



# ***TR 2013/7 - Income tax: foreign employment income: interpretation of subsection 23AG(1AA) of the Income Tax Assessment Act 1936***

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## Taxation Ruling

### Income tax: foreign employment income: interpretation of subsection 23AG(1AA) of the *Income Tax Assessment Act 1936*

Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
What this Ruling is about	1
Ruling	5
Date of effect	75
<b>NOT LEGALLY BINDING SECTION:</b>	
Appendix 1:	
Explanation	77
Appendix 2:	
Detailed contents list	151

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## What this Ruling is about

1. This Ruling sets out the Commissioner's views on the interpretation of aspects of subsection 23AG(1AA) of the *Income Tax Assessment Act 1936* (ITAA 1936). This Ruling specifically considers:

- what is the 'delivery of Australian official development assistance by the person's employer' within the meaning of paragraph 23AG(1AA)(a)
- when foreign service is 'directly attributable' to the activities listed in subsection 23AG(1AA)
- what is a 'disciplined force' within the meaning of paragraph 23AG(1AA)(d)
- what is the meaning of 'deployment' within the meaning of paragraph 23AG(1AA)(d); and
- who is a 'member' of a disciplined force within the meaning of paragraph 23AG(1AA)(d).

2. This Ruling applies to Australian-resident individuals serving in a foreign country as an employee or office holder.
3. This Ruling does not consider terms in paragraphs 23AG(1AA)(b) or (c) and does not deal with the period of foreign service. Taxation Determination TD 2012/8 *Income tax: what types of temporary absences from foreign service form part of a continuous period of foreign service under section 23AG of the Income Tax Assessment Act 1936?* deals with breaks in foreign service.
4. All references in this Ruling are to the ITAA 1936 unless otherwise indicated.

## Ruling

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### **Delivery of Australian official development assistance by an employer**

5. 'Australian official development assistance' refers to activities or programs in respect of which the funding has been (or would properly be) classified, in whole or in part, by the Australian Government as official development assistance (ODA) for the purposes of reporting to the Organisation for Economic Co-operation and Development (OECD) Development Assistance Committee (DAC). The Australian Government bases its classification of funding as Australian ODA solely on the directives of the OECD DAC.
6. In the context of paragraph 23AG(1AA)(a) 'delivery of Australian ODA' means the act of providing, giving or sending forth the relevant Australian ODA by the employer. The 'delivery of Australian ODA by the person's employer' is the doing of the activities which are carrying out or sending forth the Australian ODA. The term 'delivery' includes activities which are necessary for or facilitate carrying out the Australian ODA. Therefore, an employer is delivering Australian ODA for the purposes of section 23AG where they are undertaking activities necessary for or which facilitate the carrying out of Australian ODA even though the expenditure on those particular activities may not be classified as Australian ODA by the Australian Government. Delivery of Australian ODA does not necessarily require an employer to undertake all activities associated with the Australian ODA.

### **Directly attributable to**

7. For the purposes of paragraphs 23AG(1AA)(a) to (c) an employee's foreign service is 'directly attributable to' the activities of the employer where the requisite activities of the employer are the immediate and controlling reason why the employee is engaged in that foreign service. Similarly, for the purposes of paragraph 23AG(1AA)(d), the foreign service of an employee deployed as a member of a disciplined force is 'directly attributable' to

that deployment where that deployment is the immediate and controlling reason why the employee is engaged in foreign service. This condition must be satisfied throughout the continuous period of foreign service in respect of which the foreign earnings are derived before the earnings can be eligible for exemption under section 23AG.

8. Where an employee is working for more than one employer at the same time, only the foreign earnings derived from the foreign service which meets the conditions in paragraph 7 of this Ruling will be eligible for exemption under section 23AG.

### **Disciplined force**

9. The phrase 'disciplined force' in paragraph 23AG(1AA)(d) refers to the Australian Defence Force (ADF), Australian Federal Police (AFP) and the State and Territory police forces.

### **Deployed**

10. A person is 'deployed' within the meaning of paragraph 23AG(1AA)(d) if, and only if, they have been directed to perform duties overseas by the Commonwealth, a State or a Territory or an authority thereof in their capacity as a member of a disciplined force. This includes the member being sent overseas to undertake or participate in study or training activities in their capacity as a member of the relevant disciplined force.

