CR 2024/71 - Department of Energy, Environment and Climate Action - Victorian Forestry Transition Program

Status: **legally binding**

Class Ruling

Department of Energy, Environment and Climate Action – Victorian Forestry Transition Program

Relying on this Ruling

This publication (excluding appendix) 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.

Table of Contents **Paragraph**

What this Ruling is about

1. This Ruling sets out the income tax and fringe benefits tax consequences of support payments provided by the Victorian Government and administrated by the Department of Energy, Environment and Climate Action (DEECA) to support employees impacted by the transition away from native timber harvesting under the Victorian Forestry Transition Program (Program).

2. Details of this scheme are set out in paragraphs 22 to 58 of this Ruling.

3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you are an employee who receives the following support payments under the Program:

- Government top-up payments
- relocation reimbursements, and
- hardship payments.

When this Ruling applies

5. This Ruling applies from 1 February 2023 to 30 June 2028.

Status: **legally binding**

Ruling

Government top-up payments

6. If an employee receives a Government top-up payment (GTU payment) under the Program and satisfies the criteria of section 83-175 with reference to an objective assessment of their circumstances, that payment will be a genuine redundancy payment and will be non-assessable non-exempt income (tax-free) up to the limit worked out under section 83-170.

7. If an employee receives a GTU payment under the Program, to the extent that payment either does not satisfy the criteria of section 83-175, or exceeds the limit worked out under section 83-170, that payment will be an employment termination payment (ETP), where the criteria of section 82-130 is satisfied with reference to an objective assessment of their circumstances. The tax treatment of that ETP will also depend on their circumstances.

8. If an employee receives a GTU payment, it will not be included in their assessable income under section 6-5 if when undertaking an objective assessment of their circumstances it:

- satisfies the criteria of section 83-175, or
- does not satisfy that criteria but does satisfy the criteria of section 82-130 and does not exceed the limit worked out under section 83-170.

9. A capital gain which an employee makes when receiving a GTU payment is reduced under section 118-20 by the extent to which that payment satisfies the requirements of either Division 82 (Employment termination payments) or Division 83 (Other payments on termination of employment).

Relocation reimbursements

10. The following payments forming part of the relocation reimbursements that are paid to employees are not an ETP or genuine redundancy payment under Divisions 82 and 83:

- Category 1 – removalist and relocation expense reimbursement
- Category 2 – property purchase and end-of-tenancy expense reimbursement
- Category 3 – incidental relocation costs reimbursement, and
- Category 4 – short-term accommodation costs reimbursement.

11. These payments that are paid to employees are not included in their assessable income under section 6-5.

12. For the purposes of a Category 1 – removalist and relocation expense reimbursement, CGT event C2 under section 104-25 occurs when an employee's entitlement to receive a removalist and relocation expense reimbursement is satisfied. However, any capital gain is disregarded pursuant to paragraph 118-37(2)(a).

13. For the purposes of a Category 2 – property purchase and end-of-tenancy expense reimbursement, the property purchase and end-of-tenancy assistance is not included in assessable income. Therefore, the expenditure incurred is excluded from the cost base, or reduced cost base, of the property. Depending on the circumstances of the employee, the

main residence exemption provisions in Subdivision 118-B may apply to disregard a capital gain or capital loss made on disposal of the property.

14. For the purposes of Category 3 – incidental relocation costs reimbursement, CGT event C2 under section 104-25 occurs when an employee's entitlement to receive an incidental costs reimbursement is satisfied. However, any capital gain is disregarded pursuant to paragraph 118-37(2)(a).

15. In terms of the Category 4 – short-term accommodation costs reimbursement, CGT event C2 happens under section 104-25 when an employee's entitlement to receive the short-term accommodation costs assistance is satisfied. However, any capital gain under CGT event C2 is disregarded by virtue of paragraph 118-37(2)(a).

16. The relocation reimbursements also will not give rise to a reportable fringe benefit amount (RFBA) pursuant to Part XIB of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).

Hardship payments

17. If an employee receives a hardship payment under the Program, that payment will not satisfy the requirement of either section 83-175 or section 82-130 and consequently, will not be an ETP or genuine redundancy payment under Divisions 82 and 83.

18. The hardship payment forming part of the support payments paid to employees is not ordinary income and is not assessable under section 6-5.

19. An employee's entitlement to a hardship payment is a capital gains tax (CGT) asset under subsection 108-5(1), which is acquired when the employee's application is approved. CGT event C2 happens under section 104-25 when an employee's entitlement to receive a hardship payment is satisfied.

20. Where the entitlement to receive the hardship payment was not acquired by the employee at least 12 months before CGT event C2 happened, the capital gain cannot be a discount capital gain in accordance with subsection 115-25(1).

21. A payment made to an employee under the Program experiencing significant hardship will not result in the employee having an RFBA for the purposes of Part XIB of the FBTAA.

Scheme

22. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

Victorian Forestry Transition Program

23. The Victorian Government has introduced the Program to assist native timber employees, supply chain employees and their families as they navigate the transition away from harvesting of native timber in Victoria's state forests. The Program is administered by DEECA.

24. Native timber harvesting ended on 1 January 2024, with changes in the legal and regulatory environment. The businesses of many Victorian sawmills have, or will, close as a result. This impacts sawmills, community forestry, harvest and haulage, seed collecting, pulp and paper and supply chain businesses operating in the industry.

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25. VicForests was a body under the *State Owned Enterprises Act 1992* (Vic) managing the harvest, sale, and regrowing of sustainable timber from Victorian state forests on behalf of the Victorian Government. VicForests ceased operating on 30 June 2024.

26. The Program's objectives are to:

- support employees' financial security while they seek new employment outside the native timber industry
- support employees and their families to plan for the future, and
- equip employees with the skills, capability, confidence, and resources to successfully transition into new employment, long-term education and training or retirement.

27. Information about the Program, its objectives and aims, who is an eligible employee for the purposes for the Program, what support is available, and how employees must register for the Program in order to be eligible are contained in the *Victorian Forestry Transition Program Worker Support Program Service Framework and Eligibility Criteria April 2024* publication (April 2024 publication) and is supported by online public guidance.

28. Once registered, eligible employees can apply for:

- support payments
- a range of other support services (support services), or
- support payments and support services.

29. The Program commenced in November 2022 and will conclude on 30 June 2026.

Eligibility for the Worker Support Program

30. Eligibility for the Program is determined by DEECA. A worker may apply for the Program, and if eligible, may receive support until 30 June 2026. The April 2024 publication states that the eligibility criteria include:

- working in Victoria
- employment with an eligible business (an eligible business is a native timber business that is eligible for support through the Program), and
- employment within the native timber industry.

31. The April 2024 publication also states that the following may be eligible roles under the Program:

- sawmill employees that are employees who have been made redundant by an eligible native timber sawmill, or their casual employment was ended by their employer within the last 12 months – employees must have been directly employed by the business on a casual, contractual, or permanent basis (this does not include pulp and paper employees, including Opal Australian Paper Maryvale Mill employees)
- harvest and haulage employees that are employees that have been made redundant within the last 12 months by an eligible harvest and haulage business – employees must have been directly employed by the business on a casual or permanent basis

- community forestry licensees and their employees that are businesses with a forest produce licence issued by VicForests
- seed collectors and their employees, which are a business with a VicForests contract
- chip truck drivers that are employees that have transported hardwood woodchips from sawmills that had a timber sale agreement, or a forest produce licence issued by VicForests since 1 July 2020
- pulp and paper employees (including Opal Australian Paper Maryvale Mill workers), who have been made redundant or their casual employment was ended by Opal Australian Paper Maryvale Mill within the last 12 months
- supply chain employees, that are employees employed in downstream businesses such as accountancy services, electricians and general maintenance businesses
- employees of eligible native timber businesses.

