



## Class Ruling

### Income tax: assessable income: Australian Federal Police personnel deployed to Sudan as part of the United Nations peacekeeping force

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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, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are 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 provision(s) 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 provisions dealt with in this Ruling are:
- section 23AG of the *Income Tax Assessment Act 1936* (ITAA 1936); and
  - section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997).

## Class of entities

3. The class of entities to which this Ruling applies are:
- employees of the Australian Federal Police (AFP);
  - persons seconded to the AFP under section 69D of the *Australian Federal Police Act 1979* (AFP Act 1979) for the period of deployment; and
  - persons appointed to the AFP as special members of the AFP under section 40E of the AFP Act 1979 for the period of their deployment,

who are deployed to Sudan as part of the United Nations (UN) peacekeeping force. The deployment under the United Nations Mission in Sudan (UNMIS) is to perform certain functions relating to humanitarian assistance and the protection of human rights.

4. Those deployed as described in paragraph 3 of this Ruling to whom this Ruling applies will be collectively referred to in this Ruling as 'AFP employees'.
5. AFP employees remain Australian residents throughout the period of deployment.
6. AFP employees include those employees who while on deployment to Sudan return to Australia for a period during which they utilise leave that has wholly accrued from their service in Sudan.
7. The class of entities does not include AFP employees:
- who while on deployment to Sudan return to Australia for a period during which they utilise leave that has wholly or partly accrued from service in Australia;
  - whose term of deployment to Sudan is suspended or terminated before completing a continuous period of foreign service of not less than 91 days; or
  - who while on deployment to Sudan return to Australia for a period during which they utilise Cumulative Time Off days that have accrued from service in Sudan and that breaks the period of continuity of foreign service (see paragraphs 64 to 69 of this Ruling).

## Qualifications

8. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
9. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 16 to 35 of this Ruling.

10. 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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12. This Ruling applies from 1 February 2006. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

13. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

14. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

15. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

## Scheme

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16. The scheme that is the subject of the Ruling is described below. This description is based on the following documents which are attached to the file record maintained by the Australian Taxation Office for this Ruling. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- the application for Class Ruling (dated 2 February 2006);
- AFP – International Deployment Group (IDG) – Determination No. 19 of 2005;
- Diplomatic Note No. 103/2005 dated 9 November 2005;
- Agreement between the Government of Sudan and the United Nations Concerning the Status of the United Nations Mission in Sudan (signed 28 December 2005) (the Status Agreement); and
- AFP Certified Agreement 2003-2006 (Certified Agreement).

17. On 9 November 2005, the Australian Government approved the deployment of AFP personnel to UNMIS.

18. The AFP's core function will be to monitor the work of Sudanese police and where possible advise them about modern policing methods. They will also be on alert for potential abuses of human rights, police powers or any other unacceptable police behaviour.

19. The AFP employees will be deployed to Sudan for either 40 or 60 weeks.

20. For terms of deployment of 40 weeks the period of overseas duty will be 32 weeks of overseas service. For terms of deployment of 60 weeks the period of overseas duty will be 48 weeks of overseas service.

21. The AFP employees will not be afforded diplomatic status and will not be attached to a diplomatic mission.

22. The remuneration for AFP employees takes the form of an annual salary entitlement and the payment of various allowances. Salary and allowances will continue to be paid into the employee's nominated account on a fortnightly basis.

23. The AFP employees will be entitled to some or all of the following allowances:

- composite allowance (paid during pre-deployment training);
- composite allowance (paid during posting and deployment accrued recreation leave);

- transfer allowance (to and from deployment);
  - extended unaccompanied overseas service allowance;
  - mission allowance;
  - telephone/communication allowance;
  - field accommodation allowance; and
  - meals and accommodation allowances (if applicable), and incidental allowance.
24. Only the composite allowance will be paid while an AFP employee is on leave accrued during the deployment period.
25. During the period of deployment, AFP employees will accrue:
- recreation leave as outlined in paragraphs 26 and 27 of this Ruling;
  - six Cumulative Time Off (CTO) days for every 30 days worked in succession (CTOs are to compensate for not having weekends off) – AFP employees usually take CTOs as they accrue, however, they can be accumulated and taken in Australia;
  - UN recreation leave of 1.5 days per month of overseas service; and
  - miscellaneous leave may also be granted for special circumstances (for example, death of a close family member).
26. For terms of deployment of 40 weeks, eight weeks recreation leave will be accrued less six days for additional training, briefing, debriefing and travel.
27. For terms of deployment of 60 weeks, 12 weeks recreation leave will be accrued less nine days for additional training, briefing, debriefing and travel.
28. The general expectation is that AFP employees will be required to take recreation leave following a 32 or 48 week deployment. This may vary due to mission-specific requirements, however, employees will be provided with leave as outlined in paragraphs 26 and 27 of this Ruling. AFP employees lose both UN recreation leave and CTOs if not utilised prior to the end of their deployment.
29. Recreation leave and mandatory recreation leave already accrued by an AFP employee prior to their deployment will be held over until their term of deployment ceases.
30. During the periods of leave following each posting, AFP employees will make themselves available for additional training, briefing and debriefing at the discretion of the National Manager of the IDG.

