


***CR 2010/40 - Income tax: payments from
Redundancy Payment Central Fund No 2 and
Redundancy Payment Approved Worker Entitlement
Fund 2***

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Class Ruling

Income tax: payments from Redundancy Payment Central Fund No 2 and Redundancy Payment Approved Worker Entitlement Fund 2

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❶ 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

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 82-130 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 83-170 of the ITAA 1997; and
- section 83-175 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is all common law employees who receive a payment under the scheme described in paragraphs 9 to 46 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 carried out in accordance with the scheme described in paragraphs 9 to 46 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

7. This Ruling applies from 1 July 2010 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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

8. The following description of the scheme is based on information provided by the applicant.

9. The Redundancy Payment Central Fund Limited (Incolink) is the trustee of the Redundancy Payment Central Fund No. 2 (Existing Fund 2) and the Redundancy Payment Approved Worker Entitlement Fund 2 (Approved Fund 2) (together the Funds).

10. Existing Fund 2 is a workers entitlement fund that was established prior to 1 July 2003. Approved Fund 2 is an approved worker entitlement fund under section 58PB of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).

11. The Funds were established in recognition of the transitory nature of employment in the metal construction and contracting industry, engineering construction and contracting industry and allied industries (Industries).

12. The Funds have been established to provide benefits to employees (workers) in the Industries who become entitled to payments on termination of their employment under the terms and conditions of their employment.

13. The use of the Funds is recognised in most awards and enterprise agreements applying to workers in the Industries. Employers are able to make contributions to the Funds to assist in satisfying their obligations on termination of employment.

14. For example, clauses 15.9, 15.9.1, and 15.9.2 of the National Metal and Engineering On-Site Construction Industry Award 1989 states:

15.9 An employer bound by this award may utilise a fund to meet all or some of the liabilities created by this clause. Where an employer utilises such a fund:

15.9.1 Payments made by a fund designed to meet an employer's liabilities under this clause, to employees eligible for redundancy/severance pay shall be set off against the liability of the employer under this clause, and the employee shall receive the fund payment or the award benefit whichever is the greater but not both; or

15.9.2 Where a fund, which has been established pursuant to an agreement between unions and employers, does not make payments in accordance with this clause, contributions made by an employer on behalf of an employee to the fund shall, to the extent of those contributions, be set off against the liability of the employer under this clause, and payments to the employee shall be made in accordance with the rules of the fund or any agreement relating thereto and the employee shall be entitled to the fund benefit or the award benefit whichever is greater but not both.

15. Enterprise agreements may also contain provisions similar to those found in the National Metal and Engineering On-Site Construction Industry Award 1989 discussed in paragraph 14 of this Ruling. For example, clause 15.1(f) of the Australian Workers Union Asphalt Industry Certified Agreement 2009-2011 states:

The company is, and will remain during the life of this Agreement, a member of the Redundancy Payment Approved Workers Entitlement Fund 2 ('Incolink Number 2 Fund') of which Redundancy Payment Central Fund Ltd ('Incolink') is trustee, and all the employees of the Company within the scope of this Agreement will be enrolled in the Incolink Number 2 Fund and be entitled to redundancy benefits in accordance with the terms of the Trust Deed. The Company shall pay contributions to the Incolink Number 2 Fund on behalf of each employee on a weekly basis in accordance with the Trust Deed.

16. Employers currently make fixed weekly contributions to Approved Fund 2 on behalf of each of their employees (other than apprentices) in satisfaction of their obligations under the Awards and any relevant enterprise agreement. Employers previously made contributions to Existing Fund 2, however due to the concessional fringe benefits tax treatment accorded to 'approved worker entitlement funds' under the FBTA, all contributions are now made to Approved Fund 2.

Worker's Account

17. Under the Trust Deed for Approved Fund 2 (and previously for Existing Fund 2), Incolink is required to credit weekly contributions (less an apprentice levy) to an account for each worker called a 'Worker's Account' (clause 4.1(2) of the Existing Fund 2 Trust Deed and clause 8 of the Approved Fund 2 Trust Deed).

18. A Worker's Account may be accessed by a worker when the employment of that worker is terminated or ended for any reason (clause 6 of the Existing Fund 2 Trust Deed and clause 10 of the Approved Fund 2 Trust Deed). This payment is called an initial benefit.

19. Under the Existing Fund 2 Trust Deed, clause 6.1 provides that a worker, upon termination, is entitled to a redundancy benefit of:

- (a) not less than one-half of the maximum initial payment benefit as prescribed from time to time by the 1987 Redundancy Pay Agreement; and
- (b) not more than the amount standing to the credit of that worker in his or her Worker's Account.

20. Under the Approved Fund 2 Trust Deed, clause 10.1 provides that a worker (other than an Approved Worker) upon termination (or a person claiming through or under the worker in the case of the Worker's death), is entitled to the lesser of:

- (a) a redundancy benefit not exceeding the maximum initial payment benefit as prescribed from time to time in the 1987 Redundancy Pay Agreement; and
- (b) a redundancy benefit equal to the amount standing to the credit of that worker in his or her Worker's Account.

21. Under the Approved Fund 2 Trust Deed, clause 10.2 provides that an Approved Worker upon termination (or a person claiming through or under the worker in the case of the Worker's death), is entitled to a redundancy benefit of:

- (a) not less than 50% of the maximum initial payment benefit as prescribed from time to time by the 1987 Redundancy Pay Agreement; and
- (b) not more than the amount standing to the credit of that worker in his or her Worker's Account.

22. The maximum initial benefit is \$4,496 for the period from 1 October 2009 to 30 September 2010.

23. If the worker remains unemployed for four consecutive weeks, the worker is entitled to withdraw the balance (if any) of their Worker's Account upon providing evidence that they are registered with Centrelink (clause 6.2 of the Existing Fund 2 Trust Deed and clause 10.3 of the Approved Fund 2 Trust Deed). This is called an additional benefit.

