



Taxation Determination Compendium – TD 2012/8

❶ Relying on this Compendium

This Compendium of comments summarises and provides responses to submissions received during public consultation on draft Consolidation TD 2012/8DC *Income tax: what types of temporary absences from foreign service form part of a continuous period of foreign service under section 23AG of the Income Tax Assessment Act 1936?*. It is intended to promote transparency and explain how stakeholder feedback was considered in finalising the document only.

It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Consultation period: 10 June 2026 to 17 July 2026.

We thank all submitters for their time and contributions.

Summary of issues raised and responses

All legislative references in this Compendium are to the *Income Tax Assessment Act 1936*.

Issue 1 – work-related absences from foreign country into international waters and airspace

Paragraph or section of draft product

Paragraphs 1A, 43, 44 and 46

Issue raised

The final update to this Determination should clarify whether work-related absences into international waters and airspaces may be treated as 'foreign service' where they are not excessive compared to the overall period of foreign service. We note that this is distinct from work-related absences into Australia, however international waters and airspaces are not treated as a foreign country for the purposes of subsection 23AG(1).

ATO response

We have recently reviewed the law as it applies in respect of service in Australia, international waters and international airspace. The updates made to the Determination reflect the correct interpretation of the law, specifically that since Australia, international waters and international

airspace are not a foreign country or part of a foreign country, it is not possible to undertake foreign service in them. In that regard there is no discretion as to what service can or cannot be regarded as foreign service. This is because it is based on where the person is located when they are performing that service.

This is confirmed in the final consolidated Determination at paragraph 1A.

Outcome

No change

Issue 2 – work-related absences from foreign country as a result of being a medical escort

Paragraph or section of draft product

Paragraphs 1A, 30, 31, 43, 44 and 46

Issue raised

There are situations where a staff member will be required to escort another staff member to Australia where the other staff member was injured whilst on work overseas. In these situations, the staff member who is escorting will generally be in Australia for 1 to 7 nights. It would appear that the escorting staff member's service whilst they return to Australia would not be treated as foreign service.

ATO response

A work-related absence from a foreign country that occurs as a result of accident or illness is treated as foreign service, provided that the absence is within the staff member's terms and conditions of service. An absence due to injury or illness can include the situation where a person is escorting someone back to Australia. This is because the absence is a consequence of the injury or illness of a person for whom they have assumed caring responsibilities.

This work-related absence due to injury or illness is able to be treated as foreign service from when the person departs the foreign country, until they return to the foreign country. This is so, provided that they return to the foreign country as soon as is practicably possible from when they cease having responsibility for the injured or ill person. Where the person does not return as soon as is practicably possible, the time that they can treat as foreign service ends at the time they cease having responsibility for the injured or ill person. Any further absence must be considered separately under the section 23AG absence rules.

This position is consistent with Example 9 of the Determination, which outlines the situation in respect of carer's leave.

Outcome

No change

Issue 3 – flight delay from Australia on return from an exempt absence to a foreign country

Paragraph or section of draft product

Paragraphs 1A, 43, 44 and 46

Issue raised

Where a person has returned to Australia for a leave purpose that may continue to be treated as foreign service (for example, leave accrued as part of foreign service or medical leave) and their return to the foreign country of service is delayed due to circumstances beyond their control such as natural disasters, will the delay be treated as a work-related absence in Australia which the draft Determination will deem not part of foreign service?

ATO response

Each situation needs to be considered on its facts and circumstances as changes in underlying facts will lead to different outcomes.

If the person was on leave accrued as part of their foreign service and, due to the delays, took additional leave that accrued as a result of their foreign service, the time of the additional leave would be treated as part of the foreign service. However, if they instead took additional leave, but that leave was not accrued during their foreign service or it was unpaid leave, there is a break in service.

In terms of medical leave where the person was absent from the foreign country due to injury or illness, the delay would be able to be treated as foreign service, provided that the person returned to the foreign country as soon as practicably possible.

