



***TD 2014/D17 - Fringe benefits tax: when are the duties of the employment of an employee of a government body exclusively performed in, or in connection with, a public hospital or 'non-profit hospital' for the purposes of paragraph 57A(2)(b) of the Fringe Benefits Tax Assessment Act 1986?***

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## Draft Taxation Determination

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Fringe benefits tax: when are the duties of the employment of an employee of a government body exclusively performed in, or in connection with, a public hospital or ‘non-profit hospital’ for the purposes of paragraph 57A(2)(b) of the *Fringe Benefits Tax Assessment Act 1986*?

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This publication is a draft for public comment. It represents the Commissioner’s preliminary view about the way in which a relevant taxation 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.

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### Ruling

1. The duties of the employment of an employee of a government body<sup>1</sup> are exclusively performed in, or in connection with, a public hospital or a ‘non-profit hospital’<sup>2</sup> for the purposes of paragraph 57A(2)(b) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)<sup>3</sup> when the duties of employment of the employee satisfy one of the following tests:

- the duties are performed ‘in’ the hospital such that the employee performs their duties in the physical location of the hospital facility and within that facility at a place where activities are conducted that enable the hospital to carry out its functions, or
- the duties are performed ‘in connection with’ the hospital such that the employee is engaged in activities that enable the hospital to carry out its functions. These duties may be performed at places other than ‘in’ the hospital.

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<sup>1</sup> Government body is defined in subsection 136(1) and means the Commonwealth, a State, a Territory or an authority of the Commonwealth or of a State or Territory. A nominated State or Territory body is a government body under paragraph 135U(5)(c).

<sup>2</sup> A hospital carried on by a society or association that is a rebatable employer for the purpose of subparagraph 57A(2)(b)(ii) is referred to as a ‘non-profit hospital’.

<sup>3</sup> All references in this draft Taxation Determination are to the FBTAA unless otherwise stated.

2. The presence of the word ‘exclusively’ in paragraph 57A(2)(b) requires that all of the duties of the employment of the employee must be performed for the required purposes, being ‘in, or in connection with...a public hospital’ or a non-profit hospital.
3. When an employee engages in separate job positions during a year, each job position must be considered separately for the purpose of determining whether the criteria in subsection 57A(2) are satisfied.
4. Therefore, when an employee has more than one job position during the year, it is possible for subsection 57A(2) to apply to the benefits provided in respect of one of the positions even if the requirements of subsection 57A(2) are not met in relation to the other position. Refer examples 6 and 7.<sup>4</sup>

***Example 1: Cleaner performing duties ‘in’ a public hospital or a non-profit hospital***

5. *John is an employee of a nominated State Health Department.<sup>5</sup> John is employed as a cleaner at two public hospitals for five days a week. John performs all of his cleaning duties at the first hospital facility three days a week and at the second hospital facility two days a week. John’s duties require that he works in each hospital service area including general wards, public reception areas and thoroughfares between hospital service areas. John as part of his duties as an employee of the State Health Department is also seconded at intermittent times to perform cleaning duties at a nearby non-profit hospital.*
6. John performs all of his duties in a public or non-profit hospital facility and within each facility at a place where activities are conducted that enable the hospital to carry out its functions. Paragraph 57A(2)(b) is satisfied.

***Example 2: Clinical nurse performing duties ‘in, or in connection with... a public hospital’***

7. *Clare is a Clinical Nurse who is an employee of a State Government. Claire’s duties include the provision of clinical nursing and individual case management to patients of a public hospital. Clare’s duties are performed in the public hospital facility in the clinical service area and also in the homes of patients who are part of the hospital’s home management program.*
8. Clare performs all of her duties either in the hospital facility at a place where activities are conducted that enable the hospital to carry out its functions, or at a different place (the patient’s home) where Clare is engaged in activities that enable the hospital to carry out its functions.
9. Clare performs all of her duties, ‘in, or in connection with...a public hospital’. Paragraph 57A(2)(b) is satisfied.

<sup>4</sup> Under subsection 5B(1E), benefits which are exempt under subsection 57A(2) have their exemption capped to a \$17,000 grossed-up amount for each employee of a government employer. Under subsection 5B(1E), each government employer is only allowed one \$17,000 cap per employee even if the employee has multiple positions with the same employer.