### **Member**

11. Any person subject to the strict code of conduct governing the above forces is a 'member' for the purposes of paragraph 23AG(1AA)(d). Employees of the ADF or AFP, State or Territory police forces who have undertaken the oath or affirmation required to perform operational duties are 'members'.

12. The term member includes employees referred to in paragraph 11 of this Ruling that are part of an international peacekeeping force in their capacity as an ADF, AFP or State or Territory police force member.

13. Australian Public Service (APS) and State and Territory Public Service appointees deployed alongside the disciplined force are 'members' of a 'disciplined force' where they are effectively integrated into the 'disciplined force' and are subject to the same command structure and the same rules of conduct as those persons described in paragraph 11 of this Ruling.

**Examples**

14. The following examples relate to the terms in section 23AG set out in paragraph 1 of this Ruling. Foreign earnings will only be exempt under section 23AG if all the conditions in section 23AG are satisfied. This includes considering whether, and if so, why, the foreign earnings are exempt from tax in the foreign country: see subsection 23AG(2).

***Example 1 – Department of Foreign Affairs and Trade (DFAT)<sup>1</sup> employee sent overseas as project adviser***

15. Alice, a resident of Australia for income tax purposes, is an employee of DFAT. Alice is sent to the Solomon Islands as project advisor on a project to improve the quality of early childhood education in the Solomon Islands. All expenditure on the project is reportable by DFAT to the OECD DAC as Australian ODA.

16. Alice's employer, DFAT, is delivering Australian ODA. However, because DFAT is an Australian government agency, paragraph 23AG(1AA)(a) is not satisfied. Alice's foreign earnings will not be exempt under 23AG.<sup>1A</sup>

***Example 2 – Employees of an entity contracted by DFAT to deliver Australian ODA***

17. DFAT enters into a contract for the delivery of a housing project in Papua New Guinea with B Co, a housing construction company.

18. Expenditure on the housing project is reportable by DFAT to the OECD DAC as Australian ODA.

19. B Co, the employer, is delivering Australian ODA.

20. B Co sends its employees, who are residents of Australia for income tax purposes, to work on the housing project in Papua New Guinea for a period of 6 months.

21. The foreign service of B Co's employees sent to Papua New Guinea is directly attributable to the delivery of Australian ODA by their employer.

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<sup>1</sup> As from 1 November 2013 DFAT undertake the functions previously undertaken by the former Australian Agency for International Development (AusAID). In respect of periods prior to 1 November 2013 (but covered by the date of effect of this Ruling in paragraphs 75-76), this Ruling applies to employees of the former AusAID in the same manner as it applies to DFAT employees.

<sup>1A</sup> Employers that are an Australian government agency were expressly excluded from paragraph 23AG(1AA)(a) with effect from 1 July 2016. In respect of periods prior to 1 July 2016 (but covered by the date of effect of this Ruling in paragraphs 75 to 76), Alice satisfied paragraph 23AG(1AA)(a) as her foreign service was directly attributable to the delivery of Australian ODA by her employer.

***Example 3 – Employees of an entity contracted by DFAT to provide services to workers delivering ODA***

22. DFAT enters into a contract with a security firm 'Secure Co' to provide for the security of Australian workers delivering a humanitarian program in a foreign country.

23. The funding for the humanitarian program is reportable by DFAT to the OECD DAC as Australian ODA. The program is therefore Australian ODA. Expenditure in respect of these security services is not reportable by DFAT to the OECD DAC as Australian ODA in accordance with the OECD DAC Directives.

24. However, the provision of services by Secure Co is necessary for or facilitates the Australian ODA. Therefore, Secure Co is delivering Australian ODA.

***Example 4 – Non-government organisation employees delivering a training program not related to a specific Australian ODA activity***

25. DFAT enters into a contract with Training Co to assist with the training and development of DFAT staff to allow Australia to deliver on its ODA commitments. This training and development occurs in a foreign country. The expenditure is not reportable by DFAT to the OECD DAC as Australian ODA.

26. Whilst the training has a connection to the delivery of Australian ODA, it is not itself a part of the delivery of any particular program or activity.

27. Therefore, the training and development of staff is not itself the delivery of Australian ODA.

***Example 5 – Multiple roles for the one employer***

28. DFAT enters into a contract with Australian Services Co to build water sanitation facilities in a foreign country. The expenditure on the program is reported by DFAT to the OECD DAC as Australian ODA. Australian Services Co has other business in that same country.

