



Australian Government

About the BSWAT Payment Scheme:

Information for families,
advocates and nominees



Copyright notice – 2016

This document About the BSWAT Payment Scheme: Information for families, advocates and nominees is licensed under the **Creative Commons Attribution 4.0 International Licence**

Licence URL: <https://creativecommons.org/licenses/by/4.0/legalcode>

Please attribute: © Commonwealth of Australia (Department of Social Services) 2016

Notice identifying other material or rights in this publication:

- Australian Commonwealth Coat of Arms — not Licensed under Creative Commons, see <https://www.itsanhonour.gov.au/coat-arms/index.cfm>
- Certain images and photographs (as marked) — not licensed under Creative Commons
Certain images and photographs (as marked) — not licensed under Creative Commons

ISBN 978-1-925318-20-3



What's in this document?

About this document?	4
Important update	5
What is the BSWAT Payment Scheme?	6
Who is eligible for the BSWAT Payment Scheme?	9
How does the BSWAT Payment Scheme work?	11
How will the payments be calculated?	17
What is your role in this process?	19
What are the roles of legal advisors and financial counsellors?	25
What legal proceedings are there about the BSWAT?	27
What can you do if a participant is unhappy with a decision?	32
Other concerns	34
Where can you get more information?	36
Useful terms	37





About this document

This document has been written by the Australian Government to explain the BSWAT Payment Scheme and your role in the process.

As family members, advocates and nominees, your role is to help a person with intellectual impairment (the participant) to understand and use the scheme.

A comprehensive Easy Read handbook about the scheme has been drafted for supported employees. It is written in a way that is very easy to understand and uses images to help explain the information.

The handbook, titled *About the BSWAT Payment Scheme – Information for supported employees*, is available on the website at www.dss.gov.au/bswat-payment-scheme-resources

Acknowledgments

This document has been written by the Australian Government.

Editing and design by the Information Access Group.

Specialist consultation by Dr Sheridan Forster.

Important update

On 16 December 2015, the Minister for Social Services, the Hon Christian Porter MP, made an announcement.

The Government is currently in the process of seeking to change the law about the BSWAT Payment Scheme. Under the current law, payments are half (50 per cent) of the difference between what a person was paid and what they would have been paid if their wages had been assessed using only the productivity component of the BSWAT. If the law is amended, this payment will be increased to 70 per cent.

We will update this resource when the law is amended. For now, the information remains useful and relevant. The steps for registering and applying for a payment haven't changed. However, if the changes to the law are passed in Parliament, people will have more time to register and apply as the deadlines will be extended by 12 months.

Further, under the proposed changes to the law:

- people who accept an offer under the scheme before the law has passed will not be disadvantaged – they will receive a top-up payment if the changes to the law are passed
- changes may be made to the requirement that all people receive legal advice before they can accept an offer.

If you'd like more information about these changes, please visit our website at www.dss.gov.au/changes-to-the-BSWAT-Payment-Scheme



What is the BSWAT Payment Scheme?

BSWAT stands for the Business Services Wage Assessment Tool. This tool was used to work out the wages of supported employees who work in Australian Disability Enterprises (ADEs).

Many families and supporters will be familiar with the BSWAT. You may know that it was used to work out the wages of supported employees based on two different assessments, productivity and competency.

The productivity assessment looked at how much work a person did during a period of time. The competency assessment looked at how well a person understood and did their job, or parts of their job. The results of these two assessments were then combined to give the person a score. And the score was used to work out the person's wages.

The BSWAT Payment Scheme (the scheme) was established by the Australian Government following the Federal Court finding in December 2012 that two supported employees with intellectual disability were unlawfully discriminated against by their employing ADEs because their wages were worked out based on BSWAT assessments.

In particular, the Court found that the use of the competency assessment to assess the wages of those two supported employees was discriminatory.

Since the Australian Government owns the BSWAT and had promoted its use by the ADEs, the Court also found that the Australian Government unlawfully discriminated against the two supported employees. A copy of the judgement of the Full Federal Court in those legal proceedings (the *Nojin & Prior* proceedings) is available at

www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2012/2012fcafc0192

The High Court refused the Commonwealth's application for special leave to appeal the judgement of the Full Federal Court. A copy of the High Court's decision is available at www.hcourt.gov.au/registry/special-leave-applications-results-2013

Under the *Business Services Wage Assessment Tool (BSWAT) Payment Scheme Act 2015*, the scheme offers eligible supported employees a one-off payment. The scheme is only for people who had their pro-rata or training wages worked out using the BSWAT and have an intellectual impairment. You can find more information about eligibility on page 8.

The Australian Government Department of Social Services (the Department) will run the scheme's application and payment process.

The Department can answer any questions you have about the scheme through the BSWAT Payment Scheme information line on 1800 799 515 or email BSWATPayments@dss.gov.au

What is being offered?

Broadly, the scheme will pay eligible people 50 per cent of the difference between:

- the amount that the person would have been paid if their wage had been assessed only on the productivity component of the BSWAT test
- AND
- the amount the person was in fact paid based on their BSWAT assessment or assessments, which included both the competency and productivity components.

If the changes to the law about the scheme are passed by Parliament (see page 29), the scheme will pay eligible people 70 per cent of that difference.





If a person accepts an offer of 50 per cent before the changes are passed, they will subsequently receive top-up payments so they get the full 70 per cent.

Payments will be made quickly and directly to the participant, once they have accepted their offer.

The participant may not have to pay tax on this money. If they do have to pay additional tax, the participant will receive an extra amount with their payment to help meet the cost. If tax is to be paid, the lump sum amount will be taxed over the period the supported employee's wages were earned, meaning tax owed will be minimised. The payments will also be indexed to account for the rising cost of living.