32. The employees who are not eligible for the Program include, but are not limited to:

- employees in plantation timber-related roles
- employees of businesses that are not eligible for business transition support
- employees with less than 12 months of employment
- employees who voluntarily leave their employment
- employees whose employment has been terminated for reasons other than genuine redundancy
- employees dismissed because they reached normal retirement age
- employees dismissed for disciplinary or inefficiency reasons
- employees working outside Victoria
- trainees and apprentices.

33. This Ruling does not address the potential tax implications (if any) of the support services. It focuses only on the support payments. Further it does not apply to workers who are considered eligible employees for the purposes of the Program but who are not employees under a taxation law.

Support payments

34. The classes of support payments provided under the Program are:

- GTU payments
- relocation reimbursements, and
- hardship payments.

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35. An eligible employee for the purposes of the Program is defined in the April 2024 publication as, '… employees of eligible businesses including eligible contractors who meet the criteria of the Worker Support Program or the conditions for a Government top-up payment'.

36. A common law employee is defined in the April 2024 publication as a person employed by a business and performs work as a representative of the businesses. Employees can be

- full-time
- part-time
- casual
- piece rate
- seasonal.

37. A contractor is defined in the April 2024 publication as providing services under a contract and can work for more than one client at a time. Contractors are also called:

- self-employed workers
- sole traders
- ABN holders.

38. The particular facts and circumstances of an Eligible Employee will influence the level and type of support available under the Program. Variables include:

- the type of employment (including permanent, casual, seasonal or fixed-term employees)
- whether the existing common law employment relationship was recognised during the duration of the employment
- how an Eligible Employee is engaged, including through an incorporated or unincorporated business
- whether an Eligible Employee works for multiple employers
- whether an Eligible Employee's length of service in the native timber industry has been interrupted, and
- whether an Eligible Employee is both an employee and an owner of a business.

Government top-up payments

39. Eligible employees may be entitled to a GTU payment where they have been made genuinely redundant as defined by section 389 of the *Fair Work Act 2009*. This payment will be made in recognition that their jobs are no longer available.

40. To qualify for the GTU payment, a native timber employee must meet all the following conditions:

- The employee has been made genuinely redundant, or their casual employment was ended by their employer within the last 12 months.
- The employee worked in Victoria.

- The employee was employed in the native timber industry at the time of their separation.
- The employee was employed specifically in a native timber role.
- The employee's most recent employment lasted for 12 months or more.
- The employee must be one of the following
  - sawmill employee
  - harvest and haulage employee
  - community forestry employee
  - seed collector
  - chip truck driver, or
  - employee of an eligible native timber business.

41. The employee will not be eligible for the GTU payment if they meet any of the following criteria or conditions:

- The employee was in a plantation timber-related role.
- The employee was an employee of a business that is not eligible for business transition support.
- The employee had less than 12 months of employment.
- The employee voluntarily left their employment.
- The employee's employment was terminated for reasons other than genuine redundancy.
- The employee was dismissed because they reached normal retirement age.
- The employee was dismissed for disciplinary or inefficiency reasons.
- The employee was working outside Victoria.
- The employee is or was a trainee or apprentice.
- The employee's termination occurred at the end of a fixed period.
- There is a contrived arrangement to re-employ the employee, or the employer still requires the employee's job to be performed by someone else.
- The employee's redeployment or transfer was not reasonably considered, or their employer could have reasonably offered them another job within the business or an associated entity.
- The employee initiated the termination of employment or the termination is not at arm's length.
- An arrangement to re-employ the employee after termination is entered into between either
  - the employer and employee, or
  - the employer and another entity.

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42. The GTU payment is capped at $150,000 including any genuine redundancy paid by the employer for eligible employees aged less than 45 years old. Those over the age of 45 years will receive a further 3 weeks of pay for every year of service in the industry after the age of 45. This payment is calculated separately from the GTU payment and has a cap of $50,000.

43. To receive a GTU payment employees must provide evidence to support their entitlement. Examples of some acceptable evidence which have been provided include:

- for full-time, part-time, piece rate and seasonal employees
  - a letter of termination of employment by reason of redundancy
  - an 'Employment Separation certificate' form indicating the reason for separation was redundancy, and
  - receipt of a redundancy payment (if applicable).
- for casual employees
  - a letter of termination of employment by reason of the transition from native timber harvesting in state forests and shortage of work available, and
  - an 'Employment Separation certificate' form indicating the reason for separation was shortage of work.
- for subcontractors (noting additional evidence may be required depending on the business type and structure)
  - evidence that the business has not taken any steps towards or plan to engage in the native timber industry in the future, and
  - evidence that the business has ceased operations and closed.

44. The GTU payment is calculated based on an eligible employee's years of service in the native timber industry and is comprised of:

- 4 weeks of pay for each year of service in the native timber industry
- unused sick leave (up to 152 hours), and
- less any amount paid and reported as a genuine redundancy to the eligible employee in respect of their final employer.

45. Weekly pay rates will be based on:

- for common law employees (recognised as such during their employment) – employees will be paid at their most recent ordinary rate of pay (pro rata for part-time and casual employees), and
- for contractors and business owners – the rate of pay will be based on their average annual salary for the best 2 financial years from 2018–19 and 2021–22, divided by 52, up to $120,000 per annum.

46. Years of service in the native timber industry are calculated by:

- records showing the sum of all eligible periods of employment and rounding down to the nearest whole year – for example, if an employee has worked for 5 years and 6 months, their years of service will be recorded as 5 years
- where no record of earlier industry service is provided or unavailable, or where it is unclear, payment will be based on records from the most recent

employer or contractor, and where necessary, reasonable, industry-informed assumptions will be made having regard to the eligible employee's skill levels aligned with the Timber Industry Award.

Relocation reimbursements

47. The relocation reimbursement is a government-provided financial assistance designed to help timber employees (who have been made redundant or whose casual employment has ended) and their families if they need to relocate more than 50 kilometres from their current residence to secure new employment.

48. The relocation reimbursement is flexible and can be tailored to cover specific moving expenses incurred by the employee and their family during the relocation process.

49. The maximum amount of relocation reimbursements available across all categories is $45,000 and will be considered by DEECA on a case-by-case basis.

50. To be eligible, employees must present invoices and evidence 2 quotes. Reimbursement will cover the cost of the most economical option selected based on the provided quotes.

51. A range of relocation assistance payments may be available. The type of assistance available will depend on the employee's circumstances.

52. The reimbursements can be grouped into 4 broad categories. The categories and evidence requirements can be summarised as:

Table 1: Categories and reimbursements and evidence requirements for each

Reimbursement type	**Evidence requirements**
Category 1: Removalist and relocation expense reimbursement	Two quotes and an invoice to be provided for: • removalists and removalist insurance • truck hire • storage • trailer hire • gardening fees • cleaning fees • pet boarding fees (up to one month) One invoice to be provided for: • travel costs.