24. Where a worker ceases to be employed in the industry, the worker is entitled to withdraw the balance (if any) of their Worker's Account 39 weeks after the last contribution was paid on behalf of the worker (clause 6.3 of the Existing Fund 2 Trust Deed and clause 10.4 of the Approved Fund 2 Trust Deed). This is also called an additional benefit.

25. Where a worker retires from the workforce, the worker is entitled to withdraw the balance (if any) of their Worker's Account provided the worker is over 55 years of age (clause 6.4 of the Existing Fund 2 Trust Deed and clause 10.5 of the Approved Fund 2 Trust Deed).

26. Where a worker dies, Incolink may pay the balance standing to the credit of the Worker's Account to the legal personal representative of the worker or the dependants of the worker (clause 10.7 of the Approved Fund 2 Trust Deed).

Genuine Redundancy Account

27. It is proposed that the Trust Deeds will be amended to provide:

- (a) existing workers with the ability to irrevocably elect to change the status of their Worker's Account to a 'Genuine Redundancy Account' by giving at least six months notice in writing to Incolink (Proposed clause 6AA.1(2) of the Existing Fund 2 Trust Deed and proposed clause 10A.1(2) of the Approved Fund 2 Trust Deed), and
- (b) new workers with the choice to establish their account as a Worker's Account or a Genuine Redundancy Account (Proposed clause 6AA.1(1) of the Existing Fund 2 Trust Deed and proposed clause 10A.1(1) of the Approved Fund 2 Trust Deed).

28. The conversion of the Worker's Account to a Genuine Redundancy Account will occur at the:

- end of the six month period if an election is made; or
- time the account is established for a new worker.

29. If an election is made by an existing worker, then during the six month notice period, a worker (or a person claiming on behalf of a worker in the case of death) will be able to access the Worker's Account in the event of termination of employment for any reason.

30. If the election is made, a worker (or a person claiming on behalf of a worker in the case of death) will only be entitled to access their Genuine Redundancy Account (following conversion at the end of the six month notice period) in the following circumstances (proposed clause 6AA.4 of the Existing Fund 2 Trust Deed and proposed clause 10A.4 of the Approved Fund Trust Deed):

- (a) on being made genuinely redundant and providing Incolink with a statutory declaration to that effect in the form of the Claim Form (proposed clause 6AA.5 of the Existing Fund 2 Trust Deed and proposed clause 10A.6 of the Approved Fund 2 Trust Deed);
- (b) on retirement (but only after the worker has attained 55 years of age) (proposed clause 6AA.7 of the Existing Fund 2 Trust Deed and proposed clause 10A.8 of the Approved Fund 2 Trust Deed); or
- (c) on death (Incolink may pay the balance to the credit of the Worker's Account to the legal personal representative of the worker or the dependants of the worker) (proposed clause 6AA.9 of the Existing Fund 2 Trust Deed and proposed clause 10A.10 of the Approved Fund 2 Trust Deed).

31. Under proposed clause 6AA.10 of the Existing Fund 2 Trust Deed and proposed clause 10A.11 of the Approved Fund 2 Trust Deed, the term 'genuine redundancy' has the meaning given to it in section 83-175.

32. Under proposed clause 6AA.5 of the Existing Fund 2 Trust Deed and proposed clause 10A.6 of the Approved Fund 2 Trust Deed a worker will, on or after conversion at the end of the six month period, receive an initial benefit if their employment is terminated by reason of genuine redundancy.

33. Under the Existing Fund 2 Trust Deed, proposed clause 6AA.5 provides that a worker, upon termination, is entitled to a redundancy benefit of:

- (a) not less than one-half of the maximum initial payment benefit as prescribed from time to time in the 1987 Redundancy Pay Agreement; and
- (b) not more than the amount standing to the credit of that worker in his or her Genuine Redundancy Account.

34. Under the Approved Fund 2 Trust Deed, proposed clause 10A.5 provides that a worker (other than an Approved Worker), upon termination, is entitled to the lesser of:

- (a) a redundancy benefit not exceeding the maximum initial payment benefit as prescribed from time to time in the 1987 Redundancy Pay Agreement; and
- (b) a redundancy benefit equal to the amount standing to the credit of that worker in his or her Genuine Redundancy Account.

35. Under the Approved Fund 2 Trust Deed, proposed clause 10A.6 provides that an Approved Worker, upon termination, is entitled to a redundancy benefit of:

- (a) not less than 50% of the maximum initial payment benefit as prescribed from time to time in the 1987 Redundancy Pay Agreement; and
- (b) not more than the amount standing to the credit of that worker in his or her Genuine Redundancy Account.

36. The maximum initial benefit is currently \$4,496 for the period from 1 October 2009 to 30 September 2010.

37. Under proposed clause 6AA.6 of the Existing Fund 2 Trust Deed and proposed clause 10A.7 of the Approved Fund 2 Trust Deed, an additional benefit comprising the remaining balance of the 'Genuine Redundancy Account' will be paid by the Trustee of the Fund to a worker whose employment is terminated by reason of genuine redundancy and the worker remains out of work for four consecutive weeks and provides evidence that they are registered with Centrelink.

38. Proposed clause 13.4 of the Existing Fund 2 Trust Deed and proposed 21.4 of the Approved Fund 2 Trust Deed will preclude balance transfers from another redundancy fund to:

- (a) a Worker's Account (following the making of the irrevocable election); or
- (b) a Genuine Redundancy Account.

Apprentice and Former Apprentice Payments Account

39. Under the Trust Deed of Existing Fund 2, Incolink is required to credit apprentice levy contributions, together with certain other funds, to a separate pooled account called the Apprentice and Former Apprentice Payments Account (clauses 4.1 and 8.1 of the Existing Fund 2 Trust Deed).