A payment under the scheme is unlikely to affect a participant's Disability Support Pension. Most people will continue to receive the Disability Support Pension in the usual way. Some people will need to have an asset test.

There is detailed information about how the payments are worked out on page 17.

Participants cannot take part in any legal proceedings about the BSWAT if they accept a payment from the scheme.

You may be aware that there is a class action court case currently underway about the BSWAT (more information, including the settlement reached in this class action, can be found on page 27). There is important information about accepting a payment offer from the scheme for group members in the class action on page 30.

If a participant is not offered a payment through the scheme, or if they decide not to accept a payment that is offered to them through the scheme, they can still take part in other legal proceedings about the BSWAT, including the class action (if it continues).



Who is eligible for the BSWAT Payment Scheme?

To be eligible for the scheme, a participant must have, for at least one day in the period starting on 1 January 2004 and ending on 28 May 2014:

- an intellectual impairment
AND
- worked in an ADE
AND
- had their wages worked out using the BSWAT or been paid a training wage while waiting for a BSWAT assessment to be completed
AND
- received employment support from the ADE.

A participant must also have:

- required ongoing daily support in the workplace to maintain their employment in the ADE
AND
- not accepted an amount of money in settlement of a claim made relating to the use of the BSWAT to assess the person's wage (or a court must not have ordered payment of an amount of money to the person in connection with such a claim).

For the purposes of the scheme, intellectual impairment means a person who has:

- intellectual disability
- autism spectrum disorder
- dementia
- acquired brain injury.

To receive a payment offer, participants must follow the steps of the process and meet all of the deadlines. You can check the important dates on page 11.

When the Department receives an application, it will carefully review all the information provided by the participant. The Department will work out if the participant is eligible for the scheme.

If the person **is** eligible, the Department will then work out a payment offer.

If the person **is not** eligible for the scheme, the Department will write to the person to let them know that they are not eligible and why.

If the participant is not happy with the Department's decision, they can ask for a review. More information about the review process is on page 32.

Examples

Emma can take part in the scheme

Emma is a 38-year-old woman with intellectual impairment. Since 1 October 2005, she has worked at her local ADE as a packaging assistant. The Australian Government funds her local ADE to support Emma in her daily work activities.

In March 2006, Emma had her first BSWAT assessment to determine her prorata wage. She had two further BSWAT assessments in February 2009 and January 2012. Emma's minimum wage was based on these assessments. Emma is **eligible** for the scheme.

Mark cannot take part in the scheme

Mark has autism and has worked in an ADE as a warehouse assistant since 2007. The Australian Government funds Mark's ADE to support him in his daily work activities. His wages were worked out using a tool called the Supported Wage System. Mark is **not eligible** for the scheme because his wages were not assessed using the BSWAT.



How does the BSWAT Payment Scheme work?

Important dates

Activity	Date
Registrations	By 30 April 2016
Applications	From 1 July 2015 to 30 November 2016
Acceptances	By the date in the Letter of Offer (and not past 31 December 2017)
Offers end (unless under review)	31 August 2017
All offers and refusals end	30 November 2017
Extensions	Must be sought by the date in the Letter of Offer

If the changes to the law about the scheme are passed by Parliament (see page 29), the important dates referred to above will be extended by 12 months.

Registration

Participants must register to take part in the scheme. If they don't register they cannot apply, even if they may be eligible. Once someone has registered, the Department will send them more information and forms to fill in if they want to apply for a payment offer from the scheme.

Registering does **not** mean:

- that a participant will receive a payment
- that a participant will be prevented from being part of legal proceedings about the BSWAT, including the class action court case.

How to register

Participants can register by:

- phoning the BSWAT Hotline on 1800 880 052
- emailing BSWATPayments@dss.gov.au
- visiting the website at www.bswat.dss.gov.au

Registrations are due by 30 April 2016. If the changes to the law about the scheme are passed by Parliament (see page 29), this date will be extended by 12 months.

Application

To receive a payment offer, a participant will need to apply and provide some information about their employment to the Department.

An application form will be sent out to participants after they register.

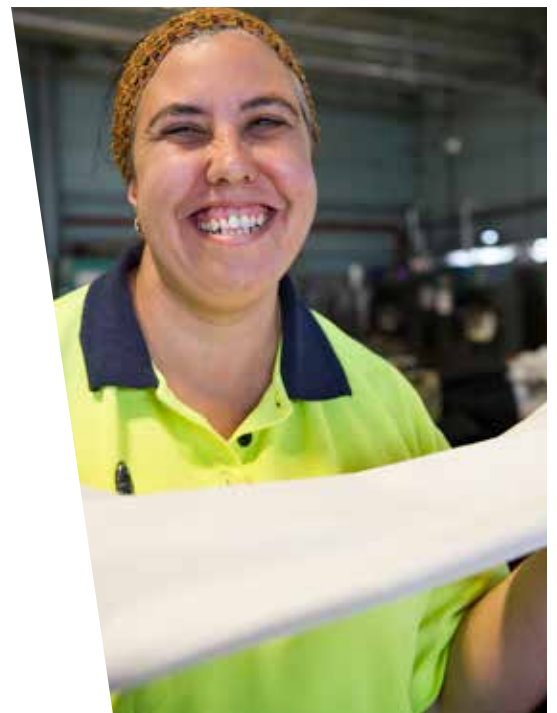
The application form asks for information such as a participant's:

- contact details
- details of employment during the last financial year
- annual income, if known
- nominee details, if the participant needs a nominee.