<sup>5</sup> A nominated State or Territory body is taken to be the employer of the employee under subsection 135U(1).

**Example 3: Construction project manager not performing duties ‘in ... a public hospital’**

10. Dean is employed by a nominated State Department of Public Works (DPW) and his duties are performed in the role of project manager for the construction of a new hospital building. The construction site for the new building is located within the physical boundary of the Newland Public Hospital. The new hospital building is for the provision of additional public hospital services and will form part of the Newland Public Hospital.

11. Dean’s role includes working in an office performing engineering and related tasks for the construction of the new building. This office is part of a self-contained building within the physical boundary of the Newland Public Hospital. The building and immediate surrounds are fitted out with offices, office equipment, employee amenities and dedicated employee parking. The use of this building is exclusively for DPW employees who are engaged on the construction project, including Dean. Dean also performs his duties at the construction site location.

12. When Dean performs duties at the office location (and also at the construction site) he is within the physical boundary of the Newland Public Hospital facility. However, Dean does not work at a place where activities are conducted that enables the hospital to carry out its functions, either at the office location or at the construction site.

13. Dean does not perform his duties ‘in ...a public hospital’. Paragraph 57A(2)(b) is not satisfied.

**Example 4: Support officer performing duties ‘in connection with... a public hospital’**

14. Edith is an employee of a nominated State Health Department. The unit that Edith works for exclusively provides administrative support to a number of metropolitan public hospitals including for procurement of hospital goods and services and payment of suppliers. Edith performs her duties at the Department premises which is outside the physical location of a public hospital facility.

15. Edith’s duties enable the hospital to carry out its functions. Edith performs all of her duties, ‘in connection with... a public hospital’. Paragraph 57A(2)(b) is satisfied.

**Example 5: Shared services manager not performing duties ‘in connection with... a public hospital’**

16. Ahmed is the manager of a team in the Shared Services group. The Shared Services group is part of a nominated State Administrative Services Department which is Ahmed’s employer. Ahmed and his team provide information technology services to all areas of the Department of Health. The Department of Health as part of its portfolio responsibility manages public hospital services, ambulance services, public dental services and primary health care programs.

17. Ahmed’s duties do not enable a public hospital to carry out its functions. Ahmed does not perform all of his duties, ‘in connection with...a public hospital’. Paragraph 57A(2)(b) is not satisfied.

**Example 6: Employee has two concurrent jobs.**

18. Christopher is an employee of a nominated State Health Department. Christopher works for three days a week in a management position 'in or in connection with' a public hospital. On the other two days Christopher works at the Health Department premises in a separate position which is not hospital related. The two positions have separate job contracts and pay entitlements.

19. Entitlement to the subsection 57A(2) exemption is considered in relation to each separate job position. When Christopher works in a management position 'in or in connection with...a public hospital', paragraph 57A(2)(b) is satisfied. Benefits provided in relation to that position will be exempt under subsection 57A(2).

**Example 7: Employee changes jobs during the year**

20. Janet is an employee of a nominated State Health Department. Her current employment duties do not satisfy the requirements of paragraph 57A(2)(b). Janet is provided, as part of her remuneration package, the use of a car for private purposes.

21. Janet will shortly cease duties in relation to her current position. Janet will then commence duties relating to a new position as Director of Nursing at a public hospital. Janet's employer remains the State Department of Health and Janet will retain the use of the car as part of her new remuneration package.

22. Entitlement to the subsection 57A(2) exemption is considered in relation to each separate job position. Janet's new duties are exclusively performed, 'in, or in connection with, a public hospital' and paragraph 57A(2)(b) is satisfied. Subsection 57A(2) applies to the car benefits provided to Janet in respect of her Nursing position.

**Example 8: Employee seconded to corporate role**

23. Bill is employed by the nominated State Health Department. Bill is a clinician and performs duties 'in, or in connection with...a public hospital' where he works. He is seconded to the State Health Department corporate office for 4 weeks relieving in an executive management position while the incumbent is absent on annual leave. During Bill's secondment he is not performing his duties 'in, or in connection with...a public hospital'.