40. An apprentice is not entitled to a payment on the voluntary termination of employment.

41. An apprentice may access the Apprentice and Former Apprentice Payments Account only in circumstances of genuine redundancy as defined for taxation purposes. This is called an initial benefit. An apprentice will receive an initial benefit in the following circumstances:

- (a) on their training agreement being cancelled because of 'work shortage' where an Industrial Training Council of Victoria Supervisor is involved (clause 7.2 of the Existing Fund 2 Trust Deed); and
- (b) on their training agreement being cancelled or terminated where Incolink is satisfied that the cancellation or termination arises out of 'genuine redundancy' (clause 7.2A of the Existing Fund 2 Trust Deed).

42. Clause 7.14(2) of the Existing Fund 2 Trust Deed defines genuine redundancy as:

For the purposes of clause 7.2A, the cancellation or termination of the training agreement of an apprentice or the termination of a worker will be taken not to arise from the genuine redundancy of that person (redundant person) unless:

- (a) the cancellation or termination date is before;
 - (i) the date the redundant person attained 65 years of age; and
 - (ii) an earlier date on which the redundant person's employment would necessarily have had to terminate under the terms of his or her training agreement or employment;

- (b) there is, at the cancellation or termination date, no agreement, arrangement or understanding whether formal or informal, expressed or implied or whether or not enforceable or intended to be, between the redundant person and his or her employer, or between that employer and another person, to employ the redundant person after that date;
- (c) the cancellation or termination is not on account of any personal act or default of the redundant person; and
- (d) the cancellation or termination was initiated and implemented by the employer.

43. A payment to an apprentice will be calculated in accordance with clauses 7.5 and 7.6 of the Existing Fund 2 Trust Deed.

44. Under clause 7.10 of the Existing Fund 2 Trust Deed, an apprentice will receive an additional benefit if he or she is unemployed after four consecutive weeks provided that the Trustee is provided with evidence that the apprentice is registered with Centrelink.

45. Under clause 7.3 of the Existing Fund 2 Trust Deed, where a training agreement is terminated for any reason, the Trustee has an absolute discretion as to what benefit, if any, will be paid to the apprentice or former apprentice, if a claim is made by the apprentice or former apprentice because of extenuating circumstances. The Trustee will not exercise the discretion on the voluntary termination of employment.

46. The payment made to the Funds by employers and payments made from the Funds to a worker or apprentice from the Workers Account, Genuine Redundancy Account or Apprentice and Former Apprentice Payments Account under the terms of the Trust Deed do not include and are not in lieu of, any of the following payments in section 82-135. That is, a contribution to the Fund and a payment of a benefit from the Fund is not:

- a superannuation benefit;
- a pension or annuity payment;
- an unused annual leave payment;
- an unused long service leave payment;
- a foreign termination payment;
- a CGT exempt amount under the small business retirement exemption;
- an advance or a loan;
- an amount deemed to be a dividend;
- a capital payment for, or in respect of, personal injury;
- a capital payment for, or in respect of, a legally enforceable contract in restraint of trade;

- a commutation of a pension payable from a constitutionally protected fund wholly applied in paying superannuation contributions surcharge;
- a commutation of a pension payable by a superannuation provider wholly applied in paying superannuation contributions surcharge; or
- an amount that is assessable as part of an employee share scheme.

Ruling

Worker's Account

47. An initial benefit paid to a worker from a Worker's Account on the termination of employment under clause 6.1 of the Existing Fund 2 Trust Deed and clause 10 of the Approved Fund 2 Trust Deed is considered to be made 'in consequence of' the termination of employment of the worker.

48. If an application for the payment of the initial benefit is lodged with Incolink within 12 months of the worker becoming entitled to the payment under the terms of the relevant trust deed and the payment is made no later than the period allowed in Legislative Instrument SPR 2009/1 entitled *Employment Termination Payments Redundancy Trusts (12 month rule) Determination 2009* (SPR 2009/1), subject to any determination that the Commissioner may make, the payment will be an employment termination payment as defined under subsection 82-130(1).

49. An initial benefit paid to a worker from a Worker's Account on the termination of employment under clause 6.1 of the Existing Fund Trust Deed and clause 10 of the Approved Fund 2 Trust Deed will **not** be a genuine redundancy payment under subsection 83-175(1).

50. An additional benefit paid to a worker from a Worker's Account on the termination of employment under clauses 6.2 and 6.3 of the Existing Fund 2 Trust Deed, and clauses 10.3 and 10.4 of the Approved Fund 2 Trust Deed is considered to be made 'in consequence of' the termination of employment of the worker.

51. If an application for the payment of the additional benefit is lodged with Incolink within 12 months of the worker becoming entitled to the payment under the terms of the relevant trust deed and the payment is made no later than the period allowed in SPR 2009/1, subject to any determination that the Commissioner may make, the payment will be an employment termination payment as defined under subsection 82-130(1).

52. An additional benefit paid to a worker from a Worker's Account on the termination of employment under clauses 6.2 and 6.3 of the Existing Fund 2 Trust Deed, and clauses 10.3 and 10.4 of the Approved Fund 2 Trust Deed will **not** be a genuine redundancy payment under subsection 83-175(1).

Genuine Redundancy Account

53. An initial benefit paid to a worker from a Genuine Redundancy Account under proposed clause 6AA.5 of the Existing Fund 2 Trust Deed and proposed clause 10A.6 of the Approved Fund 2 Trust Deed on the termination of employment is considered to be made 'in consequence of' the termination of employment of the worker. However, the initial benefit will **not** be a genuine redundancy payment under subsection 83-175(1). The payment does not exceed the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of their employment at the time of dismissal. Therefore, the payment will not satisfy the second part of the condition under subsection 83-175(1).

54. An additional benefit paid to a worker from a Genuine Redundancy Account under proposed clause 6AA.6 of the Existing Fund 2 Trust Deed and proposed clause 10A.7 of the Approved Fund 2 Trust Deed on being made genuinely redundant is considered to be made 'in consequence of' the termination of employment of the worker. However, the additional benefit will **not** be a genuine redundancy payment under subsection 83-175(1). The payment does not exceed the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of their employment at the time of dismissal. Therefore, the additional benefits paid will not satisfy the second part of the condition under subsection 83-175(1).