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Category 2: Property purchase and end-of-tenancy expense	One invoice to be provided for: • reimbursement of stamp duty[1] • reasonable breaking lease costs incurred at current residence as charged by estate agents • rental bond • relocation-associated legal costs, such as conveyancing and related legal fees.
Category 3: Incidental relocation costs reimbursement	One invoice to be provided for: • utility connection and exit costs charged by third-party utility providers • first groceries from a grocer's shop or supermarket to stock fridge and pantry at the new residence • associated medical costs, such as gap payments for amounts payable to medical practitioners and allied health professionals (up to 2 months) • school uniforms • one-off school enrolment fees • vehicle registration transfer fees (if moving interstate) • licence transfer fees.
Category 4: Short term accommodation costs reimbursement	One invoice to be provided for: • temporary accommodation (that is, staying in a hotel, motel, caravan, or Airbnb) • rent at new location (up to 2 months) Two quotes and an invoice to be provided for: • non-rent accommodation at new location (up to 2 weeks).

53. None of the payments outlined in paragraph 52 of this Ruling will be periodic or recurring, nor will they be intended to supplement income.

54. To qualify for these reimbursements, employees must fall into one of the following categories:

- sawmill employees
- harvest and haulage employees
- community forestry licensees and their employees
- subcontractors and their employees

[1] The reimbursement of stamp duty requires the employees to demonstrate that they sold a residence at their previous location, occupied a residence within 15 months of the effective date of redundancy or the ending of their casual contract and provided satisfactory evidence of related expenses. The reimbursement of stamp duty is not available if the employee occupies a government residence at the new location.

- seed collectors
- chip truck drivers
- pulp and paper employees (including Opal Australian Paper Maryvale Mill employees)
- employees of an eligible native timber business.

Hardship payments

55. A one-off hardship payment of $3,000 is available specifically for native timber employees in the Community Forestry industry. The payment is administered for employees who have experienced significant hardship due to the transition away from native timber harvesting and have not been receiving or received any other government payments.

56. To be eligible for the hardship payment, an employee must be a community forestry licensee or seed collector.

57. An employee is not required to be made redundant to be eligible for the hardship payment.

58. The scheme operates in conjunction with the April 2024 publication.

Commissioner of Taxation
6 November 2024

Status: **not legally binding**

Appendix – Explanation

This Explanation 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.

Table of Contents **Paragraph**

Status: **not legally binding**

Background

59. In arriving at the decisions outlined in this Ruling, we have considered whether the payments made to employees under the Program are:

- genuine redundancy payments
- ETPs
- assessable as ordinary income
- subject to the CGT provisions, and
- subject to fringe benefits tax.

Government top-up payment

Genuine redundancy payments

60. A GTU payment made to an employee is a genuine redundancy payment if that payment satisfies all the requirements in section 83-175, with reference to an objective consideration of the circumstances of that payment and of the employee.

61. Subsections 83-175(1) and (2) provide that:

> A ***genuine redundancy payment*** is so much of a payment received by an employee who is dismissed from employment because the employee's position is genuinely redundant as exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of the dismissal.
>
> A ***genuine redundancy payment*** must satisfy the following conditions:
>
> (a) the employee is dismissed before the earlier of the following:

(i) the day the employee reaches pension age;

(ii) if the employee's employment would have terminated when he or she reached a particular age or completed a particular period of service – the day he or she would reach the age or complete the period of service (as the case may be);

(b) if the dismissal was not at arm's length – the payment does not exceed the amount that could reasonably be expected to be made if the dismissal were at arm's length;

(c) at the time of the dismissal, there was no arrangement between the employee and the employer, or between the employer and another person, to employ the employee after the dismissal.

62. Paragraph 11 of Taxation Ruling TR 2009/2 *Income tax: genuine redundancy payments* provides the 4 components of a payment which, in our view, must necessarily be satisfied for a payment to be a payment received by an employee who is dismissed from employment because the employee's position is genuinely redundant. Satisfying this requirement establishes the essential character of the payment.

63. The 4 necessary components within this requirement are:

- The payment being tested must be received *in consequence* of an employee's termination.
- That termination must involve an employee being dismissed from employment.
- That dismissal must be caused by the redundancy of the employee's position.
- The redundancy payment must be made genuinely because of a redundancy.

64. There are further conditions that must also be satisfied before a payment can be treated as a genuine redundancy payment. Paragraph 33 of TR 2009/2 outlines the further conditions for genuine redundancy payment treatment as required by subsections 83-175(2) and (3), as follows:

- The dismissed employee is not older than specified age limits.
- The termination is not at the end of a fixed period of employment.
- The actual amount paid is not greater than the amount that could reasonably be expected had the parties been dealing at arm's length, in the event that the employer and employee are in fact not dealing at arm's length in relation to the dismissal.
- There is no arrangement entered into between the employer and the employee or the employer and another entity to employ the dismissed employee after the termination.
- The payment is not in lieu of superannuation benefits.

Is the payment received in consequence of an employee's termination?

65. We consider that any payment must be made 'in consequence of' the employee's termination for it to be a genuine redundancy payment.

66. The phrase 'in consequence of' is not defined in the legislation. However, the words have been interpreted by the courts in several cases. The Commissioner has also issued Taxation Ruling TR 2003/13 *Income tax: employment termination payments (ETP): payments made in consequence of the termination of any employment: meaning of the phrase 'in consequence of'* which discusses the meaning of the phrase.

67. The Full High Court of Australia considered the expression 'in consequence of the termination of any employment' in *Reseck v Commissioner of Taxation (Cth)* [1975] HCA 38 (*Reseck*). The relevant issue in that case was whether amounts paid to a taxpayer by his employer at the end of 2 periods of employment, to which the taxpayer was entitled under an agreement between the employer and the taxpayer's union, were an allowance paid in a lump sum 'in consequence of retirement from, or the termination of, any office or employment …'. Gibbs J concluded that the amounts were made in consequence of the termination of the taxpayer's employment. His Honour said that:

> Within the ordinary meaning of the words a sum is paid in consequence of the termination of employment when the payment follows as an effect or result of the termination … It is not in my opinion necessary that the termination of the services should be the dominant cause of the payment … In the present case the allowance was paid in consequence of a number of circumstances, including the fact that the taxpayer's service had been satisfactory and that the industrial agreements provided for the payment, but it was none the less paid in consequence of the termination of the taxpayer's employment.

68. Jacobs J also concluded that the amounts constituted an allowance that was paid in consequence of the termination of the taxpayer's employment. His Honour said:

> It was submitted that the words "in consequence of" import a concept that the termination of the employment was the dominant cause of the payment. This cannot be so. A consequence in this context is not the same as a result. It does not import causation but rather a "following on".

69. The interpretations of 'in consequence of' adopted by Gibbs J and Jacobs J were considered by the Full Federal Court in *McIntosh, Charles v The Commissioner of Taxation* [1979] FCA 65 (*McIntosh*). The matter before the Court concerned a taxpayer who one week after retirement, commuted part of the pension to which he became entitled upon his retirement, into a lump sum. The commuted payment was made out of a provident fund established by a bank for the payment of benefits to bank officers on their retirement. The issue being considered by the Court was whether the commuted lump sum payment came within former paragraph 26(d) of the *Income Tax Assessment Act 1936*.

70. In *McIntosh*, Brennan J considered the judgments of Gibbs J and Jacobs J in *Reseck* and concluded that their Honours were both saying that a causal nexus between the termination and payment was required, though it was not necessary for the termination to be the dominant cause of the payment. Brennan J said that:

> Though Jacobs J. speaks in different terms, his meaning may not be significantly different from the meaning of Gibbs J … His Honour denies the necessity to show that retirement is the dominant cause, but he does not allow a temporal sequence alone to suffice as the nexus. Though the language of causation often contains the seeds of confusion, I apprehend his Honour to hold the required nexus to be (at least) that the payment would not have been made but for the retirement.