29. Australian Services Co sends Peter, a resident of Australia for income tax purposes, to the foreign country to build the water sanitation facilities. If Australian Services Co had not entered into the contract with DFAT, they would not have sent Peter to the foreign country. While Peter is present in that country, he is also required to perform duties in respect of Australian Service's Co unrelated business activities.

30. Notwithstanding these other tasks, the immediate and controlling reason why Peter is undertaking service in the foreign country is the delivery of the water sanitation facilities. Peter's foreign

service is therefore directly attributable to the delivery of Australian ODA by his employer.

***Example 6 – Co-funded project***

31. The Australian Government provides funding to the Government of a foreign country to support the implementation of their strategic health plan. Funding is also provided by other donor countries and global bodies. This expenditure is reportable by DFAT to the OECD DAC as Australian ODA.

32. DFAT makes their funding conditional on the appointment of an employee of Manage Co as project supervisor. Manage Co is an Australian-resident company set up to supervise and manage projects.

33. Isabel, a resident of Australia for income tax purposes and an employee of Manage Co is appointed to undertake this role. Isabel performs this work in the foreign country.

34. The delivery of Australian ODA by Isabel's employer is the immediate and controlling reason for her foreign service. Therefore, her foreign service is directly attributable to the delivery of Australian ODA by her employer.

***Example 7 – Employment changes while overseas***

35. The facts are the same as Example 6 of this Ruling, except as modified below.

36. Isabel is employed by a commercial bank in a foreign country on a full-time basis. Isabel applies for and is successful in obtaining the role of project supervisor that arises in the same country as her bank job. When taking up the position of project supervisor, Isabel ceases her employment with the commercial bank.

37. From the date of this appointment, Isabel's foreign service as an employee of Manage Co is directly attributable to the delivery of Australian ODA by her employer.

***Example 8 – Working for two employers***

38. The facts are the same as Example 7 of this Ruling, except as modified below.

39. Isabel is appointed as the project supervisor on a part-time basis and is able to continue her role in the bank also on a part-time basis.

40. Hence, Isabel has two employers one of which (Manage Co) is delivering Australian ODA.

41. In respect of Isabel's employment with Manage Co, her foreign service is directly attributable to the delivery of Australian

ODA by her employer. Therefore, her foreign earnings from this foreign service will be exempt, subject to satisfying the remaining conditions in section 23AG. Conversely her earnings from the bank would not be exempt.

***Example 9 – Same employer with two roles***

42. The Australian Government contributes funds to an overseas micro finance bank as part of an ODA program to provide development loans to local communities in Papua New Guinea. This expenditure is reportable by DFAT to the OECD DAC as Australian ODA. This contribution forms part of the pool of funds available to be lent. The bank also makes loans for purely commercial reasons separate to its role in the Australian ODA program.

43. Mary, a resident of Australia for income tax purposes, is appointed to oversee the distribution of all the funds of the bank, including those received from the Australian Government. Mary undertakes this work in Papua New Guinea.

44. The bank specifically needed to employ Mary in order to deliver the Australian ODA component. Although Mary's role is broader than just the delivery of the Australian ODA, this is the immediate and controlling reason for her employment.

45. As the immediate and controlling reason for Mary's foreign service is the delivery of Australian ODA by her employer, her foreign service is directly attributable to the delivery of Australian ODA by her employer.

***Example 10 – Employee of an organisation funded by multiple governments***

46. The Australian Government contributes funds to an international development fund in furtherance of the Australian Government's overseas aid program. This expenditure is reportable by DFAT to the OECD DAC as Australian ODA. The fund also receives contributions from other OECD donor countries. The funding from all countries is pooled.

47. Bill is a resident of Australia for income tax purposes and is employed in a foreign country as managing director of the international development fund. As managing director, Bill oversees the entire operation of the fund, which includes overseeing how each country's ODA contribution is spent.

48. Bill's employer is delivering an aspect of Australian ODA in that the employer is carrying into effect Australia's contribution to development efforts in specific countries. However, Bill's foreign service is not directly attributable to this. The immediate and controlling reason for his foreign service is his employment as the managing director of the development fund. The receipt of the funding in furtherance of the Australian aid program, and the subsequent



oversight of those funds, is not the immediate and controlling reason why Bill is engaged in his foreign service. Bill's foreign earnings will not be exempt under section 23AG.