31. During the term of deployment, the leave entitlements referred to in paragraphs 26 and 27 of this Ruling replace the AFP employees entitlement to recreation leave and mandatory recreation leave prescribed under the Certified Agreement.

32. However, where an AFP employee voluntarily terminates their term of deployment prior to the completion of six months, the employee is not entitled to the recreation leave referred to in paragraphs 26 and 27 of this Ruling. The employee will then be entitled to recreation leave under the Certified Agreement.

33. Training, briefing and debriefing may be conducted in person, by telephone or any other communication method determined by the National Manager of the IDG.

34. The AFP employee is entitled to no other leave whilst deployed. The National Manager of the IDG may, upon request from an AFP employee, consider any special circumstances in respect of the employee (for example the death of a close family member) to determine whether to return the employee to their home base on miscellaneous leave. In so doing, the deployment is suspended.

35. Paragraph 31 of the Status Agreement grants an exemption to members of UNMIS (including AFP employees deployed as part of the UN operations) from taxation by the Government of Sudan on their pay and other emoluments from a participating State (Australia), and from any income received from outside Sudan. The Australian Government is not a party to the Status Agreement, but participates in the UN operation under a Diplomatic Note with the UN.

## Ruling

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36. Subject to paragraph 37 of this Ruling, the salary and allowances referred to in paragraphs 22 and 23 of this Ruling, derived by AFP employees described in paragraphs 3 to 6 of this Ruling deployed to Sudan are exempt from tax under section 23AG of the ITAA 1936 where:

- the employee has been engaged, or is taken to have been engaged, in service in Sudan for a continuous period of not less than 91 days; and
- the salary and allowances are derived from that foreign service, including payments for recreation leave that has wholly accrued from the period of service in Sudan.

37. The composite allowance paid during pre-deployment training and transfer allowance referred to in paragraph 23 of this Ruling are not exempt from tax under subsection 23AG(1) of the ITAA 1936.

38. Where the salary and allowances are exempt from tax under paragraph 36 of this Ruling, they are 'foreign earnings' of the AFP employees under subsection 23AG(7) of the ITAA 1936 and are taken into account in calculating the Australian tax on other assessable income derived by the employee (subsection 23AG(3) of the ITAA 1936).

### **Example**

39. In the 2006-2007 income year, Daniel, an AFP employee derives the following types of income:

- a. Australian employment income of \$60,300;
- b. allowable deductions against Australian income of \$300;
- c. foreign exempt employment income of \$30,100; and
- d. expenses directly related to exempt foreign employment income of \$100.

Assume that Daniel has appropriate private patient hospital cover for Medicare levy surcharge purposes.

The total amount of Australian tax payable will be calculated with reference to the following formula:

(Notional gross tax/Notional gross taxable income) × Other taxable income

#### **Step 1**

Daniel's **notional gross taxable income** is \$90,000 ( $[\$60,300 - \$300] + [\$30,100 - \$100]$ ).

#### **Step 2**

The **notional gross tax** is \$25,200 (the normal Australian income tax and Medicare levy payable on a taxable income of \$90,000).

#### **Step 3**

The **other taxable income** is \$60,000 (Australian employment income).

#### **Step 4**

The Australian tax payable (including Medicare levy) on Daniel's Australian income is:

$$(\$25,200/\$90,000) \times \$60,000 = \$16,800$$

**Note:** This calculation is based on the 2006-2007 income tax rates. If the income tax rates for future years change, you should refer to the tax rates for that current income year.

## 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.*

40. Subsection 6-5(2) of the ITAA 1997 provides that the assessable income of a resident taxpayer includes ordinary income derived directly or indirectly from all sources, whether in or out of Australia, during the income year.