71. In the same case, Lockhart J stated:

> In my opinion, although the phrase is sufficiently wide to include a payment caused by the retirement of the taxpayer, it is not confined to such a payment. The phrase requires that there be a connection between the payment and the retirement of the taxpayer, the act of retirement being either a cause or an antecedent of the payment. The phrase used in section 26(d) is not 'caused by' but 'in consequence of'. It has a wider connotation than

> causation and assumes a connection between the circumstance of retirement and the act of payment such that the payment can be said to be a 'following on' of the retirement.

72. TR 2003/13 considers the divergent views as to the correct interpretation of the phrase 'in consequence of' as interpreted by the courts. Paragraph 5 of TR 2003/13 states:

> … the Commissioner considers that a payment is received by a taxpayer in consequence of the termination of the taxpayer's employment 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 received by the taxpayer.

73. As further stated in paragraphs 6 and 7 of TR 2003/13:

> 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 greater the length of time between the termination of employment and the payment, the more likely that the causal connection between the termination and the payment will be too remote for a conclusion that a payment was received in consequence of the termination of employment. However, length of time will not be determinative when there is a presently existing right to payment of the amount at the time of termination …

74. The question of whether a GTU payment is made in consequence of the termination of employment will be determined by the relevant facts and circumstances of each case.

75. In this case, the Program is described in the April 2024 publication as providing 'a safety net to those who have been made redundant, or their casual contract ended due to the Victorian Forestry Transition Program'.

76. To be eligible for a GTU payment under the Program, an eligible employee (within the meaning of the Program) who is a common law employee must satisfy certain criteria as outlined in the April 2024 publication. Relevantly, the employees must meet all of the conditions outlined in paragraph 35 of this Ruling.

77. To receive a GTU payment, employees must also provide evidence as outlined in paragraph 43 of this Ruling.

78. GTU payments can only be made once employment has ended.

79. In this case, we consider that termination of an employee's employment, because of a business' closure or restructure, will in most cases be the dominant cause of the GTU payment being made to the employee. It follows that, where the conditions of the Program are met, there will generally be a sufficient causal nexus between the termination of the employee and the subsequent receipt of the payment, and that the payment will have been received in consequence of an employee's termination.

Does the termination involve the employee being dismissed from employment?

80. For a payment to quality as a genuine redundancy, the employee must be dismissed from employment. Paragraph 241 of TR 2009/2 provides that, in our view, it is not sufficient that the person loses a particular position with an employer but continues on in some other capacity. A redundancy payment can only arise when there is no suitable job available for the employee with the employer, meaning that they must be dismissed.

81. The exception to this general principle is the case of a person holding an office with the employer at the same time as having a common law employment relationship with the same employer, referred to as 'dual capacity' employees. Dual capacity employees are discussed in further detail from paragraphs 86 to 96 of this Ruling.

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82. Dismissal is a particular mode of employment termination. It requires a decision to terminate employment at the employer's initiative without the consent of the employee. This stands in contrast to employment that is terminated at the initiative of the employee, for example, in the case of resignation.

83. Consent in this context refers to the employee freely choosing to agree to or approve the act or decision to terminate employment in circumstances where the employee has the capacity to make such a choice. Determining whether an employee has consented to their termination requires an assessment of the facts and circumstances of each case. Consent may be either expressly stated by the employee or implied by their behaviour or conduct.

84. A dismissal can still occur even where an employee has indicated that they would be interested in having their employment terminated, provided that the final decision to terminate employment remains solely with the employer. Such a case may arise where expressions of interest in receiving a redundancy package are sought from employees as part of a structured process undertaken by the employer as a means of promoting industrial harmony.

85. Determining whether an employee has been dismissed from their employment, and whether they consented to their termination, requires an assessment of the facts and circumstances of each case. This will be most apparent where the employer has chosen to close or restructure their business without input from the employee. This is likely to be evidenced by statements to the effect that the employee's employment has been terminated (for example, a certificate of termination), as is generally required by the eligibility criteria.

Dual capacity employees

86. A dual capacity employee is a person who, in addition to being engaged as an employee of an employing entity, is also a directing mind of, or holds an office, with that entity. The most common example is a person who is a director of the employer while also being a common law employee of that company. In many cases a dual capacity employee will have made, or actively participated in, a decision to terminate their own employment in either or both capacities.

87. Under section 80-5, the concept of employment for the purposes of Part 2-40 is extended to include the holding of an office. Therefore, termination of a dual capacity employee in either employment capacity will be sufficient to be a termination of employment for Part 2-40 purposes, even if the person continues to hold employment with the employer in the other capacity.

88. Otherwise, the same principles apply to a dual capacity employee as they apply to a single capacity employee when working out whether a termination payment is a genuine redundancy payment. There are no special rules applying to dual capacity employees. We recognise, however, that these employees have the ability to act or make a decision to terminate their own employment (either directly or indirectly), or actively participate in or influence such an act or decision, on the satisfaction of the conditions in section 83-175.

89. As noted in paragraphs 82 to 85 of this Ruling, dismissal requires termination of employment without the employee's consent. As consent is reflected in a person's state of mind, we consider that is not possible for a person to consent to a decision in his or her capacity as a director of the employer, yet not consent to the same decision in his or her capacity as an employee.

Status: **not legally binding**

90. It follows that the question of consent for a dual capacity employee can be addressed by considering the following 2 matters:

- Firstly, did the person agree to or approve the employer's act or decision to terminate their own employment? If not, the termination is without the person's consent and is therefore a dismissal.
- Secondly, if the person did agree to or approve the employer's act or decision to terminate their own employment, were the circumstances surrounding the act or decision such that the person did not have any real or practical choice in terminating their own employment? If so, the termination is without the person's consent and is therefore a dismissal.

91. In relation to the first of these 2 matters, the agreement or approval of a dual capacity employee to the relevant decision may be express (for example, by actively participating in the decision-making process and assenting to the ultimate decision) or implied by behaviour or conduct.

92. In contrast, a dual capacity employee may be dismissed where the decision to terminate employment is not a unanimous decision of the directing minds of the employer. If it can be demonstrated that a dual capacity employee did not consent to the decision to terminate their employment, the person is dismissed.

93. In relation to the second of these 2 matters, a dual capacity employee, who, in their capacity as a directing mind of the employer, actively agrees to a decision of the employer to terminate their own employment, may nevertheless be dismissed if he or she does not freely consent to that termination decision. This will be evident where the influence of external circumstances is such that there is no apparent choice to be made or there is no awareness from those circumstances that consent or refusal is called for.

94. Paragraphs 88 to 89 of TR 2009/2 are of particular relevance to the current case, noting that such external circumstances include a termination decision that is dictated by legal or economic compulsion originating from outside the business. An industry specific or a general economic downturn is also more likely to give rise to these types of circumstances, which we consider to be the case in this case. This recognises a form of constructive dismissal. We consider this to align with the legal and economic compulsions to transition away from the native timber industry caused by the end of native timber harvesting in Victoria on 1 January 2024.

95. Ultimately, because a dual capacity employee can terminate their own employment or actively participate in or influence such an act or decision, careful consideration of all the facts and circumstances is required to determine whether a dual capacity employee has not consented to their termination. Paragraphs 95 to 147 of TR 2009/2 provide examples involving dual capacity employees to assist in these considerations.

96. For this purpose:

- only dual capacity employees who have been made genuinely redundant are eligible for support, and
- prospective dual capacity employees that attempt to apply for support under the Program but have not been made genuinely redundant due to contrived arrangements are ineligible for support.

Status: **not legally binding**

Was the dismissal caused by the redundancy of the employee's position?