**Example 11 – Australian Federal Police deployed overseas**

49. Catherine, a resident of Australia for income tax purposes, is a member of the AFP within the meaning of the *Australian Federal Police Act 1979* (AFP Act 1979) and is sent by the AFP as part of the Regional Assistance Mission to Solomon Islands (RAMSI).

50. Catherine has been 'deployed as a member of a disciplined force' for the purposes of paragraph 23AG(1AA)(d).

51. Similarly if Catherine was employed by the New South Wales Police Force and was designated as a police officer within the meaning of section 11 of the *Police Act 1990* (NSW), she would also be 'deployed as a member of a disciplined force'.

**Example 12 – APS employee acting in a support role to ADF**

52. Doug, a resident of Australia for income tax purposes, is employed by the Department of Defence as an APS employee.

53. Doug is deployed alongside ADF personnel to play an operational support role in a foreign country.

54. Doug has signed an official ADF document which states that he is subject to defence force discipline during the course of his deployment giving Doug the status of 'defence civilian' under the *Defence Force Discipline Act 1982*. Therefore, for the duration of this deployment, Doug is under the command of the ADF.

55. As Doug is working under identical conditions to ADF personnel, is subject to the same code of conduct and working under the same command structure for the duration of the deployment he is considered to be a member of a disciplined force under paragraph 23AG(1AA)(d).

**Example 13 – Contractor's employees acting in a support role to ADF**

56. The Australian Government enters into a contract with Service Co to provide support services to the ADF overseas. In this particular case the ADF is not delivering Australian ODA. The contract provides that Service Co's employees are to sign an official ADF document stating they are subject to defence force discipline during the course of the deployment giving them the status of 'defence civilians' under the *Defence Force Discipline Act 1982*. The contract also specifically provides that the employees are not deemed to be employees of the Commonwealth by virtue of the contract.

57. The employees of Service Co, while members of a disciplined force for the purposes of paragraph 23AG(1AA)(d), have not been deployed by the Commonwealth, a State or Territory (or an authority thereof). Their earnings are therefore not exempt under section 23AG.<sup>2</sup>

***Example 14 – AFP employee who is not a member of the AFP***

58. Emma, a resident of Australia for income tax purposes, is an AFP appointee who is not a 'member' within the meaning of the *AFP Act 1979*. Emma is deployed to a foreign country alongside AFP appointees who are 'members' within the meaning of that Act as part of the RAMSI.

59. Emma is, due to the conditions of her deployment, subject to the same operating conditions and command structure as the members she is working alongside.

60. Therefore, Emma is considered to be a 'member of a disciplined force' for the purposes of paragraph 23AG(1AA)(d).

***Example 15 – ADF member posted overseas***

61. Kylie, a resident of Australia for income tax purposes, is a member of the ADF within the meaning of the *Defence Act 1903*. Kylie receives a posting order to relocate to a foreign country in order to support a project between Australia and the foreign country.

62. Kylie is sent to a foreign country for 12 months commencing 1 July 2012.

63. As a member of the ADF, Kylie is a member of a disciplined force. As Kylie has been directed to perform duties outside Australia by the ADF in her capacity as a member of the ADF, she has been deployed by the Commonwealth for the purposes of paragraph 23AG(1AA)(d).

***Example 16 – AFP member delivering training overseas***

64. Tim, a resident of Australia for income tax purposes, is a member of the AFP within the meaning of the *AFP Act 1979* and is sent to a foreign country by the AFP as part of the United Nations (UN) Mission (UN Mission) in that country.

65. Tim and other UN Mission members provide support in a number of areas including delivering training to assist in building a professional police service.

66. As a member of the AFP, Tim is a member of a disciplined force.

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<sup>2</sup> However, if the ADF was delivering Australian ODA, the position in respect of the employees of the contractor may be different – see Example 5 of this Ruling.

67. As Tim has been directed to perform duties overseas by the AFP in his capacity as a member of the AFP, he has been deployed by the Commonwealth for the purposes of paragraph 23AG(1AA)(d).