24. Entitlement to the subsection 57A(2) exemption is considered in relation to each separate job position. Paragraph 57A(2)(b) is not satisfied during Bill's secondment. Paragraph 57A(2)(b) is satisfied at other times.

**Example 9: CEO engaged in related activities**

25. Jim is CEO of a public hospital and is employed by a nominated State Health Department. During enterprise bargaining processes the State Health Department Director-General requests Jim to assist in the negotiations at different stages over two weeks, during which time Jim also remains as CEO of the hospital and undertakes his normal role. Enterprise bargaining involves negotiating new certified agreements for Health Department staff.

26. Jim's duties when engaged in Enterprise Bargaining are performed in the context of his hospital role which enables the hospital to carry out its functions. Jim performs all of his duties 'in, or in connection with...a public hospital'. Paragraph 57A(2)(b) is satisfied.

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**Date of effect**

27. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will 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 Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

28. It is recognised that this draft Determination takes a slightly different approach to the criteria in subsection 57A(2) to ATO Interpretative Decision 2003/40. It is not expected that this difference will have a widespread practical impact. Nevertheless, in respect of arrangements entered into before the date of this draft Determination, the Commissioner does not intend to take active compliance action to treat a benefit as not exempt from fringe benefits tax if it would have been treated as exempt under the approach in ATO Interpretative Decision 2003/40. This would include not taking active compliance action on affected salary sacrifice arrangements in place before the date of this draft Determination. We would invite comment on whether any other transitional measures are warranted.

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**Commissioner of Taxation**29 October 2014

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## Appendix 1 – Explanation

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

### Explanation

29. Subsection 57A(2) provides:

Where:

- (a) the employer of an employee is a government body; and
  - (b) the duties of the employment of the employee are exclusively performed in, or in connection with:
    - (i) a public hospital; or
    - (ii) a hospital carried on by a society or association that is a rebatable employer;
- a benefit provided in respect of the employment of the employee is an exempt benefit.

30. Paragraph 57A(2)(b) requires that the duties of the employment of the employee are exclusively performed ‘in, or in connection with’ a public hospital or a ‘non-profit hospital’.

31. The words ‘in, or in connection with’ contain two separate phrases separated by the conjunction ‘or’. This means that when considering **all** of the duties that each duty must be performed **either** ‘in’ **or alternatively** ‘in connection with’ a hospital to satisfy subparagraph 57A(2)(b).

32. An employee whose main duties are performed ‘in’...a hospital’ and whose remaining duties are performed ‘in connection with...a hospital’ will satisfy paragraph 57A(2)(b).

33. Whether the duties of employment are being performed in a particular way can be determined by reference to an employee’s statement of duties and also by examining the actual duties being performed at a particular time. A positive indicator that an employee is engaged in activities that enable a hospital to carry out its functions is where those activities are conducted under the direction, management and control of the hospital administration.

### Duties of the employment exclusively performed ‘in’ a hospital

34. Paragraph 57A(2)(b) provides that the duties of an employee are exclusively performed ‘in’ a hospital.

35. The *Macquarie Dictionary*<sup>6</sup> defines the preposition ‘in’ as including:

- 1. inclusion within space or limits, a whole, material or immaterial surroundings, etc.; *in the city, in the army, dressed in white; in politics.*

36. The word ‘in’ can take different meanings such as being within a physical space or geographical location. Alternatively, it can refer to being within immaterial limits such as being ‘in’ an organisation to which one belongs as ‘in the army’.

<sup>6</sup> The Macquarie Dictionary, 2009, rev 5th Edn, The Macquarie Library Pty Ltd, NSW.

37. In the context of paragraph 57A(2)(b), ‘in a hospital’ means that the duties of the employee are such that the employee performs their duties in the physical location of a hospital facility and in a place within that facility where activities are conducted that allow the hospital to carry out its functions.

38. For example, places such as a surgical theatre, a patient ward or a hospital administration office are clearly recognisable as being part of the hospital facility where activities are conducted that allow the hospital to carry out its functions. However, an office in a hospital building that is used for managing the construction of a new wing of the hospital will not be regarded as being a place in the hospital facility where activities are conducted that allow the hospital to carry out its functions.

