



# Employment Termination Payments Redundancy Trusts (12 month rule) Legislative Instrument 2009

## Explanatory Statement

### General Outline of Instrument

1. This instrument extends the definition of employment termination payment to include certain payments from redundancy trusts that are received more than 12 months after the termination of a person's employment.
2. This instrument is made by the Commissioner of Taxation pursuant to subsection 82-130(7) of the *Income Tax Assessment Act 1997* (ITAA 1997).
3. The instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

### Date of effect

4. The instrument commences on the day after it is registered. It will apply to a payment received after 30 June 2007, and is understood to reflect the approach that has in fact been applied to affected payments made by redundancy trusts.

### What is this instrument about?

5. This instrument makes a payment from a redundancy trust that is received more than 12 months after termination of a person's employment an employment termination payment, if the payment is in consequence of the termination of the person's employment and:
  - (a) an application for the payment has been lodged with the trustee of the redundancy trust within 12 months of the person becoming entitled to the payment according to the terms of the trust deed of the redundancy trust; and;
  - (b) the payment has been made by the trustee of the redundancy trust as soon as practicable after the receipt of the application for the payment; and
  - (c) the payment has been made no later than 2 years after the termination of the person's employment that has led to the entitlement to the payment.
6. Termination of a person's employment includes retirement from employment and cessation of employment because of death as stated in section 80-10 of the ITAA 1997.

7. The person must be a member of the redundancy trust at the time the application for the payment is lodged with the trustee of the redundancy trust or have been a member at the time of death in the case of a death benefit payment.
8. A payment will also be an employment termination payment if the payment is made prior to 1 July 2010 and is the payment of an entitlement that the member of the redundancy trust had immediately prior to 1 July 2007 because of a termination of employment of the member prior to 1 July 2007.

### **What is the effect of this instrument?**

9. This instrument extends the tax law definition of employment termination payment by removing the requirement that a payment is made within 12 months of a person's termination of employment in the two circumstances explained above. This will extend the kinds of payments that receive the concessional tax treatment applying to employment termination payments.
10. An assessment of the compliance cost impact indicates the impact will be low. There will be an implementation increase in compliance costs arising from the need for taxpayers to become familiar with the change and make adjustments to their withholding systems. The ongoing impact will be a reduction in compliance costs as taxpayers will not need to seek the Commissioner's discretion in order for the payment to qualify as an employment termination payment. Administration will be simpler.

### **Background**

11. As part of the Government's *Simplified Superannuation* reforms new provisions commenced from 1 July 2007 to deal with payments made in consequence of the termination of a person's employment. The new provisions are contained in the ITAA 1997 and replace similar rules that were contained in the *Income Tax Assessment Act 1936*. The old rules dealt with payments from both superannuation funds and in consequence of termination of employment. Under the new rules, payments made by superannuation funds are dealt with under separate provisions to those made in consequence of termination of employment.
12. Payments made in consequence of the termination of a person's employment will be employment termination payments if they are not specifically excluded from the definition of an employment termination payment by being listed in section 82-135 of the ITAA 1997. A superannuation benefit is specifically excluded. Payments that meet the definition of employment termination payment qualify for concessional taxation treatment.
13. In order to qualify as an employment termination payment, the law requires the payment to be received no later than 12 months after a person's termination of employment under paragraph 82-130(1)(b) of the ITAA 1997. This can be referred to as the 12 month rule.
14. However, provision is made for the Commissioner to allow a payment made after the 12 month period to still be treated as an employment termination payment. Accordingly, the Commissioner has the power to make determinations covering a class of payments or recipients or in respect of an individual taxpayer to exclude the requirement of the 12 month rule.

15. The Explanatory Memorandum to the Tax Laws Amendment (Simplified Superannuation) Bill 2006 (the Explanatory Memorandum) provides:

4.19 The 12-month rule exists to prevent abuse of the tax concession offered for these payments by using a series of payments over a number of income years. The provisions dealing with the Commissioner's ability to issue a determination are provided to allow flexibility where delays in payment are reasonable and not constructed with the intent of delivering taxation advantages.