If the participant needs a nominee, the following information will need to be provided on the application form:

- whether or not a person has agreed to be the participant's nominee for the scheme
- that person's relationship to the participant and their contact details.

You can read more about nominee appointments and duties on page 20.



You can get more information on the application process by:

- phoning the BSWAT Payment Scheme information line on 1800 799 515
- emailing BSWATPayments@dss.gov.au
- visiting the website at www.dss.gov.au/bswat-payment-scheme

Applications are due by 30 November 2016. If the changes to the law about the scheme are passed by Parliament (see page 29), this date will be extended by 12 months.

Receiving an offer

If a person is eligible for the scheme, the Department will work out a payment amount for that person. To calculate a payment amount, the Department will review the participant's wage records.

The participant will then receive a letter from the Department with the decision. This is called the Letter of Offer.

Some people will be told that they will **not** receive a payment because the actual wage they received was more than what they would have received if only the productivity component of the BSWAT was used to assess their wages (see the formula underneath the heading 'What is being offered?' on page 7). If the participant is not happy with this decision, they can ask for a review.

The participant can also ask for a review of the payment amount if they are unhappy with what has been offered. You can read about the review process on page 32.

Providing proof of legal advice and financial counselling

To make sure that the rights of participants are protected we want to know that participants, and their nominees, have received independent legal advice and financial counselling about the scheme before they make a decision to accept a payment offer.

Payment for legal advisors and financial counsellors is funded through the scheme (although there are limits on this funding, being a flat fee of \$850 (GST incl) for legal advice and a flat fee of \$435 (GST incl) for financial counselling).

When participants and their nominees get independent legal advice and financial counselling sessions the legal advisor and financial counsellor will sign the certificates. The legal advisor and financial counsellor need to include their certificates in the request for payment that will be made using the online portal. After the request for payment is complete, the Department will then pay the legal advisor and financial counsellor.

The participant or their nominee needs to sign the acceptance form and send it to the Department by the deadline written on their Letter of Offer before the Department can make a payment.

Funded financial counselling is available to all participants and their nominees, however:

- Participants who receive an offer of \$1,000 or less do not have to seek financial counselling and they (or their nominee) can sign the Financial Counselling Certificate themselves – funded financial counselling is still available to them
- If a participant's nominee is a guardian for financial issues they do not have to get financial counselling and can sign the Financial Counselling Certificate for the participant. If they wish to, they can still attend a financial counselling session with the participant.

Currently, all participants must receive legal advice before they can accept a payment offer. However, if the changes to the law about the scheme are passed (see page 23), that requirement may change.

Participants can ask for more time to return the certificates to the Department by calling the BSWAT Payment Scheme information line on 1800 799 515 or emailing BSWATPayments@dss.gov.au

They will need to do this by the date on the Letter of Offer.

Accepting a payment offer

If a participant is happy with their payment offer, they need to formally accept the offer by filling in the acceptance form and sending it back to us.

Once the Department has received the acceptance form and certificates, the payment offer will be paid directly into the participant's bank account. The payment will be made as soon as possible after the Department receives the acceptance information.

Accepting an offer from the scheme means that the participant can no longer take part in any legal proceedings about the BSWAT. There is important information about accepting payment offers for group members in the class action on page 30. Further information about the class action is available on page 27.

Declining an offer

If a participant decides that they do **not** want to accept the offer, they can decline it.

They don't need to do anything to decline the offer. If the Department doesn't receive their acceptance information by the due date, the Department will assume the participant has declined the offer.

If a participant declines an offer from the scheme they will still have the right to take part in other legal proceedings about the BSWAT.

If the participant is a group member of the class action court case and declines the offer from the scheme, they will still be part of the class action. Information about the class action is available on page 27.

Asking for a review

If a participant is not happy with a decision that has been made about the scheme they can ask for a review. They can ask for a review about:

- their eligibility for the scheme
- the amount of money they have been offered (including if a determination is made that the payment amount is nil).

To ask for a review, the participant needs to call the BSWAT Payment Scheme information line on 1800 799 515 or email BSWATPayments@dss.gov.au

You'll find detailed information about the review process on page 32.

What if a participant changes their mind?