### ***Example 17 – ADF member undertaking language studies overseas***

68. Mark is a resident of Australia for income tax purposes and a member of the ADF within the meaning of the *Defence Act 1903*.

69. He is sent to a foreign country for 16 months for full-time advanced language studies. His study is to be undertaken at that country's Navy Command and Staff College.

70. During this time he has no official duties other than to study. He continues to receive his salary and allowances, including an overseas living allowance.

71. As Mark has been directed to perform duties overseas by the Royal Australian Navy in his capacity as a member of the Royal Australian Navy, he has been deployed as a member of a disciplined force by the Commonwealth for the purposes of paragraph 23AG(1AA)(d).

### ***Example 18 – ADF member of an international peacekeeping force***

72. Alex is a resident of Australia for income tax purposes. Alex is not a member of the ADF or of any of the Australian police services. Alex successfully applies for employment with an international peacekeeping force in a foreign country.

73. The international peacekeeping force is not delivering Australian ODA. Certain nations, including Australia, are a party to the international peacekeeping force and provide military contingents that make up the peacekeeping force and perform specific and specialised tasks.

74. Alex has not been deployed by the Commonwealth, a State or a Territory or an authority thereof. His earnings from this employment are therefore not exempt under section 23AG.

## **Date of effect**

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75. Subject to paragraph 76 of this Ruling, this Ruling applies to years of income commencing both before and after its date of issue. 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 *Public Rulings*).

76. This Ruling does not apply to:

- (a) foreign earnings derived before 1 July 2009 from foreign service performed before, on or after 1 July 2009; and
- (b) foreign earnings derived on or after 1 July 2009 from foreign service performed before 1 July 2009.

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**Commissioner of Taxation**

27 November 2013

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## 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.*

77. Section 23AG provides an exemption from Australian income tax:

- for certain foreign earnings derived by a resident individual;
- from a continuous period of foreign service of at least 91 days;

if:

- the foreign service is directly attributable to certain activities which are listed in subsection 23AG(1AA); and
- all of the other requirements of section 23AG are satisfied.

78. Subsection 23AG(1AA) provides that the foreign earnings are exempt only if the continuous period of foreign service is 'directly attributable to' any of the following:

- (a) the delivery of Australian ODA by the person's employer, except if that employer is an Australian government agency<sup>2A</sup>;
- (b) the activities of the person's employer in operating a public fund
  - (i) declared by the Minister<sup>2B</sup> to be a developing country relief fund; or
  - (ii) established and maintained by a registered public benevolent institution solely to provide monetary relief to people who are distressed as a result of a disaster,
- (c) the activities of the person's employer, if the employer is exempt from income tax because they are a prescribed institution located outside Australia or pursuing objectives principally outside Australia and meets certain other conditions;

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<sup>2A</sup> The exception for Australian government agencies was inserted with effect from 1 July 2016, as per the *Tax and Superannuation Laws Amendment (2015 Measures No. 4) Act 2015*.

<sup>2B</sup> Subsection 30-80(1) was amended by the *Tax and Superannuation Laws Amendment (2014 Measures No. 4) Act 2014* to substitute 'Minister' for 'Treasurer', effective from 16 October 2014.

- (d) deployment outside Australia as a member of a disciplined force;
- (e) any activity of a kind specified in the regulations.

### **Delivery of Australian ODA by an employer**

79. Paragraph 23AG(1AA)(a) provides that foreign earnings are exempt under subsection 23AG(1) if the continuous period of foreign service is directly attributable to the delivery of Australian ODA by the person's employer, except if that employer is an Australian government agency.<sup>2C</sup>

80. The term 'Australian ODA' is not defined for the purposes of section 23AG.

81. The term 'official development assistance' (ODA) is a term used in international standards developed by the OECD DAC as a measure of government aid that promotes and specifically targets the economic development and welfare of developing countries.<sup>2D</sup> The OECD DAC is an international forum of providers of aid, including 30 members.<sup>2E</sup> The OECD DAC tracks and monitors ODA so that individual donor efforts are measured alongside the wider array of resources that are available to developing countries. It informs donors about where aid should be targeted, and provides a clearer picture of the resource flows available to developing countries.<sup>2F</sup>

82. The OECD DAC sets out what is reported as ODA and defines ODA<sup>5A</sup> as:

flows to countries and territories on the [DAC List of ODA Recipients](#) [(developing countries)] and to [multilateral development institutions](#) which are:

- i. provided by official agencies, including state and local governments, or by their executive agencies; and

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<sup>2C</sup> Australian government agency is defined in section 995-1 of the *Income Tax Assessment Act 1997* as '(a) the Commonwealth, a State or Territory; or (b) an authority of the Commonwealth or of a State or a Territory.'