16. As indicated in the Explanatory Memorandum, the Commissioner will only issue a determination where the delay of more than 12 months for receipt of payment is reasonable and not constructed with the intent to deliver taxation advantages.
17. Accordingly, the Commissioner may make a determination on a case by case basis pursuant to subsection 82-130(5) of the ITAA 1997. Furthermore, in recognition of the likelihood that there could be more than one individual receiving the same type of payment, the Commissioner also may make a determination for a class of payments or recipients under subsection 82-130(7) of the ITAA 1997.
18. Entitlement to payments from redundancy trusts varies and in some cases members do not become entitled to payment of their benefits within 12 months of their termination of employment.
19. Prior to 1 July 2007 a number of redundancy trusts did not have time limits on members claiming benefits with the result that a number of members had unpaid entitlements at 30 June 2007. These entitlements cannot be paid within 12 months of the termination of employment that gave rise to these entitlements and will thus not be considered to employment termination payments.
20. This determination, made under subsection 82-130(7) of the ITAA 1997, will provide an exception to the 12 month rule for a class of payments where:
- (a) the person whose employment was terminated was a member of a redundancy trust and an application for the payment was lodged with the trustee of the redundancy trust within 12 months of the person becoming entitled to the payment under the terms of the trust deed of the redundancy trust; and
  - (b) the payment was made by the trustee of the redundancy trust:
    - as soon as practicable after receipt of the application for payment; or
    - no later than 2 years after the termination of the person's employment that led to the entitlement;whichever occurs earlier; or
  - (c) immediately before 1 July 2007 the member of the redundancy trust had an existing entitlement to a payment from the redundancy trust as a consequence of a termination of employment of the person and the payment of the benefit was made by the trustee of the redundancy trust prior to 1 July 2010.

## **Examples**

### **Example 1**

21. An individual terminates employment on 1 August 2007. The termination entitles them to the payment of a benefit from the redundancy trust of which they are a member. The benefit they are entitled to is an amount equal to their account balance with the redundancy trust. The member applies to the trustee of the redundancy trust for their benefit on 15 July 2008. Due to processing requirements within the redundancy trust the trustee pays their benefit to them on 11 August 2008.
22. The payment on 11 August 2008 while paid in consequence of the person's termination will not meet the definition of an employment termination payment because the requirement in paragraph 82-130(1)(b) of the ITAA 1997 has not been met. However, the payment will meet the extended definition of employment termination payment under this determination as the application for payment was lodged with the trustee of the redundancy trust within 12 months of the termination of employment and the payment was made as soon as practicable by the trustee and within 2 years of the termination of employment.

### **Example 2**

23. An individual's employment is terminated on 1 August 2007. Under the terms of the trust deed the member does not become entitled to payment of a benefit from their redundancy trust until 52 weeks after the termination. The member applies to the trustee of the redundancy trust for their benefit on 1 September 2008. The benefit is paid to the individual by the trustee on 1 October 2008.
24. The payment on 1 October 2008 while paid in consequence of the person's termination will not meet the definition of an employment termination payment because the requirement in paragraph 82-130(1)(b) of the ITAA 1997 has not been met. The payment will however meet the extended definition of an employment termination payment under this determination as the application for payment was lodged with the trustee of the redundancy trust within 12 months of the member becoming entitled to the payment under the terms of the trust deed and the payment was made less than 2 years after the termination of employment.

### **Example 3**

25. An individual terminated employment in August 2006. The termination entitled them to payment of a benefit from their redundancy trust. The trust deed of the redundancy trust imposed no time limit on when they could apply for and receive this benefit and in August 2006 there was no requirement for employment termination payments to be paid within 12 months. On 1 August 2008 the individual applies to the trustee of the redundancy trust for payment of their benefit which the trustee pays on 31 August 2008.
26. The payment on 31 August 2008 while paid in consequence of the person's termination will not meet the definition of an employment termination payment because the requirement in paragraph 82-130(1)(b) of the ITAA 1997 has not been met. However, the payment will meet the extended definition of employment termination payment under this determination as the individual had an entitlement to payment of the benefit immediately before 1 July 2007 and the payment was made before 1 July 2010.

#### **Example 4**

27. An individual's employment is terminated on 1 August 2007. Under the terms of the trust deed the individual became entitled to payment of a benefit from their redundancy trust because they are unemployed and have no offer of re-employment pending in the building industry. However, the member believes it will only be a short period of time before the individual will be able to obtain a new position in the industry.
28. One week later on the 8 August 2007 the individual obtains employment in the industry with another employer. Under the terms of the trust deed the individual can no longer make a claim for an entitlement because he is again employed in the industry. The member works for the new employer for a period of two years and on the 9 August 2009 is terminated. The individual then decides he is leaving the building industry forever and can make a claim for his benefits from the redundancy trust.
29. For the purposes of this legislative instrument the date of 9 August 2009 is the date of termination that entitled the individual to payment from the redundancy trust. This date is to be used when calculating the time period to 'application for payment' and to 'actual payment'.

#### **Consultation**

30. Consultation was undertaken with representatives of the construction industry redundancy trusts including the Australian Construction Industry Redundancy Trust (ACIRT), the Building Employees Redundancy Trust (BERT), the Redundancy Payment Central Fund Limited (known as Incolink), the WA Construction Industry Redundancy Fund, the Building Industry Redundancy Scheme Trust (BIRST), and the Contracting Industry Redundancy Trust (CIRT).

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**Neil Olesen**  
**Deputy Commissioner of Taxation**  
23 February 2009

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*Legislative references:*

*Income Tax Assessment Act 1997*  
*Legislative Instruments Act 2003*