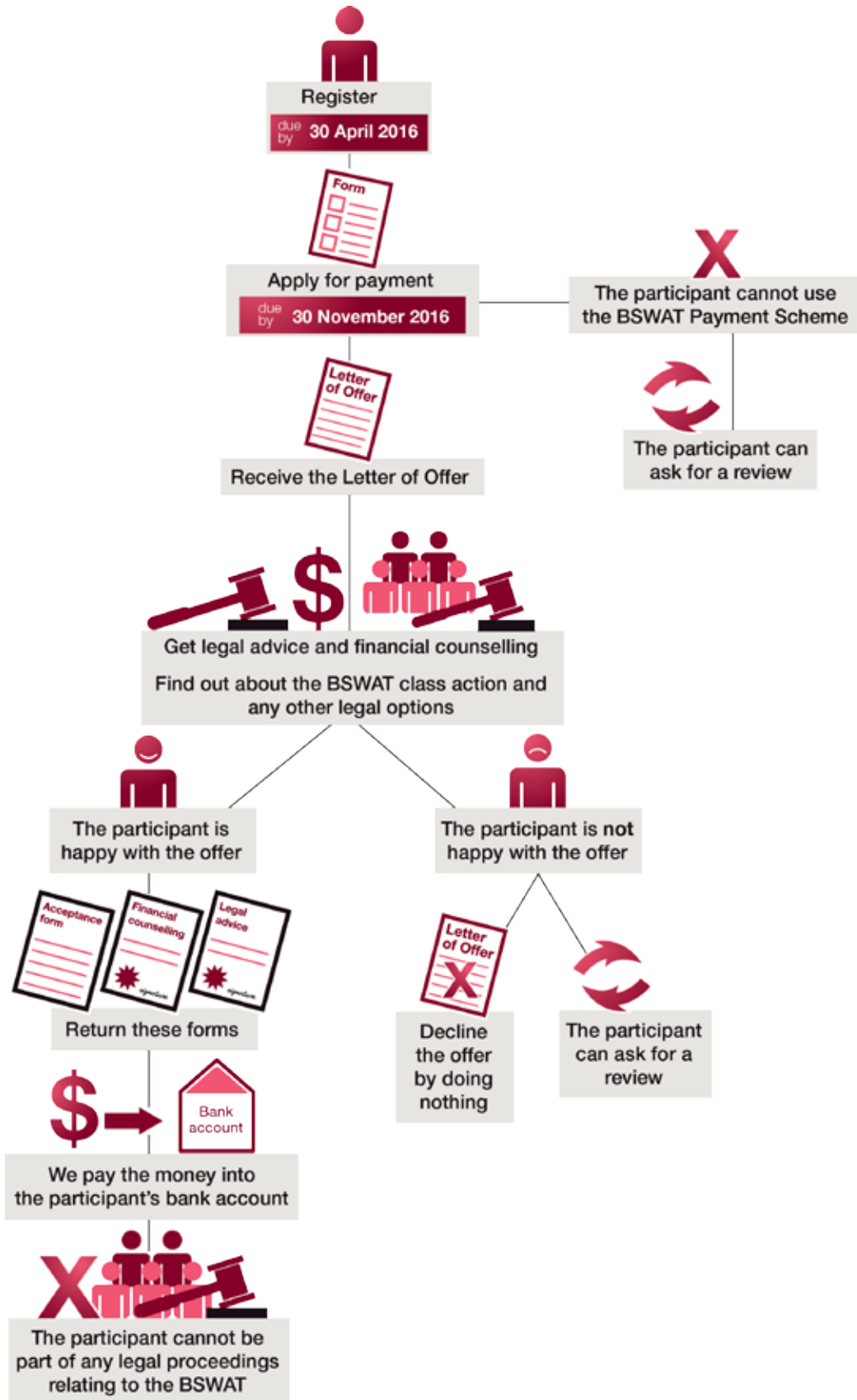
Participants can change their mind about applying for the scheme or about accepting or declining an offer. They just need to make their final decisions or take the action they need to by certain dates.

All the important dates are listed on page 11.

Participants need to accept their offer by the date included in their Letter of Offer. They won't be able to change their mind about accepting or declining the offer after this date.

A summary of the scheme process

If the changes to the law about the scheme are passed by Parliament (see page 29), the dates below will be extended by 12 months.





How will the payments be calculated?

The BSWAT was used to work out how much supported employees should be paid based on two different assessments:

1. productivity
2. competency.

The productivity assessment looked at how much work a person did during a period of time.

The competency assessment looked at how well a person understood and did their job, or parts of their job.

The results of these two assessments were then combined to give the person a score. And the score was used to work out the person's wages.

Under the scheme, we will work out how much someone would have been paid if only the productivity assessment was used to work out their wages.

We will then look at how much that person was actually paid in wages. This amount will be subtracted from the amount that would have been paid had the productivity assessment only been used to work out the wage.

We will offer the person 50 per cent of this amount. If the changes to the law about the scheme are passed (see page 29), we will offer 70 per cent of this amount.

Indexation will be applied to the final payment amount to account for rising cost of living.

Other benefits to accepting an offer of payment under the scheme

Some other benefits include:

- if offered a payment, the Department will pay the money quickly
- if participants have to pay additional tax on the payment, an extra amount will be provided to minimise the expected tax that the participant would be required to pay on the payment
- for most people, any payment they receive under the scheme will not reduce the amount of money they receive in their Disability Support Pension.

How much will people be paid?

Everyone's situation is different and each participant's payment will depend on a variety of factors.

The lowest payment eligible participants will receive is \$100. Some participants may be paid several thousand dollars. Some won't be offered anything if their payment amount is nil.





What is your role in this process?

It is important that a participant's support network, families, advocates and nominees, are able to help them, if they need help, with this process and the decisions they will have to make.

Families

Families can help the participant to understand what the scheme is offering and the process they need to go through to receive a payment offer by:

- helping them understand the information in the Easy Read handbook that is available on our website at www.dss.gov.au/bswat-payment-scheme-resources
- assisting the participant to use the review options if the participant wishes to do so
- supporting the participant to ask any questions they may have
- finding out about the information sessions being offered at the participant's ADE.

You can also help the participant to select an appropriate nominee if they need one.

If you are a nominee please read the section for nominees on page 20.

Advocates

Advocates can help participants understand their rights during the payment scheme process.

You can help a participant understand the scheme process by:

- helping them understand the information in the Easy Read handbook that is available on our website at www.dss.gov.au/bswat-payment-scheme-resources
- assisting the participant to find information
- assisting them to use the review options if the participant wishes to do so
- supporting the participant to ask any questions they may have.

If you are asked to be a nominee for a participant during the scheme process please read the section for nominees on the following pages.

Nominees

For the scheme, a nominee is a person who is 18 years of age or older. They must have agreed to be appointed to make decisions about the scheme for the participant, and they must be able to fulfil the duties and responsibilities of a nominee.

A nominee has a duty to find out and understand what the views of the participant are, and to act according to the participant's preferences.

Under the *Business Services Wage Assessment Tool (BSWAT) Payment Scheme Act 2015* and the *Business Services Wage Assessment Tool (BSWAT) Payment Scheme Rules 2015*, a nominee must promote and safeguard the participant's human rights. A nominee must act in a way that is least restrictive of those rights when making decisions relating to the scheme.

