



## Class Ruling

### Income tax: payment made to compensate for loss of benefits resulting from termination of former employment

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#### **① This publication provides you with the following level of protection:**

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

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

#### **Relevant provision(s)**

2. The relevant provision dealt with in this Ruling is Division 82 of the *Income Tax Assessment Act 1997* (ITAA 1997).

All subsequent references in this Ruling are to the ITAA 1997, unless stated otherwise.

#### **Class of entities**

3. The class of entities to which this Ruling applies is those eligible full-time permanent employees of the Greyhound Harness Racing Regulatory Authority (GHRRA) who accepted an offer, following the disbanding of GHRRA, and commenced employment with either Greyhound Racing New South Wales (GRNSW) or Harness Racing New South Wales (HRNSW) as described in paragraphs 8 to 30 of this Ruling.

## Qualifications

4. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is in accordance with the scheme described in paragraphs 8 to 30 of this Ruling.
5. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
  - this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
  - this Ruling may be withdrawn or modified.
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## Date of effect

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7. This Ruling applies from 1 July 2009 to 31 August 2009. The Ruling continues to apply after 31 August 2009 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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8. The following description of the scheme is based on information provided by the applicant.
9. The New South Wales (NSW) Government has introduced legislation to disband the GHRRA, the body which regulated greyhound and harness racing in NSW.
10. The positions of GHRRA employees were terminated once GHRRA ceased to exist from 30 June 2009.
11. GHRRA has been replaced by a single controlling body for each of the greyhound and harness racing codes, GRNSW and HRNSW respectively.

12. GRNSW and HRNSW both have commercial and regulatory responsibilities. The replacement of GHRRA with GRNSW and HRNSW ensures the ongoing integrity and viability of the greyhound and harness racing industries and allows both codes to manage their business affairs. The new arrangements also result in a more cost effective and efficient system of regulation.

13. The transition from GHRRA to the two new bodies, GRNSW and HRNSW, was oversighted and administered by the NSW Office of Liquor, Gaming and Racing.

14. GHRRA was a public sector body, with employees having a range of public sector entitlements.

15. Both GRNSW and HRNSW are private sector bodies.

16. Due to the disbanding of GHRRA, eligible full-time permanent employees of GHRRA were offered a transfer to similar positions in either GRNSW or HRNSW. The basis for the transfer is that the position will have substantially the same duties and responsibilities as the employee's previous position in GHRRA.

17. Employees who accepted the offer to transfer to either GRNSW or HRNSW gave up a wide range of public sector entitlements, including various types of leave. In particular, sick leave entitlements with GRNSW and HRNSW are less than the entitlements that were previously available with GHRRA.

18. As compensation for loss of public sector entitlements and security of employment, an offer of a 'Transfer Payment' was made to all employees who elected to transfer to either GRNSW or HRNSW.

19. The Transfer Payment is payable to full-time permanent employees of GHRRA who accepted the offer and commenced employment with GRNSW or HRNSW.

20. The Transfer Payment will be made by either GRNSW or HRNSW and will be calculated in accordance with the following table:

| Continuous length of service           | Transfer payment weeks of pay |                           |
|----------------------------------------|-------------------------------|---------------------------|
|                                        | If under 45 years of age      | If aged 45 years or older |
| Less than 1 year                       | Nil                           | Nil                       |
| 1 year and more but less than 2 years  | 4 weeks' pay                  | 5 weeks' pay              |
| 2 years and more but less than 3 years | 7 weeks' pay                  | 8.75 weeks' pay           |
| 3 years and more but less than 4 years | 10 weeks' pay                 | 12.5 weeks' pay           |
| 4 years and more but less than 5 years | 12 weeks' pay                 | 15 weeks' pay             |
| 5 years and more but less than 6 years | 14 weeks' pay                 | 17.5 weeks' pay           |
| 6 years or more                        | 16 weeks' pay                 | 20 weeks' pay             |

