

CR 2019/47 - Victorian Department of Health and Human Services - employment termination payment



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Class Ruling

Victorian Department of Health and Human Services – employment termination payment

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❶ Relying on this Ruling:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

Summary – what this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:
- section 82-130 of the *Income Tax Assessment Act 1997* (ITAA 1997)
 - section 82-135 of the ITAA 1997.

All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of employees to whom this scheme applies is those employees of the Victorian Department of Health and Human Services (DHHS) shown at paragraph 12 of this Ruling, who receive a payment under the heading 'Scheme'.

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Qualifications

4. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described under the heading Scheme.

5. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- this Ruling may be withdrawn or modified.

Date of effect

6. This Ruling applies from 8 August 2019 to 1 January 2023. The Ruling continues to apply after 1 January 2023 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Scheme

7. DHHS is a department of the Victorian Government (the State). Disability services, being Supported Independent Living (SIL) and Short Term Accommodation and Assistance (STAA) are areas within DHHS. Specialist SIL and STAA services are primarily managed and delivered through the network of group homes across the State of Victoria and also through DHHS's Central Office.

8. SIL and STAA currently have a work force of approximately 5,500 employees. The disability services provided in SIL involve approximately 507 group homes across Victoria, which have a staffing profile of between 5-8 employees, who predominately support up to 6 clients in each group home. The disability services provided in STAA involve approximately 27 facilities across Victoria, which have a staffing profile of between 5-8 employees, who support up to 6 clients at a time in each facility. Employees are rostered to support clients who are using the STAA services on a short-term basis (between 1 and 14 days) and provide support over a full 24 hour period.

9. The individuals employed to provide the SIL and STAA services are employees of the State and working within DHHS.

10. In order to support the successful implementation of the National Disability Insurance Scheme (NDIS), the State will be transferring the provision of disability services by way of the SIL and STAA services from DHHS to non-government service providers.

11. There will be a fundamental transfer of the work force as follows:

- The first stage commencing from 1 January 2019 will entail an initial secondment of the current employees of the State working within the SIL and STAA operations of DHHS to the new non-government service providers pursuant to section 205 of the *Disability Act 2006* (Vic).
- On or from 1 January 2021, the second stage will be a transfer of employment where the relevant employees will commence employment with the new non-government services providers directly. This will be facilitated through an offer and acceptance process and those employees that accept the offers of employment will cease to be employees of the State (the transfer).

12. The class of employees to whom the Scheme applies is all DHHS employees who:

- are currently employed by the State
- are currently working within the DHHS
- are currently engaged in providing disability services, being SIL and STAA services
- at the time of the transfer of the provision of these SIL and STAA services to non-government service providers as result of the implementation of the NDIS, will cease employment with the State
- commence employment with the new non-government service providers, and
- receive a 'transfer payment' from the State as described in paragraph 13.

13. DHHS will provide the following incentives to staff who change employment under this arrangement:

- The First Transfer Payment, paid to eligible employees who:
 - have been employed by the State on 18 December 2017, and
 - remain employees of the State at the date of secondment.

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- The Second Transfer Payment, paid to eligible employees who:
 - have satisfied all of the conditions in relation to the First Transfer Payment
 - have accepted an offer of employment with a new non-government service provider, and
 - have remained employees of the State up until the date of transfer to the new non-government service provider.

14. The quantum of payment will be determined based on the employees' mode of employment at the date the payment falls due and will be as follows:

(a) Full-time Employees

Full-time employees will receive the maximum payment of \$15,000 (comprised of a two-stage transfer payment of \$7,500 as a pre-payment when seconded and the second transfer payment \$7,500 when employment terminates with the State).

(b) Part-time Employees

Part-time employees will receive a pro-rata amount of the first transfer payment of \$7,500 and the second transfer payment of \$7,500 based on their actual hours worked in the preceding 12-month period from the date when the payment falls due.

(c) Regular and Systematic Casual Employees

Casual employees who have 3 or more years' service at the date that the first and second transfer payment falls due are deemed to be regular and systematic casuals for the purposes of eligibility for the transfer payment. These employees will receive a pro-rata amount of the first transfer payment of \$7,500 and the second transfer payment of \$7,500 based on their actual hours worked in the preceding 12-month period from the date when the payment falls due.

Casual employees who have less than 3 years' service at the date of the first and second transfer payments fall due are, for the purposes of eligibility of the transfer payment, deemed to be regular and systematic casuals if they have worked at least 1 shift in each of 13 weeks over the preceding 52 weeks. These employees will be entitled to 50% of the first and second transfer payments (a maximum of \$3,750 for the first transfer payment and \$3,750 for the second transfer incentive payment). These employees will

receive a pro-rata amount of the first transfer payment of \$3,750 and the second transfer payment of \$3,750 based on their actual hours worked in the preceding 12-month period from the date when the payment falls due.

15. The First Transfer Payment will be paid directly by DHHS. During the secondment period, the non-government service providers will discharge payroll obligations on behalf of the State. The second transfer payment will either be made directly by DHHS or be paid by the non-government service provider on behalf of the State in discharging the State's obligation to do so.

16. The First Transfer Payment will be paid to eligible employees around the time of the commencement of their secondment in 2019. The Second Transfer Payment will be paid to eligible employees soon after the termination of their employment with the State and commencement of employment with the applicable non-government service provider. In all cases, both the first and second payment will have been received by an employee no later than 12 months after the termination of their employment with the State.

17. The transfer payments will not be paid to employees who continue their employment with DHHS, who transfer to other Victorian Government entities, or who resign or retire. Any employee, who terminates employment other than under the Scheme, will not be entitled to receive the Scheme payment.

18. The transfer payments will be made in recognition of the employees ceasing employment within the Victorian public health system.