A nominee will often be a trusted relative, friend, associate or guardian of the participant.

One or more independent nominees can be appointed.

Under the Act, a nominee cannot be held criminally liable for anything done in good faith in their role as nominee, or for any act or omission of the participant.

The actions of a nominee in relation to fulfilling their duties and responsibilities as a nominee must be informed by the following principles:

- all adults have an equal right to make decisions that affect their life and to have those decisions respected
- people who require support in decision-making must be provided with access to the support necessary for them to make, communicate and take part in the decisions that affect their lives
- the will, preferences and rights of people who require decision-making support must direct the decisions that affect their lives.



Who can be a nominee?

A participant can nominate a person to be their nominee. The person who usually acts for the person with disability can also nominate themselves to be nominee, with the participant's agreement.

Once nominated for the purposes of the scheme, the Department will appoint the nominee.

As described above, a person can only be a nominee if they are over 18 years of age. The person must agree to be the participant's nominee and be able to fulfil the duties and responsibilities of being a nominee.

There are some people who won't be able to be a nominee for a participant in the scheme, including anyone:

- Employed by the Department of Social Services – although this doesn't apply to family members or others listed in the exemptions below.
- A recipient of a grant made under Part 11 of the *Disability Services Act 1986* or an employee of such a recipient. This includes staff employed by an ADE and certain advocacy organisations – although this doesn't apply to family members or others listed in the exemptions below.

Exemptions to these conditions include a person who is:

- a relative or family member of the participant
- appointed as a decision maker for the participant either by a court or by the participant
- a nominee for the participant for social security purposes.

Exemptions may also occur when the Department determines that there are circumstances that make it inappropriate for an employee of the Department, an ADE or an advocacy organisation to not be appointed as a nominee.

What does a nominee do?

A nominee:

- helps the participant to understand the application process and what the scheme is offering them
- helps the participant to understand their options and the decisions they need to make
- considers the participant's opinions and preferences when making a decision
- helps the participant to communicate their preferences and any questions they have
- is familiar enough with the participant's finances to be able to fulfil their duties as a nominee for the scheme
- respects the participant's human rights
- respects the participant's cultural and linguistic background and makes sure they have an appropriate way of communicating with the participant about the scheme.

Where a participant cannot express what they want, a nominee can consider any previous views expressed by the participant.

A nominee may consult with:

- the participant's family, carers and supporters
- any appointed decision makers, either appointed by a court or by the participant.

A nominee **must** tell the Department if they:

- have been convicted of abuse, violence or fraud
- have, or are likely to acquire, a conflict of interest with the participant
- don't think they can meet the obligations of being a nominee.





Conflict of interest

Nominees must avoid any conflicts of interest.

A conflict of interest is any conflict between the interests of the nominee (or an employee of the nominee in some circumstances) and the interests of the participant. This applies whether the conflict is in relation to money or other issues that would impact on the person's ability to carry out their role as a nominee.

A nominee must inform the Department if they have, or are likely to acquire, a conflict of interest in relation to the participant.

How are nominees appointed?

A participant and their family or network of supporters can ask the Department for a nominee to be appointed. They can do this:

- when they fill in the application form
- at any other time during the scheme if they decide they need a nominee.

If a participant decides they need a nominee after they have sent in their application form, they can contact the Department and a nominee request form will be sent out to them. The request form will need to be filled in by the participant and the nominee. The participant can call the BSWAT Payment Scheme information line on 1800 799 515 to ask for a form.

The Department will then work out if the proposed nominee is eligible. If the nominee is not eligible, the Department will ask the participant to suggest another nominee.

The Department can also appoint a nominee during the scheme if necessary. The Department will then send out a nominee request form to be filled in by the participant and a proposed nominee.



Court-appointed decision makers

Nominees for the scheme may already have a decision-making relationship with the participant.

A nominee for the scheme can also be someone who:

- is a guardian for the participant under state or territory law
- has a financial management or administration role for the participant under state or territory law
- is a nominee for the participant for social security purposes.

If a nominee has court-appointed responsibility for managing the participant's finances, the nominee doesn't have to see a financial counsellor. The nominee can decide to sign the financial counselling certificate themselves. This includes nominees who work for State or Public Trustees.

You can read more about the financial counselling certificate on page 13.

Suspending or cancelling a nominee appointment

The Department can suspend or cancel a nominee appointment at the request of a participant or a nominee. The Department can also suspend or cancel a nominee appointment if the nominee is unable to fulfil the duties or role of a nominee.

Participants can ask for a review of any decisions made by the Department about nominees. To do this, please call the BSWAT Payment Scheme information line on 1800 799 515.

Nominee protection against liability

Under the *Business Services Wage Assessment Tool (BSWAT) Payment Scheme Act 2015*, a nominee won't be criminally liable in relation to any act or omission of the participant or anything done in good faith in their capacity as nominee.



What are the roles of legal advisors and financial counsellors?

The legal advisor will explain the laws that apply if the participant accepts or declines the payment offer under the scheme.

The financial counsellor will discuss the money being offered and help the participant work out what is best for them.

A participant's legal advisor and financial counsellor will sign a certificate to confirm that they've discussed the payment offer under the scheme.

After the meeting, it is the role of the financial counsellor and legal advisor to lodge the signed certificates with the Department.

This lets the Department know that participants and nominees have discussed their individual situations and options with a legal advisor and financial counsellor and that they understand the consequences of a decision to accept or decline a payment offer.

If the participant wants to accept their payment offer, the participant must sign the acceptance form and send it to the Department.