41. Salary and wages are ordinary income for the purposes of subsection 6-5(2) of the ITAA 1997.

42. Subsection 6-15(2) of the ITAA 1997 provides that if an amount is exempt income then it is not assessable income.

43. Section 11-15 of the ITAA 1997 lists those provisions dealing with income which may be exempt. Included in this list is section 23AG of the ITAA 1936 which deals with exempt foreign employment income.

44. Section 23AG of the ITAA 1936 provides an exemption from Australian tax on the foreign earnings derived by an Australian resident who has been engaged in foreign service continuously for 91 days or more.

45. Subsection 23AG(1) of the ITAA 1936 states:

Where a resident, being a natural person, has been engaged in foreign service for a continuous period of not less than 91 days, any foreign earnings derived by the person from that foreign service is exempt from tax.

46. The basic tests for the exemption of foreign employment income in subsection 23AG(1) of the ITAA 1936 are:

- the taxpayer must be a 'resident of Australia';
- the taxpayer must be engaged in 'foreign service';
- the foreign service must be for a continuous period of not less than 91 days; and
- the taxpayer must derive 'foreign earnings' from that 'foreign service'.

However, certain foreign earnings that meet these tests may not be exempt from tax (see paragraphs 81 to 86 of this Ruling).

### Resident of Australia

47. The determination of a person's residency status depends on that person's circumstances and is a determination made in relation to each year of income. For further information see Taxation Ruling IT 2650. This Ruling only applies to the class of entities described in paragraphs 3 to 6 of this Ruling who remain Australian residents for tax purposes during their deployment to Sudan.

48. This Ruling is based on the assumption that AFP employees deployed to Sudan will remain Australian residents for tax purposes throughout the period of their deployment.

### **Engaged in foreign service**

49. 'Foreign service' is defined as 'service in a foreign country as the holder of an office or in the capacity of an employee' (subsection 23AG(7) of the ITAA 1936).

50. The term 'employee' is defined within subsection 23AG(7) of the ITAA 1936 to include 'a person employed by a government or an authority of a government or by an international organisation'.

51. AFP employees referred to in paragraphs 3 to 6 of this Ruling are considered to meet the above definition of an 'employee'.

52. Deployment of AFP employees to Sudan constitutes 'foreign service' as each employee is undertaking 'service in a foreign country as a holder of an office or in the capacity of an employee'.

### **For a continuous period of not less than 91 days**

53. Each AFP employee based in Sudan is expected to serve continuously in Sudan for a period of at least 91 days. These periods of 'foreign service', if met, satisfy the test that Australian residents working overseas must be engaged in foreign service 'for a continuous period of not less than 91 days'.

54. Should an AFP employee depart Sudan prior to the completion of 91 days of continuous service, that employee will normally be ineligible for the exemption.

55. However, in certain instances, an employee who departs Sudan prior to serving the necessary number of days, may still qualify for exemption if they return to continue their posting at a later date (refer paragraphs 9 to 16 of Taxation Ruling TR 96/15).

### **Temporary absences forming part of a period of foreign service**

56. Subsection 23AG(6) of the ITAA 1936 treats certain temporary absences from foreign service as forming part of the period of foreign service. The Commissioner's view on the application of that subsection is reflected in paragraphs 9 to 11 of TR 96/15.

57. Absences which form part of the period of foreign service include absences taken in accordance with the terms and conditions of employment because of accident or illness or recreation leave.

58. 'Recreation leave' is leave in the nature of paid holidays to which an employee has accrued an entitlement. Most usually it is the employee's accrued annual leave. Leave which fits this description is 'recreation leave', even if it is not called this.

59. However, 'recreation leave' does not include:
- leave that is not in the nature of paid holidays, such as weekends, rostered days off, flexidays, and days off in lieu;
  - public holidays;
  - leave wholly or partly attributable to a period of employment other than foreign service;
  - long service leave, furlough, extended leave or similar leave; and
  - leave without pay or on reduced pay.
60. During the period of deployment, AFP employees will accrue the following recreation leave:
- for terms of deployment of 40 weeks, 8 weeks recreation leave less six days for additional training, briefing, debriefing and travel;
  - for terms of deployment of 60 weeks, 12 weeks recreation leave less nine days for additional training, briefing, debriefing and travel; and
  - UN recreation leave of 1.5 days per month of overseas service.
61. Given the nature of the overseas deployment, it is considered that the recreation leave granted to AFP employees deployed to Sudan is reasonable. This recreation leave is wholly attributable to the period of foreign service and forms part of a continuous period of 'foreign service' for the purposes of subsection 23AG(1) of the ITAA 1936.
62. CTOs are not considered to be recreation leave as they are not in the nature of recreation leave; rather, they compensate for not having weekends off.
63. Miscellaneous leave granted to the AFP employee because of the accident, illness or death of another person will also form part of the employee's period of continuous foreign service where the leave is for a short period.