<sup>2D</sup> See <https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/official-development-assistance.htm>

<sup>2E</sup> Australia is a member of the DAC, which sets the international standard for defining and recording ODA. Members are required to report the provision of ODA to the DAC – see <http://www.oecd.org/dac/development-assistance-committee/>

<sup>2F</sup> See <https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/>

<sup>3</sup> [Omitted.]

<sup>4</sup> [Omitted.]

<sup>5</sup> [Omitted.]

- ii. each transaction of which:
  - a) is administered with the promotion of the economic development and welfare of developing countries as its main objective; and
  - b) is concessional in character [(as set out in the Directives)].

83. The OECD DAC Secretariat collects aid statistics using OECD Methodology.<sup>5B</sup> All donor countries should report data on the same basis as set out in the *Converged statistical reporting directives for the creditor reporting system (CRS) and the annual DAC questionnaire* (the DAC Directives).<sup>5C</sup>

84. Therefore, the term 'ODA' can be said to have a very precise meaning founded in the DAC Directives. Each country that is a member of the OECD DAC is required to follow these DAC Directives in reporting their ODA flows to the OECD DAC.<sup>7A</sup> This allows comparison between donor countries based on ODA flows.

85. Australia is a member of the OECD DAC, and from 1 November 2013 DFAT is the lead agency in delivering Australia's aid program. Prior to 1 November 2013 the lead agency was the Australian Agency for International Development (AusAID).<sup>8</sup>

86. DFAT is also the Australian body which ultimately determines whether Australian Government expenditure represents ODA and reports on such projects to the OECD. In undertaking this reporting, DFAT must follow the DAC Directives.

87. Strictly speaking, therefore, 'Australian ODA' can be said to encompass only the Australian Government's ODA flows.

88. However, section 23AG refers to 'the *delivery* of Australian ODA *by the person's employer...*' (emphasis added). The term 'delivery' is also not defined. The Australian Oxford Dictionary defines 'delivery' to include the act of giving or surrendering, a distribution (letters). The Macquarie Dictionary defines 'delivery' to include the

<sup>5B</sup> See <https://www.oecd.org/development/stats/methodology.htm>

<sup>5C</sup> See [DCDDAC\(2016\)3FINAL.pdf \(oecd.org\)](#). These directives, dated 8 April 2016, implement the new grant system in reporting on ODA. In 2012, the DAC commenced a modernisation project which saw clarifications of eligibility rules over 2016-2018, and in 2019 the grant equivalent system became the standard for measuring ODA (previously it was a cash-flow system). Further changes are being made over the years to keep the DAC statistical system fit-for-purpose with the 2030 agenda. See <http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/modernisation-dac-statistical-system.htm>

<sup>6</sup> [Omitted.]

<sup>7</sup> [Omitted.]

<sup>7A</sup> 'ODA flows' is a defined term in paragraph 60 of the *Converged statistical reporting directives for the creditor reporting system (CRS) and the annual DAC questionnaire*.

<sup>8</sup> See for example AusAID (2012), *OECD DAC Peer Review of Australia, 2013: Memorandum*, Canberra, pp. 2-3.

<sup>9</sup> [Omitted.]

delivering of letters, goods, etcetera; a giving up or handing over; and the act or manner of giving or sending forth.

89. The person's employer cannot be said to be delivering ODA flows as such. Thus, section 23AG is referring to the activity or program delivered by the employer (which may not necessarily be DFAT or another Australian government agency) in respect of which the funding is reportable (in whole or in part) by DFAT to the OECD DAC as Australian ODA.

90. The DAC Directives are very detailed and precise in terms of what can and cannot be reported as ODA. In respect of certain activities or programs undertaken in or for developing countries not all of the Australian Government funding for those activities or programs may be eligible to be reported as ODA. For example, the salary and wage income of employees working on the program may not be eligible to be reported as ODA or only a percentage may be eligible to be reported as ODA.