21. Persons excluded from receiving a payment under the scheme are those employees who provided corporate support such as Information Technology, Human Resources and Finance. These employees were not made an offer to transfer to either GRNSW or HRNSW.
22. Employees who accepted the offer and commenced employment with either GRNSW or HRNSW will receive the Transfer Payment, generally in their next pay period, made by the private sector employer.
23. Employees who did not accept the offered employment with GRNSW or HRNSW either elected to receive a voluntary redundancy package or redeployment within the public service. Benefits paid to those employees were different to the Transfer Payment. This Ruling only deals with the taxation treatment of the Transfer Payment.
24. The Transfer Payment is an amount in addition to any other benefits or statutory leave entitlements.
25. Those employees who accepted the transfer were guaranteed employment for a period of 24 months commencing from the date they started working for either GRNSW or HRNSW.
26. Transferring employees chose to have their entitlements paid out on their termination of employment with GHRRA or carried over to the new entity.
27. The GHRRA employees who were members of a defined benefit superannuation scheme retained their eligibility for membership of that scheme after they elected to transfer to either GRNSW or HRNSW.
28. Both GRNSW and HRNSW will only make superannuation contributions that are required by current superannuation guarantee legislation except for former staff of the GHRRA who were members of a defined benefit scheme.
29. The latest date that an employee's employment with GHRRA is terminated is 30 June 2009. GHRRA ceased to exist when the new arrangements with GRNSW and HRNSW commenced.
30. Employees who transfer will commence with the new entities on 1 July 2009.

## Ruling

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31. A Transfer Payment made to an eligible employee under the scheme is not an employment termination payment as defined in section 82-130 and therefore Division 82 will not apply to the payment.

## Appendix 1 – Explanation

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

32. From 1 July 2007, the taxation treatment of payments made in consequence of the termination of any employment of a taxpayer has changed. These payments formerly known as eligible termination payments are now referred to as employment termination payments.

33. There are two types of employment termination payments:

- life benefit termination payment is defined in subsection 82-130(2) as a payment made to a person in consequence of that person's termination of employment as covered by subparagraph 82-130(1)(a)(i); and
- death benefit termination payment is defined in subsection 82-130(2) as an employment termination payment made to a person after another's death in consequence of the termination of the other person's employment as covered by subparagraph 82-130(1)(a)(ii).

### Employment termination payment

34. Subsection 82-130(1) states 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 that termination (but see subsection (4)); and
- (c) it is *not* a payment mentioned in section 82-135.

35. To determine if a payment constitutes an employment termination payment, all the conditions in subsection 82-130(1) must be satisfied. Failure to satisfy any of the three conditions under subsection 82-130(1) will result in the payment not being considered an employment termination payment.

36. Even where all the conditions in subsection 82-130(1) have been satisfied to qualify as an employment termination payment, the payment must be received by the person within 12 months of termination (see paragraph 82-130(1)(b)). Any termination payments received outside of the 12 months will be assessable at the person's marginal tax rates (section 83-295), unless the taxpayer is covered by a determination exempting them from the 12 month rule (see subsection 82-130(4)).

## **Payment is made in consequence of the termination of your employment**

37. For a payment to be treated as an employment termination payment, the first condition that needs to be met is that there must be a payment that is made in consequence of the termination of employment of the taxpayer (see subparagraph 82-130(1)(a)(i)).

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

39. While TR 2003/13 considered the meaning of the phrase 'in consequence of' in the context of the eligible termination payments, as distinct from employment termination payments, TR 2003/13 can still be relied upon as both the former provision under the *Income Tax Assessment Act 1936* and the current provision under the ITAA 1997 use the term 'in consequence of' in the same manner. As noted at paragraph 32 of this Ruling, eligible termination payments ceased to exist from 1 July 2007, being replaced by employment termination payments.

40. In paragraph 5 of TR 2003/13 the Commissioner states:

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

41. In paragraph 6 of TR 2003/13, the Commissioner recognises that:

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

42. At paragraph 7 of TR 2003/13, the Commissioner provides a scenario to illustrate when causal connection may be too remote:

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 made 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.