**Temporary absences not breaking the period of foreign service: the one-sixth administrative test**

64. In certain limited circumstances, breaks other than those specified in paragraph 57 of this Ruling are also taken to form part of a period of foreign service. Such breaks include weekends, public holidays, rostered days off, and days off in lieu of such (includes CTOs), where such breaks are authorised by the terms and conditions of the deployment. However, where such breaks are used to return to Australia they must not be excessive. Where the break is excessive the period of foreign service will still not be broken if continuity of the foreign service period can be maintained by application of the rule outlined in paragraph 66 of this Ruling.

65. Breaks taken to visit or return to Australia are considered excessive when the total of such breaks are more than one-sixth of the period of scheduled foreign service or, if the period of foreign service is ongoing, more than one-sixth of the income year. This one-sixth administrative test is different to the 1/6 legislative rule covered in paragraphs 67 to 69 of this Ruling.

**Temporary absences not breaking the period of foreign service: the legislative rule**

66. In determining whether the continuity of foreign service can be maintained, the AFP employee should consider the application of subsection 23AG(6A) of the ITAA 1936. Paragraphs 67 to 69 of this Ruling provide an explanation of this tax provision. Alternatively, the AFP employee could seek professional advice from their taxation adviser or the Australian Taxation Office.

**Continuity of the period of foreign service: 1/6 legislative rule**

67. The 1/6 legislative rule allows two or more continuous periods of foreign service to be joined as a total period of foreign service, unless, at any time, the total period of absence (in days) from foreign service between the continuous periods of foreign service exceeds 1/6 of the number of days of the total period of foreign service.

68. If the period of absence exceeds 1/6 of the total period of foreign service at any time, continuity of foreign service is broken. The AFP employee will begin a new period of foreign service when he or she next engages in foreign service and must determine whether that period of foreign service lasts for at least 91 continuous days (subsection 23AG(6A) of the ITAA 1936).

69. The 1/6 legislative rule should not be confused with the one-sixth administrative test outlined at paragraphs 64 and 65 of this Ruling. The 1/6 legislative rule in subsection 23AG(6A) of the ITAA 1936 permits two or more periods of foreign service to constitute a continuous period of foreign service where continuity would be otherwise broken by absence. Absences between the periods of foreign service under the 1/6 legislative rule do not form part of the continuous period of foreign service. In contrast, the one-sixth rule is an administrative test which permits what would otherwise be a break in the foreign service to be included in a continuous period of foreign service.

## Foreign earnings

70. The definition of 'foreign earnings' is contained in subsection 23AG(7) of the ITAA 1936, which provides that:

**'foreign earnings'** means income consisting of earnings, salary, wages, commission, bonuses or allowances, or of amounts included in a person's assessable income under Subdivision 13A, but does not include any payment, consideration or amount that:

- i. is included in assessable income under Subdivision AA of Division 2; or
- ii. is excluded from the definition of 'eligible termination payment' in subsection 27A(1) because of paragraph (ja), (k), (ka), (m), (ma), (n) or (p) of that definition.

71. The exclusions to the definition of 'foreign earnings' in paragraph 70 of this Ruling are not, however, relevant to this scheme as they relate to pensions, annuities, eligible termination payments and other similar amounts.

72. The remuneration of deployed AFP employees takes the form of an annual salary entitlement and the payment of various allowances.

73. These salary and allowances which are described in paragraphs 22 and 23 of this Ruling, with the exception of the composite allowance (paid during pre-deployment training) and transfer allowance (to and from deployment), come within the definition of 'foreign earnings' in subsection 23AG(7) of the ITAA 1936.

74. Whilst the salary of AFP employees may be paid into financial institutions in Australia, those 'earnings' are still considered 'foreign earnings'.

## From that foreign service

75. To qualify for the exemption the 'foreign earnings' must be derived from the 'foreign service'. That does not mean that the foreign earnings need to be derived at the time of engaging in foreign service. The important test is that the foreign earnings, when derived, need to be derived as a result of the undertaking of that foreign service.

76. In the case of allowances paid after the taxpayer returns to Australia that relate to the period of foreign service, such allowances are treated as foreign earnings derived from that foreign service. Also, any advances against salary or allowances paid to the taxpayer prior to the undertaking of foreign service arising from the undertaking of that foreign service would be treated as foreign earnings from foreign service.