97. As noted in paragraph 82 of this Ruling, dismissal is a particular mode of employment termination. Section 83-175 further requires that the dismissal be caused by redundancy of the employee's position, and not for some other reason.

98. An employee's position is redundant when an employer determines that it is superfluous to the employer's needs and the employer does not want the position to be occupied by anyone. Accordingly, it is fundamentally the employer's decision that a position is redundant. On occasion, the decision may be unavoidable due to the circumstances surrounding the employer's operations.

99. As is the case in determining if there is a dismissal, the reason for a dismissal is to be established in light of the facts and circumstances of each case. The redundancy of the relevant position must be the prevailing or most influential reason for the dismissal if there is more than one contributing cause.

100. With reference to the outline of the scheme at paragraphs 22 to 58 of this Ruling, we consider that, where supported by an objective consideration of the relevant facts and circumstances of the case, it is likely that an employee receiving a payment under the Program will have been dismissed due to the redundancy of their position. This will be more apparent where the employer has chosen to close or restructure the business, and where that employee has provided the employer with a statement to that effect that the employee's employment has been terminated, as is generally required to be eligible for the support payment.

Was the payment made genuinely because of the redundancy?

101. For a payment to meet the conditions of a genuine redundancy, the payment must be made because the employee's position is genuinely redundant. As such, and as stated in paragraph 31 of TR 2009/2, contrived cases of redundancy will not meet the conditions in section 83-175. Whether a redundancy is 'genuine' is determined on an objective basis.

102. Examples of situations which would be considered a contrived redundancy are provided in paragraph 279 of TR 2009/2, and include:

- where an employing entity is wound-up and some or all of the employees are immediately re-engaged by a new employing entity, or
- where an employer terminates an employee on outsourcing particular duties and functions and immediately engages that employee to perform the outsourced duties and functions.

103. In this case, the Program has been established to assist employees in the timber industry who have been impacted by the transition away from native timber harvesting in Victoria's state forests. This transition has occurred due to changes in the legal and regulatory environment, and cessation of native timber harvesting in state forests. This will impact sawmills, community forestry, harvest and haulage, seed collecting and native timber businesses operating in the industry.

104. Consequently, we consider that generally, an employee receiving a payment under the Program because their position is redundant, where supported by an objective determination and where the redundancy is not contrived, is likely to have received that payment because their position was 'genuinely' redundant.

Status: **not legally binding**

Other factors

105. In order for a payment to be a genuine redundancy, it must also satisfy the conditions in subsection 83-175(2). These conditions are:

(a) the employee is dismissed before the earlier of the following:

(i) the day the employee reached pension age;

(ii) if the employee's employment would have terminated when he or she reached a particular age or completed a particular period of service – the day he or she would reach the age or complete the period of service (as the case may be);

(b) if the dismissal was not at arm's length – the payment does not exceed the amount that could reasonably be expected to be made if the dismissal were at arm's length;

(c) at the time of the dismissal, there was no arrangement between the employee and the employer, or between the employer and another person, to employ the employee after the dismissal.

Age-based limits

106. Paragraph 83-175(2)(a) provides that an employee receiving a genuine redundancy payment must, at the time of dismissal, not have reached the pension age or a younger age of compulsory retirement for the particular position in question.

107. Whether an employee who receives a payment under the Program satisfies this condition will be a question of fact, determined with reference to the circumstances of the individual employee.

108. A termination payment made to a person who has reached pension age or another younger age of compulsory retirement for the position, at the time of dismissal, may however be an ETP if the conditions in section 82-130 are satisfied.

Arm's length amount

109. Paragraph 83-175(2)(b) provides that where the dismissal was not at arm's length, the payment does not exceed the amount that could reasonably be expected to be made if the dismissal were at arm's length.

110. The GTU payment is outlined in paragraphs 40 and 42 to 44 of this Ruling. Consequently, we consider that to the extent that the employer and the employee may not be dealing at arm's length, the determination of the payment amount under the Program will be at arm's length. The amount of the payment would not be greater than any other employee's payment in an arm's length relationship between employer and employee.

111. This reasoning would extend to dual capacity employees, as again, the amount of the payment would not be greater than would be available to any other employee under the Program irrespective of the extent to which that employee was involved in considerations around their own termination.

Amount of the payment that was received in lieu of superannuation benefits

112. Pursuant to subsection 83-175(3), a genuine redundancy payment does not include any part of a payment that was received by the employee in lieu of superannuation benefits to which the employee may have been entitled at the time the payment was received or at a later time.

113. Paragraphs 40 and 42 to 44 of this Ruling detail the payment made under this scheme. We consider that no part of the payment received by an employee under the Program is received in lieu of superannuation benefits to which the employee may have been entitled.

Excluded payments

114. A payment is not a genuine redundancy payment to the extent that it is subject to a more specific tax treatment than ETPs or genuine redundancy payments. Pursuant to subsection 83-175(3), these payments are payments of the type mentioned in section 82-135 (apart from paragraph 82-135(e)).

115. We consider that, on the facts provided, GTU payments under the Program are not likely to be captured by section 82-135.

Tax-free treatment of genuine redundancy payments

116. In accordance with section 83-170, a genuine redundancy payment that falls within the specified limits is referred to as the 'tax-free' amount and will not be assessable income and will not be exempt income.

117. For each payment, the tax-free amount is limited to the amount determined under the formula at subsection 83-170(3), being:

> Base amount + (Service amount × Years of service)
>
> where:
>
> ***base amount*** means:
>
> (a) for the income year 2006-2007 – $6,783; and
>
> (b) for a later income year – the amount mentioned in paragraph (a) indexed annually.
>
> and:
>
> ***service amount*** means:
>
> (a) for the income year 2006-2007 – $3,392; and
>
> (b) for a later income year – the amount mentioned in paragraph (a) indexed annually.

118. As this Ruling applies to the period 1 February 2023 to 30 June 2028 years, inclusive, both the base amount and the service amount in relation to the calculation of the tax-free amount will need to be determined with reference to the relevant initial amount for that provision, indexed annually. Subdivision 960-M provides how to index these amounts.

119. The extent to which the payment is tax free will depend on the amount of the payment and the total number of whole years of employment to which the payment relates. There is no requirement for the years of service to be continuous when applying the threshold in section 83-170.

120. In this case, we consider that in certain circumstances, the full aggregate period of an employee's non-consecutive employment within the Victorian Forestry Industry may fall within the definition of 'years of service'.

121. Whether multiple non-consecutive employment relationships may collectively count as 'employment to which the payment relates' for the purpose of establishing 'years of

service' is to be determined as a question of fact and with regard to each employee's specific circumstances.

122. This conclusion is most apparent where an employee has performed multiple non-consecutive 'seasonal' periods with the same employer, or a series of related employers. If earlier years of service with a previous employer are carried over and acknowledged on commencement with a new employer that later makes a redundancy payment to an employee, those years of service can be included in working out the tax-free amount of the genuine redundancy payment.

123. The conclusion will be less likely where there was a significant break in the connection between employment relationships (for example, because the employee left the industry and took up other employment for several years before returning to the industry).

124. It should be noted, however, that 6 months, 8 months or even 11 months do not count as a whole year for the purposes of this calculation. As such, where an employee has been employed on a series of rolling employment contracts, only the sum of consecutive or non-consecutive periods attributable to time spent working will be counted.

125. If a particular employment relationship has already been recognised by the payment of a previous genuine redundancy payment, it would not be able to be counted again towards the employment to which the current payment relates.

Employment status considerations

126. As stated in paragraph 61 of this Ruling, section 83-175 defines a genuine redundancy payment as so much of a payment received by an 'employee who is dismissed from employment' because the employee's position is genuinely redundant.