55. Consequently, the tax-free treatment of genuine redundancy payments under section 83-170 is not available in respect of the payments made to a worker under proposed clause 6AA.5 of the Existing Fund 2 Trust Deed and proposed clause 10A.6 of the Approved Fund 2 Trust Deed.

56. As the initial benefit and additional benefits paid under proposed clauses 6AA.5 and 6AA.6 of the Existing Fund 2 Trust Deed and proposed clauses 10A.6 and 10A.7 of the Approved 2 Trust Deed are considered to be made 'in consequence of' termination of employment of the worker, they may be employment termination payments.

57. If an application for the payment of the initial benefit is lodged with Incolink within 12 months of the worker becoming entitled to the payment under the terms of the relevant trust deed and the payment is made no later than the period allowed in SPR 2009/1, subject to any determination that the Commissioner may make, the payment will be an employment termination payment as defined under subsection 82-130(1).

58. A payment paid to the legal personal representative of the worker or the dependants of the worker on the death of the worker under proposed clause 6AA.9 of the Existing Fund 2 Trust Deed and proposed clause 10A.10 of the Approved Fund 2 Trust Deed will not be a genuine redundancy payment under subsection 83-175(1). The payment is being received as a result of the death of the worker not because of genuine redundancy.

59. Payments made where the worker's employment is terminated by reason of death will be made in consequence of the termination of the employment. Such payments are considered to be death benefit termination payments (subsection 82-130(3)).

Apprentice and Former Apprentice Payments Account

60. An initial benefit paid to an apprentice from the Apprentice and Former Apprentice Payments account under clauses 7.2 and 7.2A of the Existing Fund 2 Trust Deed on being made genuinely redundant is considered to exceed the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of their employment at the time of dismissal. Therefore, the payment will satisfy the second part of the condition under subsection 83-175(1).

61. An additional benefit paid to an apprentice from the Apprentice and Former Apprentice Payments Account under clause 7.10 of the Existing Fund 2 Trust Deed on being made genuinely redundant is considered to exceed the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of their employment at the time of dismissal. Therefore, the payment will satisfy the second part of the condition under subsection 83-175(1).

62. Paragraph 82-130(1)(b) requires that a payment must be made within 12 months of the termination of employment or such later period that the Commissioner may determine. However, paragraph 82-130(1)(b) will not apply where the payment is a genuine redundancy payment (subsection 82-130(4)).

63. Also, before a payment that meets the basic redundancy requirement in subsection 83-175(1) qualifies as a genuine redundancy payment, all other conditions in section 83-175 must be met. These include:

- The payment must be made before the person turns 65 or an earlier mandatory age of retirement (paragraph 83-175(2)(a));
- The payment must be made before the end of a fixed period of employment (subparagraph 83-175(2)(a)(ii));

- The payment must not exceed an arm's length amount in the event that the employer and employee are not dealing at arm's length (paragraph 83-175(2)(b));
- There must be no stipulated arrangement to employ the person after the termination (paragraph 83-175(2)(c)); and
- The payment must not be in lieu of superannuation benefits (subsection 83-175(3)).

64. It is not possible to determine in this Ruling whether all the conditions in subsections 83-175(2) and 83-175(3) mentioned in paragraph 63 of this Ruling have been met as it would have to be determined by the relevant facts and circumstances of each case.

Commissioner of Taxation

11 August 2010

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.*

Employment termination payment

65. From 1 July 2007, payments made in consequence of the termination of a taxpayer's employment are known as employment termination payments. Where the payment is received during the life of the taxpayer it is known as a 'life benefit termination payment'. Where the payment is received after the death of the taxpayer, it is known as a 'death benefit termination payment'.

66. The term 'employment termination payment' is defined under subsection 995-1(1) as having the meaning given by section 82-130 which, in turn, states:

- (1) 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 the termination (but see subsection (4)); and
 - (c) it is *not* a payment mentioned in section 82-135.
- ...
- (4) Paragraph (1)(b) does not apply to you if:
 - (a) you are covered by a determination under subsection (5) or (7); or
 - (b) the payment is a genuine redundancy payment or an early retirement scheme payment...
- (7) The Commissioner may by legislative instrument, determine that paragraph (1)(b) does not apply to either or both of the following, as specified in the determination:
 - (a) a class of payments;
 - (b) a class of recipients of payments.

67. All of the conditions under subsection 82-130(1) are required to be satisfied in order for the payment to be treated as an employment termination payment.

In consequence of employment termination

68. The first criterion to be met is that the payment is received by the person in consequence of the termination of their employment. The phrase 'in consequence of' is not defined in the ITAA 1997. However, the words have been interpreted by the courts in several cases. The Commissioner has also issued Taxation Ruling TR 2003/13¹ which discusses the meaning of the phrase.

69. The Full High Court of Australia considered the expression 'in consequence of the termination of any employment' in *Reseck v. Federal Commissioner of Taxation*² (Reseck). The relevant issue in that case was whether amounts paid to a taxpayer by his employer at the end of two periods of employment, to which the taxpayer was entitled under an agreement between the employer and the taxpayer's union, were an allowance paid in a lump sum 'in consequence of retirement from, or the termination of, any office or employment ...'. Gibbs J concluded that the amounts were made in consequence of the termination of the taxpayer's employment. His Honour said that:

Within the ordinary meaning of the words, a sum is paid in consequence of the termination of employment when the payment follows as an effect or result of the termination ... It is not in my opinion necessary that the termination of the services should be the dominant cause of the payment ... In the present case the allowance was paid in consequence of a number of circumstances, including the fact that the taxpayer's service had been satisfactory and that the industrial agreements provided for the payment, but it was none the less paid in consequence of the termination of the taxpayer's employment.