Outcome

No change

Issue 4 – impact of changed position – returning to attend business commitments and leadership meetings in Australia

Paragraph or section of draft product

Paragraphs 1A, 43, 44 and 46

Issue raised

The change in position outlined in the draft Consolidation, which excludes all time spent in Australia from being recognised as part of a member's foreign service, has a direct impact.

Absences from the foreign country, where staff come back to Australia and continue working are directly connected to their foreign service duties and to the objectives that support eligibility for the section 23AG exemption. The return to Australia for work duties is not optional, but an essential part of work duties. Where this direct link exists, these periods should be treated as part of foreign service rather than as absences, providing they are not excessive in tenure.

The practical impact of the proposed approach can be illustrated through recent examples. In each case, travel was undertaken as a direct consequence of the person's overseas role, was required to support organisational objectives, and contributed to the delivery of agreed organisational outcomes. These activities could not have reasonably be characterised as a break from foreign service, as they formed an essential component of the person's duties related to the service in the foreign country.

Short Australian-based engagement can be a legitimate and useful part of continuing overseas assignment. In those circumstances, the person may be undertaking the same assignment work, for the same work activity, albeit temporarily from a different location because their work requires it.

Examples include persons posted overseas:

- attending meetings held in Australia – this can include leadership meetings, conferences, technical issues and workshops
- personally accompanying staff of foreign organisations (that they are working with) on trips to conduct business activities in Australia
- attending training that is essential to them being able to perform their role in the overseas country, including training on mobilisation, safeguarding, security, fraud, disability inclusion, localisation, governance and risk management.

ATO response

We have recently reviewed the law as it applies in respect of service in Australia. The updates made to the Determination reflect the correct interpretation of the law, specifically that since Australia is not a foreign country, it is not possible to undertake foreign service in Australia. In that regard, there is no discretion as to what service can or cannot be regarded as foreign service, because it is based on where the person is located when they are performing that service.

Outcome

No change

Issue 5 – professional training and assessment requirements

Paragraph or section of draft product

Paragraphs 1A, 43, 44 and 46

Issue raised

Staff members deployed overseas are professionals who have to attain and maintain their professional accreditation in Australia. Certain components of the training are face-to-face training. In these circumstances, training is compulsory but cannot be performed within the foreign country. Where a return to Australia to remain eligible for foreign service under section 23AG is required, this return to Australia should be considered as part of foreign service for section 23AG purposes.

It is accepted that not necessarily all professional development activities undertaken during an overseas posting necessarily constitute foreign service. For example, participation in leadership development programs, academic courses, or career broadening activities that are primarily directed towards a staff member's personal or career development, rather than supporting the objectives of the overseas posting, may appropriately fall outside of the definition of foreign service.

The key consideration is whether the activity arises directly from the staff member's foreign service duties and responsibilities, and whether it contributes to the delivery of the employer's objectives. Activities that are incidental to a posting and primarily benefit the member's personal development, without a clear or operational or strategic connection to the posting, should not generally be regarded as foreign service.

Professional training activities should be included as foreign service even if requiring a short-term return to Australia as that training cannot be provided overseas.

The view expressed in the draft Consolidation creates a disincentive to undertake training of a personal nature in Australia and instead, to have it take place overseas.

ATO response

We have recently reviewed the law as it applies in respect of service in Australia. The updates made to the Determination reflect the correct interpretation of the law, specifically that since Australia is not a foreign country, it is not possible to undertake foreign service in Australia. In that regard, there is no discretion as to what service can or cannot be regarded as foreign service, because it is based on where the person is located when they are performing that service.

Outcome

No change

Issue 6 – Australia-based activities

Paragraph or section of draft product

Paragraphs 1A, 43, 44 and 46

Issue raised

The final update to the Determination should clarify whether a short, planned or required Australia-based activity can form part of a continuous period of foreign service where it is directly connected to a continuing overseas assignment.

If such activities may be accepted in appropriate circumstances, the final update to the Determination should identify the relevant factors, including whether the activity is short, directly connected to the overseas assignment, properly documented, and not excessive by comparison with the scheduled period of foreign service.