91. This does not mean that the person's employer is not delivering Australian ODA. It then becomes a question of whether the employee's foreign service is 'directly attributable' to the delivery of Australian ODA by their employer.

92. Furthermore, a person's employer may be said to be delivering Australian ODA where they are performing services which are necessary for or facilitate the Australian ODA (for example by way of support services provided to other Australian employees who are directly engaged on the ODA eligible program). Even though expenditure in relation to these services may not be reportable as ODA (not representing a flow promoting the economic development or welfare of the developing country as such), the employer is still delivering Australian ODA for the purposes of section 23AG as they are part of the 'handing over' or 'sending forth' of Australian ODA.

93. However, the services must be provided in respect of an activity or program which is Australian ODA. As well, the employer cannot be an Australian government agency<sup>9A</sup>, but it can be an entity contracted by DFAT or another Australian government agency to deliver the Australian ODA.

94. This is the reason why the employer in Example 3 of this Ruling can be said to be delivering Australian ODA for the purposes of paragraph 23AG(1AA)(a). The employer is not providing the Australian ODA itself, and the expenditure on its services will not be ultimately reported as Australian ODA by the Australian Government through DFAT (as the services are provided in respect of Australian residents, not to the developing country). However, the employer is nonetheless providing services which are necessary for or facilitate the program funded, at least to some extent, by Australian ODA. The employer is therefore delivering Australian ODA within the meaning of section 23AG. In comparison, the employer in Example 4 of this

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<sup>9A</sup> From 1 July 2016.



Ruling is not providing services in respect of a specific Australian ODA activity. The services provided are more general in nature and cannot be said to constitute the 'delivery' of Australian ODA.

95. What Example 3 of this Ruling also shows is that to come within paragraph 23AG(1AA)(a), the employer need not necessarily be delivering the aid directly. The services they provide under a particular contract may nonetheless qualify as the *delivery* of Australian ODA where those services are provided in respect of an Australian ODA program. Thus, the employer need not itself undertake all the activities required to deliver the project to meet the statutory description of 'delivery of Australian ODA'.

***Ascertaining whether or not the employer is delivering Australian ODA***

96. [Omitted.]

97. Paragraph 23AG(1AA)(a) requires the employer to be delivering the Australian ODA. It, however, does not require that an Australian government agency by the employer actually delivering the Australian ODA or in fact that a government agency be directly involved. In fact, from 1 July 2016, paragraph 23AG(1AA)(a) stipulates that the employer cannot be an Australian Government agency for subsection 23AG(1AA) to be satisfied. The employer may be a contractor (contracted by an Australian government body on behalf of the Australian Government to assist in the delivery of the Australian ODA) or sub-contractor (contracted by the contractor previously identified, to assist in the delivery of the Australian ODA).

98. This is consistent with the Explanatory Memorandum (EM) to the Tax Laws Amendment (2009 Budget Measure No. 1) Bill 2009 (Cth) which provides the following:

1.20 In addition to providing Australian ODA directly, AusAID also competitively contracts aid work to Australian and international entities. Thus, in practice, individuals involved in the delivery of Australian ODA can include both Australian Public Service (APS) employees and non-APS employees.

1.21 For the purposes of subsection 23AG(1AA) the delivery of Australian ODA must be undertaken by the person's employer, which includes AusAID and an entity contracted by AusAID to assist in the delivery of Australian ODA.<sup>9B</sup>

99. Where the employer has a contract with DFAT, the contract would normally specify what the funds provided by DFAT are for. This should permit a sufficient basis to determine whether or not the services constitute the delivery of Australian ODA.

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<sup>9B</sup> From 1 July 2016, paragraph 23AG(1AA)(a) is limited to employees of non-Australian government agencies only. The Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2015 Measures No. 4) Bill 2015 states that the amendment:... ensure[s] that all employees of an Australian government agency are treated equally in that they will now all be subject to income tax on overseas income they have earned in the delivery of ODA.

100. Where the employer has a sub-contract with a head contractor, it may be more difficult to ascertain. In this instance reliance must be placed on the sub-contract and head contract.

101. There are, however, two things that employers and employees can look to in the first instance. Firstly, if the relevant activity is not in or in respect of a developing country<sup>10</sup>, there will be no program or activity which can be said to be Australian ODA. Secondly, if the relevant activity is not ultimately connected to an activity undertaken by or funded by the Australian Government, it also cannot be Australian ODA.

