the Australian Government. The class action's official name is Tyson Duval-Comrie v Commonwealth of Australia VID 1367 of 2013.

On 18 March 2016, the changes to the law were passed in the Parliament in the Amendment Act. Under the change, people will now get about 70% of the money that was claimed in the class action. Before the law was changed, they would have received about 50%.

The Federal Court of Australia held a hearing on 12 December 2016 to decide if the proposed BSWAT settlement was fair. At the hearing on 12 December 2016, Justice North considered whether the proposed BSWAT settlement was fair. Justice North approved the settlement of the class action, noting that the BSWAT Payment Scheme would provide fair and reasonable payments to group members. This decision means that the class action has now ended.

Who is eligible?

A person is eligible for the scheme, if the person, at any time between 1 January 2004 and 28 May 2014:

- had an intellectual impairment; and
- 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.

Other 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.

All eligibility criteria will need to be met for individuals to access the scheme.

Will I need to prove that I meet these criteria to access the scheme?

Wherever possible, the Department of Social Services (the Department) will use information held by the Commonwealth to assess scheme eligibility. In certain circumstances, additional information may be requested. However, the Department will attempt to minimise these kinds of requests.

Why aren't other people with disability who have had their wages assessed by BSWAT eligible for the scheme?

In the Federal Court decision of 21 December 2012, two ADEs were found to have indirectly discriminated against two supported employees with intellectual disability because the employees' wages were assessed under the BSWAT. The court did not look at the use of the BSWAT to assess the wages of people with other types of disability.

While the Commonwealth is of the view that the decision applies only to those two individuals, the scheme has been established to provide people with intellectual disability, their families and carers

with certainty that their ADE will not close because of concerns about perceived liability for discrimination.

Because the court did not look at the BSWAT in relation to the wages of people with other types of disability, there is no perceived liability for the payment of wages assessed using the BSWAT where the person does not have an intellectual disability.

I have been working in an ADE and have had my wages assessed using a different tool. Am I eligible for the scheme?

No. Only people who have been paid a pro-rata wage assessed using the BSWAT (and who meet the other eligibility criteria for the scheme) will be eligible.

If I access a payment from the scheme, how will it affect my pension?

The lump sum payment to supported employees who have had their wages assessed by the BSWAT is exempt from means income testing for income support payments in the social security law.

Lump sum payments received under the scheme are not exempt from income tax but a tax offset is calculated that will help reduce any tax payable. An additional payment will be included as part of the payment scheme offer to meet the cost of any tax payable.

What is the role of Australian Disability Enterprises?

ADEs have no formal role in the scheme or in the representative proceeding. However, from time to time, ADEs may be contacted for information to assist the Department in determining payment amounts for the scheme.

In October 2016, information sessions for potentially eligible supported employees were held at certain ADE premises and other locations across the country.

The sessions were designed to provide a clear understanding of the scheme and to help individuals make an informed decision on whether to register and apply for a payment. If individuals decided to register and apply, they were helped to do so at the sessions.

As part of the representative proceedings currently underway, relevant and or related information about how wages have been calculated or assessed by ADEs may be ordered by the court to be provided to the court. Where this occurs, the Department will aim to advise relevant ADEs prior to any information being released.

How can I find out more?

- **Visit the BSWAT Payment Scheme list page.**
- **Queries can be sent to the BSWAT inbox: bswatpayments@dss.gov.au (link sends e-mail)**
- **Call the BSWAT Payment Scheme hotline on 1800 799 515.**
- **Subscribe to the Disability eNews newsletter for the latest information for disability support providers.**