The final update to the Determination should also include industry-related examples, as this would materially improve certainty.

ATO response

We have recently reviewed the law as it applies in respect of service in Australia. The updates made to the Determination reflect the correct interpretation of the law, specifically that since Australia is not a foreign country, it is not possible to undertake foreign service in Australia. In that regard, there is no discretion as to what service can or cannot be regarded as foreign service, because it is based on where the person is located when they are performing that service.

Outcome

No change

Issue 7 – additional administrative burden

Paragraph or section of draft product

Paragraphs 1A, 43, 44 and 46

Issue raised

Changes to internal policy and operational procedures are required to administer such a change as outlined in the draft Consolidation. It creates an excessive administrative burden on supporting capabilities to track in such granular detail, each staff member's movements for the purposes of ensuring correct pay as you go (PAYG) withholding treatment.

In addition to processing of PAYG withholding obligations, processing of fringe benefits tax obligations relating to overseas based staff members will become an excessive administrative burden if members move in and out of tax-exempt status regularly throughout the year.

It is expected that significant manual intervention will be required from a payroll processing perspective each time a person returns to Australia and becomes taxable. The cost of administering this may exceed the quantum of any tax that is actually withheld.

ATO response

We have recently reviewed the law as it applies in respect of service in Australia. The updates made to the Determination reflect the correct interpretation of the law, specifically that since Australia is not a foreign country, it is not possible to undertake foreign service in Australia. In that regard, there is no discretion as to what service can or cannot be regarded as foreign service, because it is based on where the person is located when they are performing that service.

Outcome

No change

Issue 8 – Example 9**Paragraph or section of draft product**

Example 9

Issue raised

Both the original Determination and updated draft Consolidation include, in Example 9 at paragraphs 30 and 31, that carer's leave in Australia can be considered foreign service under medical leave. The final update to the Determination should clarify the ATO's intent on this, noting that carer's leave is not specifically listed under paragraph 23AG(6)(b) and may provide for an extended period of time in Australia as exempt from Australian income tax.

ATO response

Each absence from foreign service, and whether some or all of that absence can be considered as constituting foreign service for the purposes of section 23AG, must be considered on its facts and circumstances. The situation outlined in Example 9 of the Determination is an absence from work because of an accident or illness that comes within paragraph 23AG(6)(b). Therefore, it can be taken to be foreign service, provided that the absence is within the terms and conditions of that service.

Outcome

No change

Issue 9 – date of effect of the update**Paragraph or section of draft product**

Date of effect

Issue raised

The updates that are the subject of the draft Consolidation are proposed to apply to income years from 2026–27 and later income years.

To implement the change that work-related absences to Australia are no longer considered to be foreign service, there is a need to update payroll system and procedures. Due to competing priorities, including in relation to Payday Super and Single Touch Payroll changes, it is advised that a start time of 1 July 2026 is not able to be met. Alternative start dates of 1 July 2027 and 1 December 2026 are proposed.

Further, a change management and communications plan will also need to be developed to ensure impacted members understand the change, what changes are being made to comply with it and what that means for staff members. A backdated implementation date allows no time for that to be done in a meaningful way and will therefore result in a separate large body of work to be performed to make corrections up to the point where payroll process are able to be updated and to have pay processed correctly. Pay disputes are a key cause of negative union engagement and it is foreseen this would result in union attention, and negative interactions between staff members and the payroll area.

ATO response

As per the Addendum to the Determination, the updated view will be applied to the 2026–27 income year and later income years.

Employers will have processes in place for withholding for work-related absences to Australia for which the absences from service in the foreign country would have been considered excessive under the view in the Determination as it was, prior to this Addendum. It is reasonable to expect

that the processes and procedures in place for such absences from foreign service can be extended to now cover all work-related absences to Australia.

Where difficulties arise, employers are able to contact us so that the situation can be worked through and arrangements to enable compliance can be made.

Outcome

No change

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