77. The receipt of the following allowances are considered to be foreign earnings from the foreign service as they relate to engaging in foreign service in Sudan:

- composite allowance (paid during posting and deployment accrued recreation leave);
- extended unaccompanied overseas service allowance;
- mission allowance;
- telephone/communications allowance;
- field accommodation allowance; and
- meals and accommodation allowances (if applicable), and incidental allowance.

78. The salary that is paid when taking recreational leave that accrued during the period of foreign service is also considered to be foreign earnings from that service even though the recreational leave may be taken after the completion of the foreign service.

79. An AFP member is entitled to a composite allowance while undertaking pre-deployment training prior to engaging in foreign service. The composite allowance payable during the pre-deployment period is not derived from foreign service. It is derived as a result of the training undertaken prior to leaving Australia and does not, therefore, qualify for exemption under section 23AG of the ITAA 1936.

80. An AFP employee is also entitled to a transfer allowance (to and from deployment). The transfer allowance (to and from deployment) payable prior to the deployment period and after the end of the foreign service is not foreign earnings derived from that foreign service. It is paid as a compensation for non-reimbursed expenditure incurred by the AFP employee prior to engaging in foreign service and after completion of foreign service and does not, therefore, qualify for exemption under section 23AG of the ITAA 1936.

### **Certain foreign earnings not exempt**

81. Subsection 23AG(2) of the ITAA 1936 provides that no exemption is available under subsection 23AG(1) of the ITAA 1936 in circumstances where an amount of foreign earnings derived in a foreign country is exempt from tax in the foreign country solely because of:

- a double tax agreement or a law of a country that gives effect to such an agreement (paragraphs 23AG(2)(a) and (b));
- a law of that foreign country which generally exempts from, or does not provide for, the imposition of income tax on income derived in the capacity of an employee, income from personal services or any other similar income (paragraphs 23AG(2)(c) and (d)); and

- a law or international agreement dealing with privileges and immunities of diplomats or consuls or of persons connected with international organisations (paragraphs 23AG(2)(e), (f) and (g)).

82. There is currently no tax treaty between Australia and Sudan.

83. The Status agreement provides privileges and immunities to persons connected with the UN. As Australia are not a party to the Status agreement, that agreement and the Diplomatic Note do not provide AFP employees working in Sudan with privileges and immunities of persons connected with an international organisation.

84. The foreign earnings derived by AFP employees in Sudan are not exempt from income tax in Sudan.

85. However, the Status Agreement provides AFP employees deployed as part of the UN operation with an exemption from taxation by the Government of Sudan on their pay and other emoluments from Australia.

86. As a result, the foreign earnings of the deployed AFP employees are exempt from tax in Sudan for a reason other than those listed in subsection 23AG(2) of the ITAA 1936. Therefore, subsection 23AG(2) will not operate to deny the 'foreign earnings' exemption under subsection 23AG(1) of the ITAA 1936.

## **Exemption with progression**

87. The 'foreign earnings' of AFP employees that are exempt from Australian tax under section 23AG of the ITAA 1936 are nevertheless taken into account in calculating the Australian tax on other assessable income derived by the employee (subsection 23AG(3) of the ITAA 1936).

88. Tax on other assessable income will be calculated by applying to the non-exempt income (for example, Australian salary, investment income), the notional average rate of tax payable on the sum of exempt income and non-exempt income.

89. In calculating these amounts, any deductions that relate to the exempt income are allowed as if the exempt income was assessable income. That is, expenses which relate directly to earning income in Sudan are deductible from exempt income.

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

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90. 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:*

TR 96/15; IT 2650

*Subject references:*

- exempt foreign income
- exempt income
- foreign exempt employment income
- foreign income
- foreign income deductions
- foreign salary & wages
- foreign source income
- international tax
- overseas countries
- overseas employees
- overseas tax laws
- residence of individuals
- Sudan

- ITAA 1936 23AG(2)(d)
- ITAA 1936 23AG(2)(e)
- ITAA 1936 23AG(2)(f)
- ITAA 1936 23AG(2)(g)
- ITAA 1936 23AG(3)
- ITAA 1936 23AG(6)
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- ITAA 1936 Pt III Div 2 Subdiv AA
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- Agreement between the Government of Sudan and the United Nations Concerning the Status of the United Nations Mission in Sudan

*Legislative references:*

- ITAA 1936 23AG
  - ITAA 1936 23AG(1)
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  - ITAA 1936 23AG(2)(b)
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