Payment for the legal advisors and financial counsellors

Regardless of whether or not the participant decides to accept or decline the payment offer, payment for legal advisors and financial counsellors is funded through the scheme (although there are limits on this funding – a flat fee of \$850 (GST incl) for legal advice and a flat fee of \$435 (GST incl) for financial counselling).

How does a participant choose a legal advisor and financial counsellor?

Participants can choose their own legal advisor and financial counsellor, or they can choose them from the list on our website at www.dss.gov.au/bswat-advisors-counsellors

All of the people on the list are independent. None of them work for the Government. They will receive a payment from the Government in this instance, but their advice will be independent.

What's the difference between a financial counsellor and a financial planner?

Financial counsellors usually work with people with a low income or those who are struggling financially. They are trained to work in the community and they regularly provide an impartial service, usually at no cost to the person seeking assistance.

Financial planners help people to manage their assets by providing advice on how they should invest their money. They charge fees for their advice.





What legal proceedings are there about the BSWAT?

As you may know, some legal proceedings about the BSWAT have commenced and some have already taken place – see *Nojin & Prior* proceedings referred to on page 6.

On 20 December 2013, an ADE worker with disability, Mr Tyson Duval-Comrie, started a representative proceeding (also called a ‘class action’) against the Australian Government.

The class action is on behalf of all people with intellectual disability employed in ADEs as at or before 22 October 2013 whose wages had been assessed under BSWAT, or whose wages as at 22 October 2013, were proposed to be assessed under BSWAT. People can sometimes be a group member in a class action without being aware they are involved.

More people are in the class action now than when it started. In the past, the class action only applied to people who were working in an ADE on 22 October 2013. Now, the class action may also apply to people who were working in an ADE on or before 22 October 2013.

A person is now automatically a ‘group member’ of the class action if they:

- have an intellectual disability
AND
- were working in an ADE on, or before, 22 October 2013
AND
- had their wages worked out using the BSWAT.

A person will not be a group member if they have opted out of the class action. This is a formal court process which requires the submission of a specific form to the Federal Court by a particular date.

Original group members were given an opportunity to opt out by 11 June 2015 but that date was then extended to 16 October 2015. If a group member did not submit the specific form to the Court by 16 October 2015, they remain a group member.

People who have recently become group members as a result of the change to the rules (see above) are being given an opportunity to opt out of the class action by 23 April 2016. Those people will be sent information about the opt out process, including the specific form, in February 2016.

The official name of the proceeding is Tyson Duval-Comrie v Commonwealth of Australia VID 1367 of 2013 and you can access information about the class action at:

www.comcourts.gov.au/file/Federal/P/VID1367/2013/actions

In the class action, Mr. Duval-Comrie has said to the court that:

- Under BSWAT, people with an intellectual disability are paid less for the same work than people who do not have an intellectual disability.
- This is not fair. In the law, this is called discrimination and it is not allowed to happen.
- Other people like him should get more money because the BSWAT was used to work out their wages.

The Government does not agree with what Mr. Duval-Comrie says. The Government has said to the Court that using the BSWAT to work out the wages of people with intellectual disability was not discrimination because:

- Using the BSWAT to work out wages for people with intellectual disability was a fair way to work out their wages.
- ADEs have done nothing wrong by using BSWAT to work out wages for people with intellectual disability.



Settlement of the class action

Mr. Duval-Comrie and the Government have recently agreed to settle the class action instead of asking the Court to decide who should win the case.

As part of the settlement, the Government has agreed to seek to change the law about the scheme so that, amongst other things, people get more money from the scheme – the proposed changes to the law are discussed below.

If the proposed changes to the law are passed by Parliament, Mr. Duval-Comrie and the Government will ask the Court to end the class action.

The Court still needs to approve the settlement. The Court will only approve the settlement and end the class action if it thinks the settlement between Mr. Duval-Comrie and the Government is fair and reasonable for the group members.

If the Court thinks the settlement is fair and reasonable:

- group members may get more money from the scheme
- but they won't be able to take part in any other court case about the BSWAT.

What if the law is not changed or the settlement is not approved by the Court?

If the Government does not get the law changed, or the Court does not think the settlement is fair and reasonable:

- the class action will continue
- the Court will decide whether the BSWAT was a fair way to assess wages.

If the Court decides that using the BSWAT to work out Mr. Duval-Comrie's wages was not fair and reasonable, group members may get compensation. Any compensation paid might be more or less than a payment offered through the scheme. Any compensation paid through a legal proceeding (including the class action) could be taxed and may affect the person's Disability Support Pension.

If the Court decides that using the BSWAT to work out Mr. Duval-Comrie's wages was fair, group members won't get compensation.

If the Court decides that a group member did not lose any money when their ADE used the BSWAT to work out their wage, they will not get compensation.

Important information for group members about accepting payment offers

If a group member accepts a payment offer from the scheme, they will not be able to be part of any legal proceedings about the BSWAT.

If a group member accepts a payment offer from the scheme before the class action ends, they will be automatically excluded from the class action.

If the changes to the law about the scheme are passed by Parliament and the Court approves the settlement:

- The class action will end.
- If group members want a payment, they will need to register and apply to the scheme for a payment – as discussed above, if the Court approves the settlement, group members will not be able to be part of any other legal proceedings about the BSWAT.
- Group members will need to register by 30 April 2017, apply by 30 November 2017 and accept any payment offer from the scheme by the important dates referred to on page 11 as extended by 12 months.
- The scheme will pay the increased payment of 70 per cent – see page 5.