127. Further, paragraph 6 of TR 2009/2 states that Part 2-40 (that is, the part within which section 83-175 is contained) seeks to deal cohesively with all payments made in consequence of the termination of a person's employment as a common law employee. The treatment of genuine redundancy payments must therefore be determined in this context.

128. Where an employee is not an employee during an engagement period, any payment to that employee with respect to that period would not be eligible for treatment as a genuine redundancy payment.

129. This Ruling request contemplates a situation in which the relationship of an employee with respect to a relevant period of service was erroneously characterised as one of principal and independent contractor, rather than employer and employee, in a situation where the employee was in fact a common law employee during the relevant period.

130. Ultimately, whether a worker was an employee or an independent contractor during a relevant period to which a payment relates is a question of fact. Where that worker was an employee, payments made to them may be genuine redundancy payments where all other requirements of the relevant provisions are satisfied.

131. Where an employee's relationship is reclassified with respect to a period however, that reclassification must be a *genuine* characterisation of the relationship, with reference to the objective facts.

Status: **not legally binding**

132. Additionally, both the putative employer and employee will need to have regards to ensuring their other tax obligations are correct and up to date. In particular, we note that:

- For employers, there may be outstanding obligations that they will need to consider, such as whether the minimum amount of superannuation guarantee contributions have been made for the employee in a quarter to avoid liability to the superannuation guarantee charge.
- For employees, there are certain entitlements which may only be available to independent contractors that may not be available to employees, such as certain deductions.

Employment termination payment

133. Subsection 82-130(1) provides that:

> 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; and
>
> (b) it is received no later than 12 months after the termination (but see subsection (4)); and
>
> (c) it is not a payment mentioned in section 82-135.

Is the Government top-up payment received in consequence of an employee's termination?

134. Paragraphs 65 to 74 of this Ruling discuss whether a payment has been made 'in consequence of' the employee's termination for the purposes of determining whether a payment is a genuine redundancy payment.

135. Where a payment would satisfy this condition, the same conclusion would be available in considering whether the payment is an employee termination payment. Again, this will be dependent on the relevant facts and circumstances of the case.

Is the Government top-up payment received no later than 12 months after the termination?

136. Paragraph 82-130(1)(b) requires that the payment must be received no later than 12 months after the termination of the employment.

137. Subsection 82-130(4) provides that:

> Paragraph (1)(b) does not apply to you if:
>
> (a) you are covered by a determination under subsection (5) or (7); or
>
> (b) the payment is a genuine redundancy payment or an early retirement scheme payment.

138. The April 2024 publication does not provide information about when a GTU payment will be made.

139. In this case, there is no indication that subsections 82-130(5) or (7) apply. Further, if the GTU payment is a genuine redundancy payment based on the facts and

circumstances of the employee, then this paragraph will not apply, and the payment will not be an ETP.

Is the Government top-up payment not a payment mentioned in section 82-135?

140. Section 82-135 lists payments that are not ETPs. These include (among others):

- a superannuation benefit
- unused annual leave payment, and
- the part of a genuine redundancy payment or an early retirement scheme payment worked out under section 83-170.

141. The payment being made under the scheme is outlined in paragraphs 40 and 42 to 44 of this Ruling. The payment has regard to the individual circumstances of the employee and the manner in which they were engaged.

142. Consequently, we consider that on the facts provided, payments under the Program are not likely to be captured by section 82-135.

Ordinary income

143. For employees that satisfy the genuine redundancy eligibility requirements, the GTU payment will not be ordinary income by virtue of subsection 83-170(2).

144. To the extent that the GTU payment exceeds the genuine redundancy cap and satisfies the ETP requirements, the taxable component of the payment is assessable income pursuant to subsection 82-10(2).

145. Should employees not satisfy the genuine redundancy or ETP or genuine redundancy and ETP eligibility requirements, and the payment not be on capital account, the GTU payment may be income according to ordinary concepts. In this instance, the income or capital distinction will be dependent on the facts and circumstances surrounding the payment.

Capital gains tax

146. An eligible employee's entitlement to receive a GTU payment is a CGT asset under subsection 108-5(1).

147. The time of the CGT event under subsection 104-25(2) will be when payment is made by DEECA. Specifically, the payment by DEECA to eligible employees gives rise to a CGT event C2 pursuant to section 104-25, which is payment in satisfaction of an eligible employee's entitlement to the relocation assistance. However, to the extent that the eligible employee satisfies the genuine redundancy or ETP or genuine redundancy and ETP eligibility requirements, any capital gain will be reduced to nil by virtue of paragraph 118-20(4)(a), reducing the capital gain by an amount that is included in assessable or exempt income.

148. To the extent that the employee does not satisfy the genuine redundancy or ETP or genuine redundancy and ETP eligibility requirements, the capital gain may be taxable.

Status: **not legally binding**

Relocation reimbursement

149. Relocation reimbursements are a class of support payment available to 'employees' under the Program. They are described as assistance which is 'intended to reimburse employees for costs incurred in relocating more than 50 kilometres away from their current residence due to securing new employment.

150. Relocation reimbursements may be available in relation to different types of expenditure associated with relocation, with the type of assistance available dependent on the employee's circumstances. Broadly, reimbursement is grouped into the 4 categories as outlined in paragraph 10 of this Ruling.

151. None of the payments paid as relocation reimbursement will be periodic or recurring, nor will they be intended to supplement income.

Is the payment received in consequence of an employee's termination?

152. As noted, TR 2003/13 sets out the Commissioner's view on when a payment is made 'in consequence of' termination of employment. Ultimately, the question of whether a payment is received in consequence of the termination of employment will be determined by the relevant facts and circumstances of each case. Refer to paragraphs 65 to 79 of this Ruling for an explanation of our view on this phrase.

153. As reflected in paragraph 6 of TR 2003/13, while the termination does not need to be the dominant cause of the payment, the phrase requires a causal connection between the termination and the payment. A mere temporal sequence alone would not be sufficient to demonstrate this nexus.

154. In simple words, we consider that a payment will be received in consequence of an employee's termination where, but for the termination of employment, the payment would not have been received by the taxpayer.

155. In this case, we generally consider that relocation reimbursements paid under the Program would not be made in consequence of an employee's termination. Irrespective of when the employee was terminated, that employee would not actually be eligible for the payment until they have:

- secured new employment 50 kilometres or more from their current residence and will need to move to take up the new job, and
- incurred an expense associated with that relocation and provided 2 quotes and an invoice in relation to that expense.

156. The causal connection between the employee's termination and the payment of the relocation reimbursement payment would generally be too remote to satisfy this condition. Consequently, relocation reimbursement payments are not genuine redundancy payments.

157. For this same reason, relocation reimbursements would also not be ETPs as they are not payments which are paid in consequence of the termination of employment.

Category 1 – Removalist and relocation expense reimbursement

Ordinary income

158. Subsection 6-5(1) provides that an amount is included in assessable income if it is income according to ordinary concepts (ordinary income). The legislation does not provide specific guidance on the meaning of ordinary income. However, a substantial body of case law exists which identifies likely characteristics.

Status: **not legally binding**

159. Whether or not a particular receipt is ordinary income, depends on its character in the hands of the recipient; refer *Scott v Federal Commissioner of Taxation* [1966] HCA 48; *Hayes v Commissioner of Taxation (Cth)* [1956] HCA 21; *Federal Coke Company Pty Limited v The Commissioner of Taxation of the Commonwealth of Australia* [1977] FCA 29.