70. Jacobs J also concluded that the amounts constituted an allowance that was paid in consequence of the termination of the taxpayer's employment. His Honour said:

It was submitted that the words 'in consequence of' import a concept that the termination of the employment was the dominant cause of the payment. This cannot be so. A consequence in this context is not the same as a result. It does not import causation but rather a 'following on'.

¹ 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'.

² (1975) 133 CLR 45; 75 ATC 4213; (1975) 5 ATR 538.

71. The different interpretations of 'in consequence of' adopted by Gibbs J and Jacobs J were considered by the Full Federal Court in *McIntosh v. Federal Commissioner of Taxation*³ (McIntosh). The matter before the court concerned a taxpayer who one week after retirement commuted part of the pension, to which he became entitled upon his retirement, into a lump sum. The commuted payment was made out of a provident fund established by a bank for the payment of benefits to bank officers on their retirement. The issue being considered by the court was whether the commuted lump sum payment came within former paragraph 26(d) of the *Income Tax Assessment Act 1936* (ITAA 1936).

72. Brennan J considered the judgments of Gibbs J and Jacobs J in *Reseck* and concluded that their Honours were both saying that a causal nexus between the termination and payment was required, though it was not necessary for the termination to be the dominant cause of the payment. Brennan J said that:

Though Jacobs J. speaks in different terms, his meaning may not be significantly different from the meaning of Gibbs J... His Honour denies the necessity to show that retirement is the dominant cause, but he does not allow a temporal sequence alone to suffice as the nexus. Though the language of causation often contains the seeds of confusion, I apprehend his Honour to hold the required nexus to be (at least) that the payment would not have been made but for the retirement.

73. In the same case, Lockhart J stated:

In my opinion, although the phrase is sufficiently wide to include a payment caused by the retirement of the taxpayer, it is not confined to such a payment. The phrase requires that there be a connection between the payment and the retirement of the taxpayer, the act of retirement being either a cause or an antecedent of the payment. The phrase used in section 26(d) is not 'caused by' but 'in consequence of'. It has a wider connotation than causation and assumes a connection between the circumstance of retirement and the act of payment such that the payment can be said to be a 'following on' of the retirement.

74. The Commissioner in TR 2003/13 considered the phrase 'in consequence of' as interpreted by the Courts. Paragraph 5 of the Ruling states:

...the Commissioner considers that 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.

³ (1979) 25 ALR 557; (1979) 45 FLR 279; 79 ATC 4325; (1979) 10 ATR 13

Received no later than 12 months after the termination

75. Paragraph 82-130(1)(b) requires that the payment must be received no later than 12 months after the termination of the employment. However, subsection 82-130(4) allows the Commissioner to determine, in writing, that paragraph 82-130(1)(b) does not apply. Under subsection 82-130(7) the Commissioner may, by legislative instrument, determine that paragraph 82-130(1)(b) does not apply.

76. SPR 2009/1 determined that paragraph 82-130(1)(b) does not apply to a payment received from a redundancy trust if:

- an application for the payment is lodged with the trustee of the redundancy trust within 12 months of the worker becoming entitled to the payment under the terms of the trust deed of the redundancy trust; and
 - the payment is made by the trustee of the redundancy trust:
 - as soon as practicable after receipt of the application for payment; or
 - no later than two years after the termination of the person's employment that led to the entitlement;
- whichever occurs earlier.

77. For the purposes of SPR 2009/1 a redundancy trust is a workers entitlement fund that was established prior to 1 April 2003 or a prescribed workers entitlement fund listed in Schedule 3 to the Fringe Benefits Tax Regulations 1992. Existing Fund 2 and Approved Fund 2 are such funds.

78. Consequently, provided an application for the payment is lodged with Incolink within 12 months of the worker becoming entitled to the payment under the terms of the relevant trust deed and the payment is made no later than the period allowed in the legislative instrument, subject to any determination that the Commissioner may make, the payment will (subject to meeting the other conditions of subsection 82-130(1)) be an employment termination payment.

Not a payment mentioned in section 82-135

79. Section 82-135 provides that certain payments are not employment termination payments. These include:

- superannuation benefits (paragraph 82-135(a));
- payments for unused annual leave or unused long service leave (paragraphs 82-135(c) and 82-135(d));
- the tax-free part of a genuine redundancy payment or an early retirement scheme payment (paragraph 82-135(e)); and
- reasonable capital payments for personal injury (paragraph 82-135(i)).

Genuine redundancy payments

80. A payment made to an employee, after 30 June 2007, is a genuine redundancy payment if it satisfies all the criteria set out in section 83-175 of the ITAA 1997. Section 83-175 of the ITAA 1997 replaces former section 27F of the ITAA 1936 where such payments were referred to as bona fide redundancy payments. Section 83-175 of the ITAA 1997 states:

- (1) A genuine redundancy payment is so much of a payment received by an employee who is dismissed from employment because the employee's position is genuinely redundant as exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of dismissal.
- (2) A genuine redundancy payment must satisfy the following conditions:
 - (a) the employee is dismissed before the earlier of the following:
 - (i) the day he or she turned 65;
 - (ii) if the employee's employment would have terminated when he or she reached a particular age or completed a particular period of service – the day he or she would reach the age or complete the period of service (as the case may be);
 - (b) if the dismissal was not at arm's length – the payment does not exceed the amount that could reasonably be expected to be made if the dismissal were at arm's length;
 - (c) at the time of the dismissal, there was no arrangement between the employee and the employer, or between the employer and another person, to employ the employee after dismissal.
- (3) However, a genuine redundancy payment does not include any part of a payment that was received by the employee in lieu of superannuation benefits to which the employee may have become entitled at the time the payment was received or at a later time.

Payments not covered

- (4) A payment is not a genuine redundancy payment if it is a payment mentioned in section 82-135 (apart from paragraph 82-135(e)).

