

# ***ETP 2019/1 - Explanatory statement -***



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## Explanatory Statement

# Income Tax: Employment Termination Payments Redundancy Trusts (12 month rule) Determination 2019

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### General Outline of Instrument

1. This instrument is made under subsection 82-130(7) of the *Income Tax Assessment Act 1997* (ITAA 1997).
2. 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.
3. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.
4. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

### Date of effect

5. The instrument is taken to have commenced on the day after it is registered on the Federal Register of Legislation.

### What is this instrument about

6. 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) 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 according to the terms of the trust deed of the redundancy trust; and
  - (b) the payment was made by the trustee of the redundancy trust:
    - (i) as soon as practicable after receipt of the application for payment; or
    - (ii) no later than 2 years after the termination of the person's employment that led to the entitlement;whichever occurs earlier.

7. 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.
8. 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.

### **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 circumstances explained above. This will extend the kinds of payments that receive the concessional tax treatment applying to employment termination payments.

### **Cost of Compliance**

10. Cost Impact: Minor – There will be minimal impacts for both implementation and ongoing compliance costs. The legislative instrument is minor or machinery in nature.

### **Back Repeal of previous instrument**

11. This instrument replaces *Employment Termination Payments Redundancy Trusts (12 month rule) Determination 2009 F2009L00716* (the previous instrument) registered on 12 March 2009. The previous instrument is repealed on commencement of this instrument.

### **Background**

12. This instrument extends the definition of employment termination payments from redundancy trusts to include certain payments that are received more than 12 months after the termination of a person's employment.
13. Some minor changes have been made to this instrument to:
  - (a) Update the definition of 'redundancy trust' to take into account changes to the underlying definition in the *Fringe Benefits Tax Assessment Act 1986*; and
  - (b) Remove a provision concerning transitional arrangements for redundancy trust entitlements that arose prior to 1 July 2007, the date the current legislation was introduced.
14. 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.
15. 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.

16. 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.
17. The Explanatory Memorandum to the *Tax Laws Amendment (Simplified Superannuation) Act 2007* (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.
18. 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.
19. 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.
20. 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.
21. 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:
    - (i) as soon as practicable after receipt of the application for payment; or
    - (ii) no later than 2 years after the termination of the person's employment that led to the entitlement;whichever occurs earlier.

## **Examples**

### **Example 1**

22. An individual terminates employment on 1 August 2019. 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 2020. Due to processing requirements within the redundancy trust the trustee pays their benefit to them on 11 August 2020.

23. The payment on 11 August 2020 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*

24. An individual's employment is terminated on 1 August 2019. 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 2020. The benefit is paid to the individual by the trustee on 1 October 2020.
25. The payment on 1 October 2020 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*

26. An individual's employment is terminated on 1 August 2019. 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.
27. One week later on the 8 August 2019 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 2021 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.
28. For the purposes of this legislative instrument the date of 9 August 2021 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

29. The draft instrument and explanatory statement were published on the ATO legal database <http://www.ato.gov.au/law> seeking feedback and comments for a two week period ending on 22 February 2019. In addition, the draft instrument and explanatory statement were published on the ATO Consultation Hub. 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).
30. Feedback was received from one party who requested the scope of the legislative instrument be broadened to allow an extended time for a member to lodge an application for payment with the trustee of the redundancy trust. However, it was considered that the period of time already allowed for under the draft instrument is consistent with the objectives of the Determination. Consequently there are no amendments to the legislative instrument as a result of the feedback received.
31. Consistent with paragraph 16 a member or a class of members of a redundancy trust whose termination payment does not meet the 12 month rule, and who is not covered by this Determination, may still apply to the Commissioner for a determination under subsection 82-130(5) of the ITAA 1997 that the 12 month rule does not apply due to their individual circumstances. Alternatively an application may be made under subsection 82-130(7) of the ITAA 1997 in relation to the particular circumstance of a class of payments or recipients.

## Legislative references:

*Acts Interpretation Act 1901*

*Fringe Benefits Tax Assessment Act 1986*

*Human Rights (Parliamentary Scrutiny) Act 2011*

*Income Tax Assessment Act 1997*

*Legislation Act 2003*

*Tax Laws Amendment (Simplified Superannuation) Act 2007 (Explanatory Memorandum)*

## **Statement of compatibility with Human Rights**

This Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

### **Income Tax: Employment Termination Payments Redundancy Trusts (12 month rule) Determination 2019**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

This Legislative 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.

#### **Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms. By extending the definition of employment termination payment, this Legislative Instrument potentially increases those entitled to concessional tax on employment termination payments.

#### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.