160. In *GP International Pipecoaters Pty Ltd v Commissioner of Taxation (Cth)* [1990] HCA 25, the Full High Court stated:

> To determine whether a receipt is of an income or of a capital nature, various factors may be relevant. Sometimes the character of receipts will be revealed most clearly by their periodicity, regularity or recurrence; sometimes, by the character of a right or thing disposed of in exchange for the receipt; sometimes, by the scope of the transaction, venture or business in or by reason of which money is received and by the recipient's purpose in engaging in the transaction, venture or business.

161. In the circumstance where an employee receives the removalist and relocation payment directly, it is accepted that while in each instance the recipients are former employees of a particular entity, the payments received under the Program are not considered to be a product of employment, services or business.

162. Therefore, it is also appropriate to consider the following points made in various High Court cases in relation to the types of payment that can generally be characterised as voluntary payments.

163. In *Commissioner of Taxation (Cth) v Dixon* [1952] HCA 65, the Court considered the form of the receipt, that is, whether it is received as a lump sum or periodically, to be a relevant factor for consideration. The Court found that the fact that the patriotic top-up payments were regular and periodic was important, though not decisive, in concluding that those payments were assessable income. An important factor in determining that the receipts were ordinary income was that the taxpayer relied to some extent on the amount he received from his previous employer and that he had confidence that the payments would continue on a periodic basis to supplement his income as a soldier. The Court also held that the payments were made in substitution for the salary and wages the taxpayer would have earned had he not enlisted. The payment accordingly acquired the characteristics of the payment for which it was substituted.

164. In *Scott v Federal Commissioner of* Taxation [1966] HCA 48, the Court said that while the motives of the donor do not determine the answer, they are a relevant circumstance for consideration. The court held that the payment was given to the taxpayer by the donor as a gift and was not assessable income of the taxpayer.

165. In *Hayes v Commissioner of Taxation (Cth)* [1956] HCA 21, the Court held that shares given to an accountant by a former employer were not assessable as income because it was 'impossible to point to any employment or "personal exertion", of which the receipt of the shares was in any real sense an incident, or which can fairly be said to have produced the receipt'.

166. Where removalist and relocation assistance is received by an employee under the Program, the concepts of ordinary income developed by the courts over time can be applied:

- removalist and relocation assistance is not paid as any form of substitution for what would be income of the employee
- payments are made to reimburse the eligible employee for approved (capital) relocation expenses they incur and are not paid on a periodic or recurring basis, and

- payments are made to the eligible employee by DEECA and are not connected with any employment relationship or the provision of services by the eligible employee.

167. Therefore, we consider that the reimbursement of removalist and relocation costs received by an eligible employee does not possess the characteristics of ordinary income and is not assessable to the eligible employee under section 6-5.

Capital gains tax

168. An eligible employee's entitlement to the removalist and relocation assistance is a CGT asset under subsection 108-5(1) which is acquired when the eligible employee's invoices have been deemed eligible. CGT event C2 occurs under section 104-25 when an eligible employee's entitlement to receive removalist and relocation assistance is satisfied.

169. If a payment is made to a third-party supplier on behalf of the eligible employee, the CGT provisions apply as if the eligible employee has received the amount (subsection 103-10(1)).

170. However, when DEECA makes a payment to the eligible employee in satisfaction of the entitlement, any capital gain is disregarded pursuant to paragraph 118-37(2)(a). The Program is a scheme established by a State government agency, and the amount paid involves a reimbursement or payment of expenses.

Fringe benefits tax

171. The definition of 'benefit' in subsection 136(1) of the FBTAA includes any right, privilege, service or facility. Therefore, payments of any kind made to an employee under the Program (either to them directly, or to a third party on their behalf) comes within the definition of a benefit for the purposes of the FBTAA.

172. The definition of a fringe benefit contained in subsection 136(1) of the FBTAA requires, among other things, that in order for a benefit to be a fringe benefit, the benefit is provided in respect of the employment of the employee (the employment connection test).

173. The term 'in respect of employment' has been considered by the courts on numerous occasions. In *J & G Knowles v Commissioner of Taxation* [2000] FCA 196, the Full Federal Court examined the definition of fringe benefit and noted that:

> … Whatever question is to be asked, it must be remembered that what must be established is whether there is a sufficient or material, rather than a, causal connection or relationship between the benefit and the employment …

174. The following are considered to be material reasons that explain why benefits provided to employees under the Program do not have a 'sufficient or material' connection with the employment of the employee:

- They do not have a connection with any previous employment, but rather are provided in respect of their circumstances following the loss of employment.
- The support payments are made to assist employees obtain other employment.
- Employees must register for the Program to receive the support payments. Employers do not facilitate registration or payment in any way.

Status: **not legally binding**

175. In this case, the benefits being the relocation reimbursements are administered by DEECA on behalf of the Victorian Government to assist employees obtain other employment.

176. Therefore, we consider that the benefits provided to an employee under the Program do not have a sufficient or material connection with any employment of the employee to fall within the definition of a fringe benefit for the purposes of the FBTAA.

177. Consequently, an employee will not have an RFBA in relation to such benefits provided under the Program for the purposes of Part XIB of the FBTAA.

Category 2 – Property purchase and end of tenancy expense reimbursement

Ordinary income

178. When applying the principles of ordinary income as discussed at paragraphs 158 to 167 of this Ruling, the property purchase and end-of-tenancy assistance:

- does not substitute or replace income of an employee
- is not made on a periodic, recurring or regular basis, and
- is not connected with the employment, or provision of services, by the employee.

179. Accordingly, we consider that the property purchase and end-of-tenancy assistance does not have the characteristics of ordinary income. As a result, the property purchase and end-of-tenancy assistance is not assessable income in the hands of the employee under section 6-5.

Capital gains tax

180. Some aspects of the property purchase and end-of-tenancy assistance may be included in the second element of the cost base of the property's incidental costs under subsection 110-25(3). The types of incidental costs that may be included are specified in section 110-35.

181. However, for an eligible employee that receives property purchase and end-of-tenancy assistance as a form of reimbursement, the amount will be classified as a recoupment of expenditure incurred. Recouped expenditure is excluded from the cost base, under either subsections 110-40(3) or 110-45(3), or the reduced cost base under subsection 110-55(6), except if the recoupment is included in assessable income.

182. In the present case, the property purchase and end-of-tenancy assistance is not included in assessable income. Therefore, the expenditure incurred is excluded from the cost base, or reduced cost base, of the property. Depending on the circumstances of the eligible employee, the main residence exemption provisions in Subdivision 118-B may apply to disregard a capital gain or capital loss made on disposal of the property. This will need to be considered by eligible employees on a case-by-case basis.

Fringe benefits tax

183. As per the discussion at paragraphs 171 to 177 of this Ruling, we consider that the benefits provided to an employee under the Program do not have a sufficient or material

connection with any employment of the employee to fall within the definition of a fringe benefit for the purposes of the FBTAA.

184. Consequently, an employee will not have an RFBA in relation to such benefits provided under the Program for the purposes of Part XIB of the FBTAA.

Category 3 – Incidental relocation costs reimbursement

Ordinary income

185. When applying the principles of ordinary income as discussed at paragraphs 158 to 167 of this Ruling, the incidental relocation assistance:

- does not substitute or replace income of an eligible employee
- is not made on a periodic, recurring, or regular basis, and
- is not connected with the employment or provision of services, by the eligible employee.

186. Accordingly, we consider that the incidental relocation assistance does not have the characteristics of ordinary income. Therefore, the incidental relocation assistance is not assessable income in the hands of the eligible employee under section 6-5.