39. Paragraph 57A(2)(b) can also apply where an employee of a government body exclusively performs duties ‘in’ more than one hospital.

#### **Duties of the employment exclusively performed ‘in connection with’ a hospital**

40. There will be circumstances where an employee is not performing duties ‘in’ a hospital.

41. Paragraph 57A(2)(b) provides the alternative proposition that the duties of an employee are exclusively performed ‘in connection with’ a hospital.

42. In *Collector of Customs v. Cliffs Robe River Iron Associates*<sup>7</sup> per Bowen CJ, Morling and Neaves JJ at paragraph 16:

The meaning of the word ‘connection’ is both wide and imprecise. One of its common meanings is ‘relation between things one of which is bound up with, or involved, in another’.

43. In *Health and Research Employees Association of Australia v. University of Sydney*<sup>8</sup> (*Health and Research Employees*) her honour Gaudron J examined whether an employee who was employed by the Howard Florey Institute of Experimental Physiology and Medicine was a person employed ‘in or in connection with’ the University of Melbourne. At CAR 250 her honour said:

...A more appropriate consideration is whether the employment which is claimed to be in connection with universities and/or colleges of advanced education is so bound up or involved with their activities as to be necessarily supportive of or dependant upon such activities. The Institute, as observed earlier, has a separate legal identity: the evidence does not disclose either that the activities of the Institute necessarily depend upon the activities of the University of Melbourne or alternatively that the University’s activities in any way depend upon the Institute.

44. The phrase ‘in connection with’ in the context of paragraph 57A(2)(b) has a similar meaning to that referred to in *Health and Research Employees*. The employee’s duties need to be so involved with the hospital activities such that the employee supports the operation of the hospital and conversely that the employee is dependant on the hospital to undertake their duties. Essentially the employee is engaged in activities that allow the hospital to carry out its functions. Under this test, it is not necessary that the duties of employment be performed at the physical location of the hospital facility.

45. Paragraph 57A(2)(b) can also apply where an employee of a government body exclusively performs duties ‘in connection with’ more than one hospital covered by paragraph 57A(2)(b).

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<sup>7</sup> [1985] FCA 96; (1985) 7 FCR 271.

<sup>8</sup> (1977) 183 CAR 249.



## **Duties of employment**

46. The criteria in paragraph 57A(2)(b) must be tested in respect of the employee's particular position. When an employee of a government employer changes job positions during the year or is concurrently engaged in separate positions during a period, these positions should be considered separately for the purposes of subsection 57A(2). In these circumstances where there are separate employment positions, it is possible for subsection 57A(2) to apply to the benefits provided in respect of one of the positions even if the requirements of subsection 57A(2) are not met in relation to the other position.

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## **Appendix 3 – Your comments**

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47. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

48. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on the ATO website at [www.ato.gov.au](http://www.ato.gov.au).

Please advise if you do not want your comments included in the edited version of the compendium.

<b>Due date:</b>	<b>28 November 2014</b>
<b>Contact officer:</b>	<b>Paul Voglis</b>
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<b>Address:</b>	<b>Australian Taxation Office GPO Box 9977 Sydney NSW 2001</b>

## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

- fringe benefits tax
- exempt benefits
- public hospitals
- hospitals carried on by non-profit organisations
- hospitals
- government entities

*Legislative references:*

- FBTA 1986 5B(1E)
- FBTA 1986 57A(2)

- FBTA 1986 57A(2)(b)
- FBTA 1986 57A(2)(b)(ii)
- FBTA 1986 135U(1)
- FBTA 1986 135U(5)(c)
- FBTA 1986 136(1)

*Case references:*

- Collector of Custom v Cliffs Robe River Iron Associates [1985] FCA 96; (1985) 7 FCR 271
- Health and Research Employees Association of Australia v University of Sydney (1977) 183 CAR 249

*Other references:*

- ATOID 2003/40
- The Macquarie Dictionary, 2009, rev 5th Edn, The Macquarie Library Pty Ltd, NSW

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ATO references

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