If the changes to the law about the scheme are **not** passed by Parliament:

- The class action will continue.
- Group members will still be able to accept payment offers from the scheme so long as they have registered for the scheme by 30 April 2016, apply to the scheme by 30 November 2016 and accept any payment offer by the important dates on page 11.
- The payment offer will be the current offer of 50 per cent.
- As discussed above, if a payment offer is accepted, the group member will be automatically excluded from the class action and will not be able to be part of any other legal proceedings about the BSWAT.

OR

- Group members can decide to not accept a payment offer from the scheme and stay part of the class action where they may receive compensation if Mr Duval-Comrie wins the class action. Group members can stay in the class action if they have registered and applied for the scheme but not if they have accepted a payment offer from the scheme.

Making a decision

People will need to make the decision that is best for them. Everyone's personal and financial situation will be different. Any decision a person makes will not affect their current job or wages.

If a person accepts an offer under the scheme, they will not be able to take part in any legal case about the BSWAT.



What can you do if a participant is unhappy with a decision?

If a participant is not happy with a decision that has been made about the scheme they can ask for a review. A participant can access an internal and external review process, and we explain these processes below.

They can ask for a review about:

- the decision that they are not eligible for the scheme
- the payment amount they have been offered (including where a determination has been made that person is not entitled to a payment).

If a participant asks for a review after being told they are not eligible for the scheme (or, if eligible, a determination is made that the person is not entitled to a payment), the Department will look at their information again. The request for a review of this decision must take place within 21 days of the decision being made.

If a participant is not happy with the amount of money that they have been offered they must ask for a review before the acceptance date on their Letter of Offer. A participant cannot ask for a review after an offer has been accepted.

To ask for a review or to seek further information about reviews, the participant can contact the Department on the BSWAT Payment Scheme information line on 1800 799 515 or email BSWATPayments@dss.gov.au

An internal review

An internal review will be carried out by the Department. The Department will look at the participant's information again.

The participant will need to provide:

- the reason they think the decision wasn't right
- paperwork that supports their case
- if it is a review of the amount they have been offered, the reference number on their Letter of Offer.

The Department will then review the information as soon as possible and write to them about the results of the review.

If the participant is still not happy with the decision they can ask for an external review.

An external review

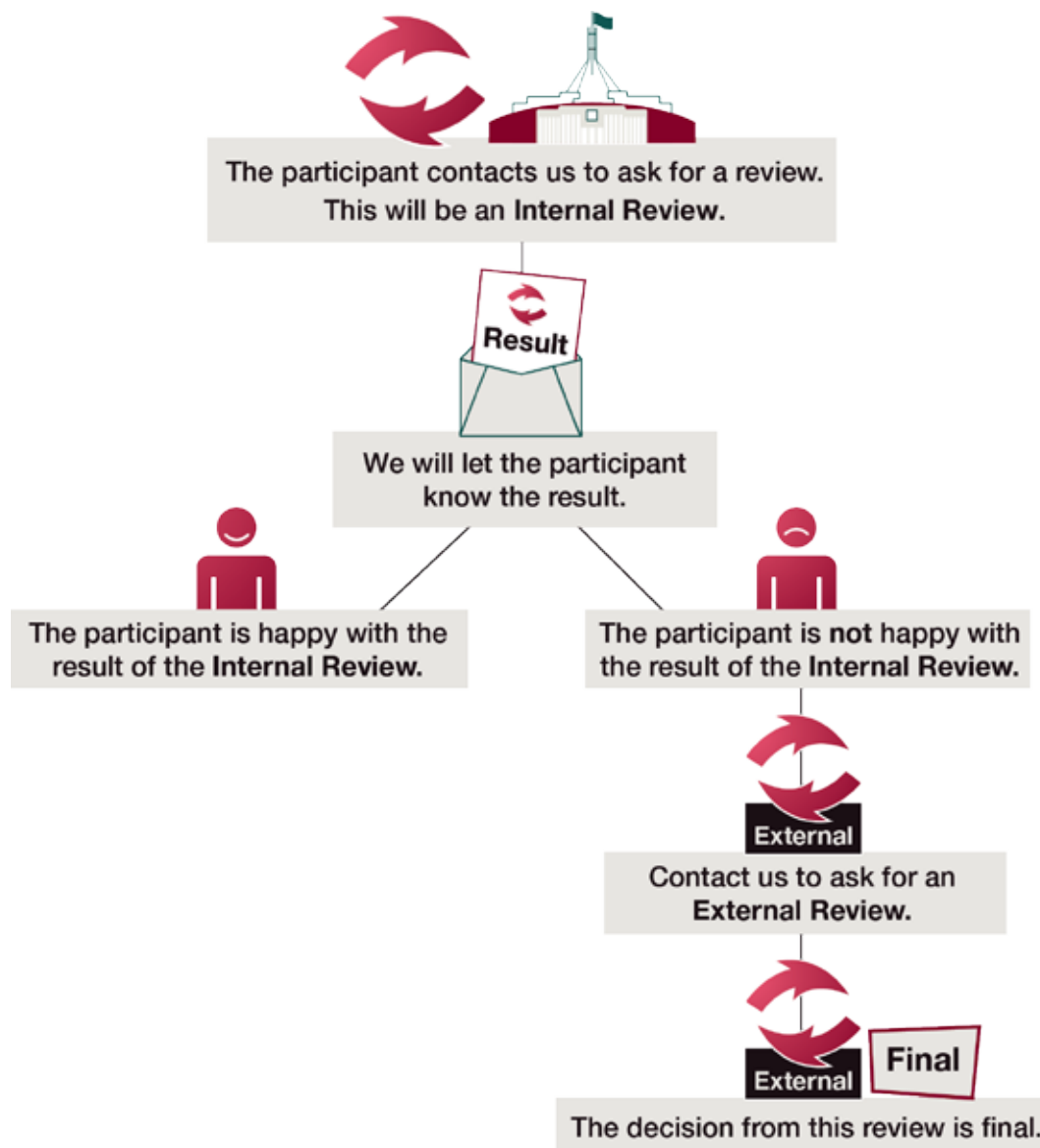
An external review will be done by someone who is independent from the Department or the Government.