81. All conditions under section 83-175 must be satisfied before the payment is a genuine redundancy. Failure to satisfy any of the conditions will result in the payment not being considered a genuine redundancy payment.

82. Under subsection 83-175(1), the worker must be dismissed from employment because the worker's position is genuinely redundant. The Commissioner has issued Taxation Ruling TR 2009/2⁴ which discusses the requirements for a genuine redundancy payment. Paragraphs 10 and 11 of the Ruling states:

10. Under subsection 83-175(1), a genuine redundancy payment is one 'received by an employee who is dismissed from employment because the employee's position is genuinely redundant'.

11. There are four necessary components within this requirement:

- The **payment** being tested must be **received in consequence of an employee's termination**.
- That termination must involve the employee being **dismissed from employment**.
- That dismissal must be **caused by the redundancy** of the employee's position.
- The redundancy payment must be made **genuinely** because of a redundancy.

83. Under the second part of the condition under subsection 83-175(1) only that part of the payment that exceeds the amount that could reasonably be expected to be received by the employee had the employee voluntarily terminated his or her employment at the time of dismissal will be treated as a genuine redundancy payment.

84. One of the key factors in determining whether a payment is a genuine redundancy payment is that there is a greater amount paid than what the employee could reasonably have expected to receive on voluntary termination. Paragraphs 61 to 63 of TR 2009/2 states:

61. It would generally be expected that a greater amount would be paid on redundancy than voluntary termination. This recognises the purpose of redundancy payments, being primarily to compensate for loss of non-transferable entitlements (for example accrued sick leave and accrued long service leave prior to 10 years service) and the peculiar hardship associated with being made redundant.

62. Contractual or other entitlements payable by an employer on voluntary termination are generally a sound guide as to what might reasonably be expected ...

63. There may be industry norms that could be used as a guide as to what payments would be made on voluntary termination ...

85. Therefore, the Commissioner considers that it is necessary to show how the amount an employee is entitled to be paid exceeds the amount that is payable to employees who voluntarily terminate their employment.

⁴ TR 2009/2 Income tax: genuine redundancy payments.

Payment from a Worker's Account***In consequence of the termination of employment***

86. A worker will be paid an initial benefit payment from their Worker's Account under clause 6 of the Existing Fund 2 Trust Deed and clause 10 of the Approved Fund 2 Trust Deed, if they terminate employment for any reason. It is considered that the initial benefit follows on as an effect or result of the termination of employment. The payment would not be made to the worker if he or she did not terminate employment. Therefore, the initial payment to a worker from a Worker's Account is made in consequence of the termination and satisfies either subparagraph 82-130(1)(a)(i) or 82-130(1)(a)(ii).

87. The trustee will pay a worker an additional benefit under clauses 6.2, 6.3 and 6.4 of the Existing Fund 2 Trust Deed and clauses 10.3, 10.4, 10.5 and 10.7 of the Approved Fund 2 Trust Deed, if they meet one of the following criteria:

- where a worker remains out of work for four consecutive weeks and provides evidence that they are registered with Centrelink (clause 6.2 of the Existing Fund 2 Trust Deed and 10.3 of the Approved Fund 2 Trust Deed); or
- where a worker has not worked in the Industry for 39 weeks and it has been 39 weeks since the last contribution was paid by an employer to the Fund on behalf of the worker (clause 6.3 of the Existing Fund 2 Trust Deed and 10.4 of the Approved Fund 2 Trust Deed); or
- where a worker retires from the workforce and is 55 years of age or over (clause 6.4 of the Existing Fund 2 Trust Deed and 10.5 of the Approved Fund 2 Trust Deed); or
- where a worker dies while employed, Incolink may pay the balance standing to the credit of the Worker's Account to the legal personal representative of the worker or the dependants of the worker (clause 10.7 of the Approved Fund 2 Trust Deed).

88. It is considered that the additional benefit under clause 6.2 of the Existing Fund 2 Trust Deed and clause 10.3 of the Approved Fund 2 Trust Deed follows on as an effect or result of the termination of employment. The payment would not be made to the worker if he or she did not terminate employment. Therefore, the additional benefit paid from a Worker's Account is made in consequence of the termination and satisfies either subparagraph 82-130(1)(a)(i) or 82-130(1)(a)(ii).

89. Similarly, it is considered that the benefit paid under clauses 6.3 and 6.4 of the Existing Fund 2 Trust Deed and clauses 10.4 and 10.5 of the Approved Fund 2 Trust Deed where the worker has not worked in the Industry for 39 weeks and on retirement, respectively, follows on as an effect or result of the termination of employment. Therefore, the benefit paid from a Worker's Account under these clauses is made in consequence of the termination and satisfies subparagraph 82-130(1)(a)(i).

90. In the case of the benefit paid under clause 10.7 of the Approved Fund 2 Trust Deed where the worker's employment was terminated by death of the worker, the payment will be made in consequence of the termination of the employment and satisfies subparagraph 82-130(1)(a)(ii). Such payments are considered to be death benefit payments (subsection 82-130(3)).

Received no later than 12 months after the termination

91. As noted in paragraph 76 of this Ruling, SPR 2009/1 determined that paragraph 82-130(1)(b) does not apply to a payment received from a redundancy trust if:

- an application for the payment is lodged with the trustee of the redundancy trust within 12 months of the worker becoming entitled to the payment under the terms of the trust deed of the redundancy trust; and
- the payment is made by the trustee of the redundancy trust:
 - as soon as practicable after receipt of the application for payment; or
 - no later than two years after the termination of the person's employment that led to the entitlement;

whichever occurs earlier.

92. SPR 2009/1 applies to both Existing Fund 2 and Approved Fund 2. If an application for the payment is lodged with Incolink within 12 months of the worker becoming entitled to the payment under the terms of the relevant trust deed and the initial and additional benefits are made no later than the period allowed in the legislative instrument or such greater period that the Commissioner may grant under subsection 82-130(5), then these payments will, subject to meeting the other conditions of subsection 82-130(1), be employment termination payments.