19. The payment made under the Scheme is in excess of any superannuation and any other benefits to which eligible employees would otherwise be entitled.

20. The transferring employees' continuity of service will not be broken by the employee's acceptance of the offer of employment with the new non-government service provider. The non-government service will recognise the transferring employees' period of continuous service with the State and will also assume the employees' accrued leave entitlements.

21. There are no obligations imposed on the employees to continue their employment with the new non-government service provider for any particular period after commencement of the employment with the new non-government service provider.

22. Payments made under the scheme will be at arm's length.

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Ruling

23. The proposed First Transfer Payment to be made to employees of the Victorian Department of Health and Human Services is not an employment termination payment.

24. The proposed Second Transfer Payment to be made to employees of the Victorian Department of Health and Human Services is an employment termination payment.

Commissioner of Taxation

7 August 2019

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Employment termination payment (ETP)

25. A payment made to an employee is an ETP if it satisfies all the conditions set out in section 82-130 and is not specifically excluded under section 82-135.

26. Subsection 82-130(1) states:

A payment is an **employment termination payment** if:

- (a) it is received by you:
 - (i) in consequence of the termination of your employment; or
 - (ii) after another person's death, in consequence of the termination of the other person's employment
- (b) it is received no later than 12 months after that termination (but see subsection (4)), and
- (c) it is *not* a payment mentioned in section 82-135.

27. Therefore, the two transfer payments will be ETPs only if all the conditions in subsection 82-130(1) are satisfied.

Is there a termination of employment?

28. Paragraph 9 of Taxation Ruling IT 2152 Income tax: *retiring allowances paid to employees upon restructuring of a business* states:

Where a company or other employer ceases carrying on a business which has been transferred to an associated entity, it will be accepted that the employees of the company have had their employment terminated. This will apply in cases similar to the *Paklan Case* where it is clear that the business in question has been transferred to another entity and it is also clear that the employee's employment has, in fact, been terminated ...

29. In this case, eligible employees will cease employment with DHHS and take up employment with a new non-government service provider. Once an eligible employee accepts a permanent position with the non-government service provider, their employment with DHHS will be terminated.

30. Therefore, it is considered that eligible employees' employment with DHHS will be terminated.

Paid in consequence of the termination of your employment

31. The phrase 'in consequence of' is not defined in the ITAA 1997. However, the courts have interpreted the phrase in a number of cases. Whilst the courts have divergent views on the meaning of this phrase, the Commissioner's view on the meaning and application of the 'in consequence of' test are set out in Taxation Ruling TR 2003/13 *Income tax: eligible termination payments (ETP): payments made in consequence of the termination of any employment: meaning of the phrase 'in consequence of'*.

32. While TR 2003/13 considered the meaning of the phrase 'in consequence of' in the context of the eligible termination payments, TR 2003/13 can still be relied upon as both the former provision under the *Income Tax Assessment Act 1936* and the current provision under the ITAA 1997 both use the term 'in consequence of' in the same manner.

33. In paragraphs 5 and 6 of TR 2003/13 the Commissioner states:

5. ... a payment is made in respect of a taxpayer in consequence of the termination of the employment of the taxpayer if the payment 'follows as an effect or result of' the termination. In other words, but for the termination of employment, the payment would not have been made to the taxpayer.

6. The phrase requires a causal connection between the termination and the payment, although the termination need not be the dominant cause of the payment. The question of whether a payment is made in consequence of the termination of employment will be determined by the relevant facts and circumstances of each case.

34. In this case, the First Transfer Payment is to be paid to employees who have been employed by the State on 18 December 2017 and remain employees of the State at the date of secondment.

35. Accordingly, the termination of employment is not a condition of, or occasion of, the employees' entitlement to the payment. The payment will be made because the relevant employee has completed a specified period of employment. If the employee terminated their employment before 1 January 2019, they would not receive this payment. As such, the First Transfer Payment is simply an incentive payment to remain in employment for the specified period of time and is not an ETP.

36. The proposed First Transfer Payment to be made to employees of DHHS is assessed as ordinary income of the employees.

37. The Second Transfer Payment is to be paid to employees whose employment with DHHS is terminated because they have accepted permanent positions with the non-government service provider.

38. The payment will be made in recognition of the employees ceasing employment within the Victorian public health system.

39. The payment will not be paid to employees who continue their employment with DHHS, who transfer to other Victorian Government entities, or who resign or retire.

40. Therefore, the Second Transfer Payment is considered to be made in consequence of the termination of employment.

Payment is received no later than 12 months after termination

41. It is intended that the payment date will not be more than 12 months from the date of termination of employment for current employees or former employees where applied retrospectively.

42. Therefore, this condition will be satisfied if the proposed Second Transfer Payment is made within 12 months of the termination date.

Payment is not a payment mentioned under section 82-135

43. Section 82-135 lists payments that are not ETPs, none of which apply to the Second Transfer payment.

44. As the proposed Second Transfer Payment is not a payment mentioned in section 82-135, this condition is satisfied.

45. As all the conditions of section 82-130 have been met, the proposed Second Transfer Payment is an ETP.

46. The proposed First Transfer Payment is not an ETP, as the payment will not be made in consequence of the termination and as such all the conditions of section 82-130 have not been met.

Appendix 2 – Detailed contents list

47. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

IT 2152 TR 2003/13; TR 2006/10

Legislative references:

- ITAA 1997

- ITAA 1997 82-130

- ITAA 1997 82-130(1)
- ITAA 1997 82-130(1)(a)
- ITAA 1997 82-130(1)(b)
- ITAA 1997 82-130(1)(c)
- ITAA 1997 82-135
- ITAA 1997 83-180(3)
- TAA 1953
- Disability Act 2006 (VIC)
- Disability Act 2006 (VIC) 205

ATO references

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