This person can be a retired judge or a senior lawyer with extensive experience. They will review all the information that the participant has provided and the decisions that have been made.

The external reviewer will then make a decision about what should be done next and a letter will be sent to the participant with the results of the review.

This will be the final decision. There will be no more reviews after this decision.

A summary of the review process





Other concerns

Current employment

The scheme will not affect a participant's current job or their wages.

No one will lose their job for taking part in the scheme.

Receiving the Disability Support Pension

A payment under the scheme is unlikely to affect a participant's Disability Support Pension. Most people will continue to receive the Disability Support Pension in the usual way. Some people will need to have an asset test.

Tax

Participants may not have to pay any tax on the one-off payment from the scheme.

If a participant does have to pay tax, the scheme will increase the amount of money they pay to help meet the costs of the tax. We will calculate this at the time of the offer.

Death during the process

If a participant should pass away after they have made an application for the scheme, a person nominated to represent them can accept a payment offer on their behalf. The payment would then be made to the deceased person's estate.

If changes to the law for the BSWAT Payment Scheme are introduced, it will allow a deceased person's legal personal representative to engage with the payment scheme on their behalf.

Fraud, or taking advantage of the scheme

If a participant is found to have deliberately provided incorrect information to apply for the scheme, they will be required to pay back any money they were given. The Government will collect any debts for incorrect payments.

Privacy

The Department will collect, use and disclose personal information in accordance with the *Privacy Act 1988* and the privacy provisions in Division 3 of Part 5 of the *Business Services Wage Assessment Tool (BSWAT) Payment Scheme Act 2015*.

During the administration of the scheme, the Department will need to access a range of personal information about each participant. Most of this information is already kept on record at the Department. Some information will be provided by the participant's ADE.

In general, this information will relate to days and hours worked, assessments that have been undertaken and the wages that have been paid.

Where possible, the participant or nominee's information will be kept private.

However, there are some limited circumstances when the information will need to be shared. For example, the Department may be required to share the information by law. Or, the Department may need to share some information with another Commonwealth agency, such as Centrelink.

A participant or nominee can give permission for the Department to share the information in some circumstances.

A participant or nominee also has the right to ask for information that is held about them, according to the *Freedom of Information Act 1982*.



Where can you get more information?

If you need more information about the scheme please contact the Department by:

- phoning the BSWAT Hotline on 1800 880 052
- phoning the BSWAT Payment Scheme information line on 1800 799 515
- emailing BSWATPayments@dss.gov.au
- visiting the website at www.dss.gov.au/bswat-payment-scheme

We have created a number of documents about the scheme for different audiences. They are available online at www.dss.gov.au/bswat-payment-scheme-resources

The titles are:

- *About the BSWAT Payment Scheme: Information for supported employees – Easy Read Handbook*
- *About the BSWAT Payment Scheme: Information for Australian Disability Enterprises (ADEs)*
- *About the BSWAT Payment Scheme: Information for families, advocates and nominees*
- *About the BSWAT Payment Scheme: Information for legal advisors and financial counsellors – Helping people with intellectual impairment to make informed decisions about the scheme*
- *About the BSWAT Payment Scheme: Information for financial counsellors*
- *About the BSWAT Payment Scheme: Information for legal advisors*

The comprehensive Easy Read handbook is written in a way that is very easy to understand and uses images to help explain the information.



Useful terms

Advocate

Advocates often work closely with people with disability to help them speak up for their rights. There are many advocates in our community, and you can find them online or you can ask the participant's ADE to help you find one.

Australian Disability Enterprise (ADE)

Australian Disability Enterprises provide work and support for people with disability. They are often called ADEs.

Business Services Wage Assessment Tool

A wage assessment tool. This tool is usually called the BSWAT.

BSWAT Payment Scheme

A scheme that has been set up by the Australian Government to provide eligible people with a one-off payment.

Competency

How well a person understands and does a job, or part of a job.

Daily support

When the staff in an ADE help participants in their daily work activities.

Financial counsellor

Financial counsellors usually work with people with a low income or those who are struggling financially. They are trained to work in the community to provide a free and impartial service. They are not the same as a financial advisor. Under the BSWAT Payment Scheme legislation, the financial counsellor must be qualified in the state or territory where they are working.

Indexation

A change to the value of money or a payment based on the way costs rise over time.

Intellectual impairment

Under the BSWAT Payment Scheme legislation, intellectual impairment describes a person who has:

- intellectual disability
- autism spectrum disorder
- dementia
- acquired brain injury.

Legal advisor

A lawyer enrolled as a legal practitioner of the High Court, of another Federal Court or of a Supreme Court of a State or Territory and who holds a practising certificate.

Letter of Offer

A letter that tells a participant how much money they will get from the BSWAT Payment Scheme.

Nominee

A nominee for the scheme is generally a person chosen by the participant. A nominee is appointed by the Department to find out the preferences and wishes of the participant and to make decisions in relation to the scheme based on the participant's wishes and opinions.

Nominees can do anything a participant can do under or for the purposes of the BSWAT Payment Scheme legislation, unless there is a limitation in an individual nominee appointment.

Productivity

How much work someone does during a period of time.

Representative proceeding

Another name for a class action, which is a court case that involves a group of people.