Not a payment mentioned in section 82-135

93. As stated in paragraph 46 of this Ruling, the initial and additional benefits made to a worker under the Trust Deeds does not include any of the payments listed in section 82-135. The relevant exclusion to be considered under section 82-135 for the payment from a worker's account is the tax-free part of a genuine redundancy payment.

Genuine Redundancy payment

94. An initial benefit is paid to a worker from a worker's account under clause 6 of the Existing Fund 2 Trust Deed and clause 10 of the Approved Fund 2 Trust Deed if they terminate employment for any reason. An initial benefit paid to a worker on the termination of employment for reasons other than genuine redundancy cannot be a genuine redundancy payment as described in subsection 83-175(2). Even if an initial benefit is paid in circumstances of genuine redundancy, this payment is not in excess of the amount that could reasonably be expected to be received by the worker in consequence of the voluntary termination of his or her employment at the time of dismissal. The reasons for this are explained in further detail in paragraphs 105 to 107 of this Ruling.

95. The worker will also be paid a benefit from a worker's account under clauses 6.2, 6.3 and 6.4 of the Existing Fund 2 Trust Deed and clauses 10.3, 10.4, 10.5 and 10.7 of the Approved Fund 2 Trust Deed in addition to the initial benefit after he or she terminates employment if they meet certain criteria. These include:

- where the worker remains out of work for four consecutive weeks;
- 39 weeks after the worker leaves the Industry;
- when a worker retires and is over 55 years of age; and
- on the death of a worker (payment being made to a legal personal representative of the worker or dependant of the worker).

96. Similar to the initial benefit these payments may be made on the termination of employment for reasons other than genuine redundancy. Additional benefits paid in circumstances other than redundancy cannot be genuine redundancy payments. Even if paid in circumstances of genuine redundancy, this payment is not in excess of the amount that could reasonably be expected to be received by the worker in consequence of the voluntary termination of his or her employment at the time of dismissal. The reasons for this are explained in further detail in paragraphs 105 to 107 of this Ruling.

97. Therefore, the payment of an initial benefit and additional benefit from a Worker's Account under clause 6 of the Existing Fund 2 Trust Deed and clause 10 of the Approved Fund 2 Trust Deed would not be in excess of the amount that could reasonably be expected to be received by the worker in consequence of the voluntary termination of his or her employment at the time of dismissal. Therefore, the first part of the condition under subsection 83-175(1) has not been met.

98. As one of the conditions under section 83-175 has not been met, the payment of an initial benefit and additional benefit from a Worker's Account is not a genuine redundancy payment for the purposes of section 83-175 and the exclusion under section 82-135 does not apply. Therefore, these payments are employment termination payments under section 82-130 as they are made in consequence of the termination of employment provided they are paid no later than the period allowed in SPR 2009/1.

99. As noted in paragraph 90 of this Ruling, payments made where the worker's employment is terminated by reason of death will be made in consequence of the termination of the employment. Such payments are considered to be death benefit termination payments (subsection 82-130(3)).

Payment from a Genuine Redundancy Account

100. It is proposed that the Trust Deeds be amended to insert clause 6AA.1(2) in the Existing Fund 2 Trust Deed and clause 10A.2(2) in the Approved Fund Trust Deed. The purpose of these clauses is to allow workers to irrevocably elect to change the status of their Worker's Account to a 'Genuine Redundancy Account'.

101. Once the election has been made and the Worker's Account is converted to a Genuine Redundancy Account, the worker will receive an initial benefit if their employment is terminated by reason of genuine redundancy (proposed clause 6AA.5 of the Existing Fund 2 Trust Deed and proposed clause 10A.6 of the Approved Fund 2 Trust Deed).

102. An additional benefit payable from this account can only be made where:

- the worker's employment is terminated by reason of genuine redundancy, the worker remains out of work for four consecutive weeks and provides evidence that they are registered with Centrelink (proposed clause 6AA.6 of the Existing Fund 2 Trust Deed and proposed clause 10A.7 of the Approved Fund 2 Trust Deed);

- the worker retires from the workforce, is age 55 or over and terminates employment for any reason (proposed clause 6AA.7 of the Existing Fund 2 Trust Deed and proposed clause 10A.8 of the Approved Fund 2 Trust Deed); or
- the worker's employment is terminated by death (proposed clause 6AA.9 of the Existing Fund 2 Trust Deed and proposed clause 10A.10 of the Approved Fund 2 Trust Deed).

103. Under proposed clause 6AA.10 of the Existing Fund 2 Trust Deed and proposed clause 10A.11 of the Approved Fund 2 Trust Deed, the term 'genuine redundancy' will have the same meaning given to it in section 83-175.

104. In the case of the payments made under proposed clauses 6AA.5 and 6AA.6 of the Existing Fund 2 Trust Deed and proposed clause 10A.6 and 10A.7 of the Approved Fund 2 Trust Deed, the worker only receives the payment if their employment is terminated by reason of genuine redundancy.

105. Currently in the Industries, employers make fixed weekly contributions into the Funds on behalf of each of their employees. In the structure of the Funds, the amounts that accrue to a worker are identical regardless of the kind of account in which a particular worker's entitlements are held.

106. The proposed amendments to the Trust Deeds of the Funds give a worker a choice to convert their Worker's Account into a Genuine Redundancy Account with the effect that entitlements will be paid when he or she is made genuinely redundant from employment, when he or she retires after age 55, or on death. The effect of the election is to defer payment of the entitlement if the termination of employment is not for genuine redundancy.

107. The amount that accrues to a particular worker (and therefore, becomes payable from a particular account) is in no way dependent on the nature of the termination of employment or the account to which the amounts are credited. The worker's entitlement is always to the balance of the account. There is no additional amount as contemplated by paragraphs 61 to 63 of TR 2009/2.