Capital gains tax

187. An eligible employee's entitlement to the incidental relocation assistance is a CGT asset under subsection 108-5(1), which is acquired when the eligible employee's application is approved. CGT event C2 happens under section 104-25 when an eligible employee's entitlement to receive the incidental relocation assistance is satisfied.

188. Where a payment is made to a third-party supplier on behalf of the eligible employee, the CGT provisions apply as if the eligible employee has received the amount (subsection 103-10(1)).

189. However, any capital gain under CGT event C2 is disregarded by virtue of paragraph 118-37(2)(a). The Program is a scheme established by a State government agency, and the amount paid involves a reimbursement or payment of expenses.

Fringe benefits tax

190. As per the discussion at paragraph 171 to 177 of this Ruling, we consider that the benefits provided to an employee under the Program do not have a sufficient or material connection with any employment of the employee to fall within the definition of a fringe benefit for the purposes of the FBTAA.

191. Consequently, an employee will not have an RFBA in relation to such benefits provided under the Program for the purposes of Part XIB of the FBTAA.

Status: **not legally binding**

Category 4 – Short-term accommodation costs reimbursement

Ordinary income

192. When applying the principles of ordinary income as discussed at paragraphs 158 to 167 of this Ruling, the short-term accommodation costs reimbursement:

- does not substitute or replace income of an eligible employee
- is not made on a periodic, recurring, or regular basis, and
- is not connected with the employment, or provision of services, by the eligible employee.

193. Accordingly, it is considered that a payment made to an eligible employee to reimburse them for short-term accommodation costs is not income according to ordinary concepts and is not assessable income under section 6-5.

Capital gains tax

194. An eligible employee's entitlement to the short-term property-related relocation assistance is a CGT asset under subsection 108-5(1) which is acquired when the eligible employee's invoices are deemed eligible. CGT event C2 happens under section 104-25 when an eligible employee's entitlement to receive the property-related relocation assistance is satisfied.

195. However, any gain arising from the CGT event is reduced to nil, pursuant to section 118-20, to the extent that the short-term property-related relocation assistance is included in the assessable income of the eligible employee.

196. If the short-term property-related relocation assistance relates to expenses included in the cost base or reduced cost base of the property, it is a recoupment of that expenditure. Recouped expenditure is generally excluded from the cost base or reduced cost base (see paragraph 181 of this Ruling).

197. However, any capital gain under CGT event C2 is disregarded by virtue of paragraph 118-37(2)(a). The Program is a scheme established by a State government agency, and the amount paid involves a reimbursement or payment of expenses.

Fringe benefits tax

198. As outlined at paragraphs 171 to 177 of this Ruling, we consider that the benefits provided to an eligible employee under the Program do not have a sufficient or material connection with any employment of the employee to fall within the definition of a fringe benefit for the purposes of the FBTAA.

199. Consequently, an eligible employee will not have an RFBA in relation to such benefits provided under the Program for the purposes of Part XIB of the FBTAA.

Hardship payments

200. Hardship payments are a class of support payment available to 'eligible employees' under the Program. They are described as a one-off payment of $3,000 which may be made to employees who are eligible for the Program but who have not received compensation payments or stand-down payments from 23 November 2022.

Status: **not legally binding**

201. To be eligible for a hardship payment, an employee must be a community forestry licensee or seed collector and must have experienced significant hardship due to the transition as a result of the Program and must not be receiving or received any other government payments.

202. It has been further submitted that hardship payments are 'act of grace' payments. We cannot confirm whether these payments are in fact an 'act of grace' payment. DEECA has the complete discretion to make a hardship payment to an employee following an application by that employee, and an assessment of that employee's personal circumstances. Employees are not required to be made redundant to access this payment.

Is the payment received in consequence of an employee's termination?

203. As noted, TR 2003/13 sets out the Commissioner's view on when a payment made 'in consequence of' termination of employment. Ultimately, the question of whether a payment is received in consequence of the termination of employment will be determined by the relevant facts and circumstances of each case. Refer to paragraphs 65 to 79 of this Ruling for an explanation of the Commissioner's view on this phrase.

204. In this case, we consider that hardship payments paid under the Program will generally not be made in consequence of an employee's termination. In forming this view, we note that there is no requirement for an employee to have been terminated to be eligible for this payment. This payment will also only be available where other government payments are not being paid or have not been paid. We understand that generally, where termination has occurred and an employee is otherwise eligible for the Program, that employee would generally be paid a GTU payment.

205. While termination may be considered as a factor in whether to grant the payment, ultimately, this would need to be considered with reference to the decisions of DEECA.

206. The causal connection between the employee's termination and the payment of the hardship payment would generally therefore be too remote to satisfy this condition. Consequently, hardship payments are not genuine redundancy payments.

207. For this same reason, hardship payments would also not be ETPs as they are not payments which are paid in consequence of the termination of employment.

Ordinary income

208. When applying the principles of ordinary income as discussed at paragraphs 158 to 167 of this Ruling, hardship payments:

- do not substitute or replace income of an eligible employee
- are not made on a periodic, recurring or regular basis, and
- they are not connected with the employment, or provision of services, by the eligible employee.

209. As the payment for any hardship experienced by an eligible employee is not ordinary income, it is not assessable to the eligible employee under section 6-5.

Capital gains tax

210. An eligible employee's entitlement to a hardship payment is a CGT asset under subsection 108-5(1), which is acquired when the eligible employee's application is

approved. CGT event C2 happens under section 104-25 when an eligible employee's entitlement to receive a hardship payment is satisfied.

211. A capital gain is made if the capital proceeds exceed the cost base of the entitlement, and a capital loss is made if the capital proceeds are less than the reduced cost base in accordance with subsection 104-25(3).

212. The capital proceeds from CGT event C2 is the amount received by the eligible employee as a hardship payment in accordance with paragraph 116-20(1)(a).

213. The cost base of the entitlement is calculated under Divisions 110 and 112. Although the eligible employee did not incur expenditure to acquire the entitlement to hardship payment, there is no market value substitution for the first element of the cost base under subsection 112-20(1). This is because the entitlement was created in the eligible employee by DEECA. Therefore, the eligible employee acquired the entitlement as a result of CGT event D1 happening, and the exclusion in subparagraph 112-20(1)(a)(i) applies.

214. The second element of the cost base includes any costs of applying for the assistance.

215. The cost base is reduced by any amount that is a deductible expense (for example, subsection 110-45(1B)).

216. Where the entitlement to receive the Hardship payment was not acquired by the eligible employee at least 12 months before CGT event C2 happened, the capital gain cannot be a discount capital gain in accordance with subsection 115-25(1).

Fringe benefits tax

217. As outlined at paragraphs 171 to 177 of this Ruling, we consider that the benefits provided to an employee under the Program do not have a sufficient or material connection with any employment of the employee to fall within the definition of a fringe benefit for the purposes of the FBTAA.

218. Consequently, an eligible employee will not have an RFBA in relation to such benefits provided under the Program for the purposes of Part XIB of the FBTAA.

Status: **not legally binding**

References

Related Rulings/Determinations:
TR 2003/13; TR 2009/2

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- ITAA 1997 112-20(1)(a)(i)
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- GP International Pipecoaters Pty Ltd v Commissioner of Taxation (Cth) [1990] HCA 25; 170 CLR 124; 90 ATC 4413; 21 ATR 1; 64 ALJR 392; 93 ALR 193
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- Scott v Federal Commissioner of Taxation [1966] HCA 48; 117 CLR 514; 40 ALJR 205; [1967] ALR 561; 14 ATD 286

Other references:
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ATO references

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