43. At paragraph 8 of TR 2003/13, the Commissioner further illustrates that the causal connection may be too remote where there is an 'intervening event'. Such an intervening act could be obtaining a right to commute a pension to a lump sum after the termination of employment. In this case, the payment does not follow on as an effect or result of the termination and the payment resulting from the exercise of that right to commute would not be one that is made in consequence of the termination of employment.

44. Taxation Ruling IT 2426 Income tax: eligible termination payments – payment to compensate for loss of benefits resulting from termination of former employment also considered the interpretation of the term 'in consequence of' in the context of a taxpayer receiving a payment from their new employer following termination of their employment before the expiration of a service agreement and receiving a reduced retiring allowance payment.

45. IT 2426 concluded that a payment to a taxpayer from his new employer to compensate for a reduced retiring allowance from his former employer was not made in consequence of the termination of the taxpayer's employment. Rather, it was considered that the payment was unrelated to their former employment. Although the payment was calculated by reference to some benefit foregone as a result of the early termination of the service agreement, the Commissioner's view is that the payment is related to the new employment. The payment was part of the remuneration paid to the taxpayer by the new employer, that is, an inducement by the new employer to gain the taxpayer's services.

46. It was concluded at paragraph 5 of IT 2426 that:

... the payment has nothing to do with former employment – the taxpayer had received from his former employer all that he was entitled to receive under the terms of the service agreement. Although the payment may have been calculated by reference to some benefit foregone as a result of the early termination of the service agreement, it relates to the new employment. It is part of the remuneration paid to the taxpayer by the new employer, i.e. an inducement paid by the new employer to gain the taxpayer's services.

47. The circumstances of the Transfer Payment in this present scheme are similar to the circumstances stated above in paragraph 46 of this Ruling, that is, a payment made by a new employer to compensate a new employee for benefits or entitlements that the employee previously had access to with their former employer.

48. An employee who has terminated their employment with GHRRA will have received all that they are entitled to receive under their employment contract.

49. While the Transfer Payment is calculated by reference to their previous employment, the Transfer Payment is being made by the new entity:

- as an inducement to gain the employee's services; and
- to compensate for the reduced entitlement conditions in the private sector company.

50. Although the Transfer Payment will be made after the employee has terminated their employment with GHRRA, the payment will be made by the new employing entity – GRNSW or HRNSW – not by the original employer, GHRRA. Therefore, it cannot be said that the payment is being made in consequence of the termination of the employee's employment with GHRRA. In fact, the Transfer Payment is in consequence of the employee's new employment with either GRNSW or HRNSW.

51. As the Transfer Payment is not being made in consequence of the termination of their employment, the first condition under paragraph 82-130(1)(a) has not been satisfied.

52. Given the failure to satisfy paragraph 82-130(1)(a), it is not necessary to consider the application of paragraphs 82-130(1)(b) and 82-130(1)(c) because, as noted at paragraph 35 of this Ruling, for a payment to constitute an employment termination payment, **all** the conditions in subsection 82-130(1) need to be satisfied.

53. Therefore, as the first condition has not been satisfied the payment is not an employment termination payment for the purposes of subsection 82-130(1).

## **Appendix 2 – Detailed contents list**

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54. The following is a detailed contents list for this ruling:

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

IT 2426; TR 2003/13; TR 2006/10

*Subject references:*

- employment relationship
- employment termination payment

*Legislative references:*

- ITAA 1997
- ITAA 1997 Div 82
- ITAA 1997 82-130

- ITAA 1997 82-130(1)
- ITAA 1997 82-130(1)(a)
- ITAA 1997 82-130(1)(a)(i)
- ITAA 1997 82-130(1)(a)(ii)
- ITAA 1997 82-130(1)(b)
- ITAA 1997 82-130(1)(c)
- ITAA 1997 82-130(2)
- ITAA 1997 82-130(4)
- ITAA 1997 82-135
- ITAA 1997 82-295
- ITAA 1936
- TAA 1953
- Copyright Act 1968

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ATO references

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