108. Given this, the Commissioner considers that a payment from a Genuine Redundancy Account does not exceed the amount that the worker could have expected to receive had they voluntarily terminated their employment.

109. Therefore, the initial and additional benefit paid from the Genuine Redundancy Account under proposed clauses 6AA.5 and 6AA.6 of the Existing Fund 2 Trust Deed and proposed clause 10A.6 and 10A.7 of the Approved Fund 2 Trust Deed does not meet the second part of the condition under subsection 83-175(1).

110. However, the initial benefit and additional benefits paid from the Genuine Redundancy Account under proposed clauses 6AA.5 and 6AA.6 of the Existing Fund 2 Trust Deed and the proposed clause 10A.6 and 10A.7 of the Approved Fund 2 Trust Deed will be considered to be paid in consequence of termination of employment.

111. Given this, the payments will be treated as employment termination payments for taxation purposes.

Payment on death

112. In the case of the benefit paid under proposed clause 6AA.9 of the Existing Fund 2 Trust Deed and proposed clause 10A.10 of the Approved Fund 2 Trust Deed, the legal personal representative of the worker or dependant of the worker can receive the payment where worker's employment is terminated by death. Clearly, as the termination of employment is not because of genuine redundancy, the payment cannot be a genuine redundancy payment.

113. As noted in paragraph 90 of this Ruling, payments made where the worker's employment is terminated by reason of death will be made in consequence of the termination of the employment and satisfies subparagraph 82-130(1)(a)(ii). Such payments are considered to be death benefit termination payments (subsection 82-130(3)).

Received no later than 12 months after the termination

114. As noted in paragraph 76 of this Ruling, SPR 2009/1 determined that paragraph 82-130(1)(b) does not apply to a payment received from a redundancy trust if:

- an application for the payment is lodged with the trustee of the redundancy trust within 12 months of the worker becoming entitled to the payment under the terms of the trust deed of the redundancy trust; and
 - the payment is made by the trustee of the redundancy trust:
 - as soon as practicable after receipt of the application for payment; or
 - no later than two years after the termination of the person's employment that led to the entitlement;
- whichever occurs earlier.

115. If an application for a payment from the Genuine Redundancy Account is lodged with Incolink within 12 months of the worker becoming entitled to the payment under the terms of the relevant trust deed and the initial and additional benefits are made no later than the period allowed in the legislative instrument or such greater period that the Commissioner will grant under subsection 82-130(5), then these payments will, subject to meeting the other conditions of subsection 82-130(1), be employment termination payments.

Payment from an Apprentice and Former Apprentice Payments Account

116. Under clauses 7.2 and 7.2A of the Existing Fund 2 Trust Deed, an apprentice may only receive an initial benefit from an Apprentice and Former Apprentice Payments Account if their apprentice's training agreement is cancelled or terminated because of work shortage and the Trustee of the fund is satisfied that the cancellation or termination is due to a genuine redundancy.

117. Clause 7.14(2) of the Existing Fund 2 Trust Deed defines when an apprentice's training agreement is cancelled or terminated because of genuine redundancy. The criteria under this clause is similar to that contained in section 83-175.

118. Under clause 7.10 of the Existing Fund 2 Trust Deed, an apprentice will receive an additional benefit if he or she is still out of work after four consecutive weeks.

119. An apprentice will not receive a payment if he or she terminates their employment voluntarily. The apprentice will only receive an initial and additional benefit if they terminate employment by reason of genuine redundancy.

120. Therefore, the initial and additional benefit paid from an Apprentice and Former Apprentice Payments Account meets the second part of the condition under subsection 83-175(1) in that the payment exceeds the amount that could reasonably be expected to be received by the employee had the employee voluntarily terminated his or her employment at the time of dismissal.

121. As mentioned in paragraph 80 of this Ruling, all the conditions under section 83-175 must be met. It is not possible to determine in this Ruling whether all these conditions have been met as it would have to be determined by the relevant facts and circumstances of each case.

122. Under clause 7.3 of the Existing Fund 2 Trust Deed, where a training agreement is terminated for any reason, the Trustee has an absolute discretion as to what benefit, if any, will be paid to the apprentice or former apprentice, if a claim is made by the apprentice or former apprentice because of extenuating circumstances. The Trustee will not exercise the discretion on the voluntary termination of employment.

123. This Ruling will not address the issue of payments made at the trustee's discretion.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2003/13; TR 2006/10;
TR 2009/2

Subject references:

- bona fide redundancy payments
- employment termination
- redundancy & retrenchment
- worker entitlement funds

Legislative references:

- ITAA 1936 26(d)
- ITAA 1936 27F
- ITAA 1997
- ITAA 1997 82-130
- ITAA 1997 82-130(1)
- ITAA 1997 82-130(1)(a)(i)
- ITAA 1997 82-130(1)(a)(ii)
- ITAA 1997 82-130(1)(b)
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- ITAA 1997 82-130(4)
- ITAA 1997 82-130(5)
- ITAA 1997 82-130(7)
- ITAA 1997 82-135
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- ITAA 1997 82-135(d)
- ITAA 1997 82-135(e)
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- ITAA 1997 83-175(2)(c)
- ITAA 1997 83-175(3)
- ITAA 1997 995-1(1)
- FBTAA 1986
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- Fringe Benefits Tax Regulations 1992 Sch 3
- TAA 1953
- Copyright Act 1968

Case references:

- McIntosh v. Federal Commissioner of Taxation (1979) 25 ALR 557; (1979) 45 FLR 279; 79 ATC 4325; (1979) 10 ATR 13
- Reseck v. Federal Commissioner of Taxation (1975) 133 CLR 45; 75 ATC 4213; (1975) 5 ATR 538

Other references:

- Legislative Instrument SPR 2009/1 Employment Termination Payments Redundancy Trusts (12 month rule) Determination 2009
- Australian Workers Union Asphalt Industry Certified Agreement 2009-2011
- National Metal and Engineering On-Site Construction Industry Award 1989

ATO references

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