102. Further guidance can be found in the nature of the programs and expenditure set out in Australia's International Development Assistance Program and in particular the budget funding that program. The Government's commitment to the Official Development Assistance Budget is described in the Minister for Foreign Affairs' Budget ministerial statement delivered on Budget night each year. That document goes on to describe various programs and initiatives.<sup>11</sup> It would normally be the case that expenditure on programs forming part of the overseas aid program would be Australian ODA.

### **'Directly attributable to'**

103. The term 'directly attributable to' is not defined for the purpose of section 23AG. The words 'attributable to' have commonly been interpreted to require a causal connection. For example, in *Commissioner of Taxation (Cth) v Sun Alliance Investments Pty Ltd (in liquidation)*<sup>12</sup>, the High Court said:

It is the concept of causation, rather than source, with which s 160ZK(5) is concerned. In determining whether the plaintiff's loss of employment was "attributable to" the provisions of the *Local Government Act 1972* (UK), Donaldson J in *Walsh v. Rother District Council* said:

"[T]hese are plain English words involving some causal connection between the loss of employment and that to which the loss is said to be attributable. However, this connection need not be that of a sole, dominant, direct or proximate cause and effect. A contributory causal connection is quite sufficient."

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<sup>10</sup> The OECD DAC determines which countries qualify as developing countries. The list of developing countries (the DAC list of ODA Recipients) is available from <https://www.oecd.org/development/financing-sustainable-development/development-finance-standards/daclist.htm>. This list is reviewed regularly by the OECD DAC and countries may be added or removed.

<sup>11</sup> See also AusAID 2012, *An Effective Aid Program for Australia Making a real difference – Delivering real results*, Canberra; AusAID 2012, *Helping the World's Poor through Effective Aid: Australia's Comprehensive Aid Policy Framework to 2015-16*, Canberra.

<sup>12</sup> [2005] HCA 70.

104. In *Repatriation Commission v. Law*<sup>13</sup>, the Full Federal Court said '[i]t seems clear that the expression "attributable to" in each case involves an element of causation.'

105. The addition of the word 'directly' describes the quality that connection must have.

106. The High Court, in *Commissioner of Taxation (Cth) v Dixon*<sup>14</sup>, said of the phrase 'directly or indirectly' in former paragraph 26(e) that 'in relation directly... to, any employment' means '... where the employment is the proximate cause of the payment ...'. Conversely, an indirect relation was '... one where the employment is a cause less proximate or, indeed, only one contributory cause.'<sup>15</sup>

107. Paragraphs 23AG(1AA)(a) to (c) require that it is the 'foreign service' that must be directly attributable to the listed activities of the person's employer. The term 'foreign service' is defined in subsection 23AG(7) to mean 'service in a foreign country as the holder of an office or in the capacity of an employee'. Thus, in this context, foreign service is directly attributable to the activities of the employer where the requisite activities of the employer are the immediate and controlling reason why the employee is engaged in that foreign service. Similarly, for the purposes of paragraph 23AG(1AA)(d), the deployment as a member of the disciplined force must be the immediate and controlling reason for the member's foreign service (as a member). This condition must be satisfied throughout the continuous period.

108. Where the employee has been sent overseas by their employer to deliver an aspect of Australian ODA that their employer has responsibility for delivering, it is clear that the employee's foreign service is directly attributable to the delivery of Australian ODA by their employer.

109. However, the position is less clear where the employee performs multiple roles, has more than one employer or was already present in the foreign country.

110. In these circumstances the enquiry is answered by looking to the main (controlling) and most proximate (immediate) reason why the employee is engaged in that foreign service. This test will not be satisfied where the activities of the employer are merely a contributory cause to the employee being engaged in foreign service – the reason must be the most immediate cause.

111. Thus, in Example 7 of this Ruling, Isabel is already present in the foreign country when she becomes the project supervisor. However, the immediate and controlling reason for her *continued* foreign service, from the date of this employment, is the delivery of Australian ODA by her employer. Her foreign earnings from the time

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<sup>13</sup> [1980] FCA 92; (1980) 31 ALR 140 at 151.

<sup>14</sup> [1952] HCA 65.

<sup>15</sup> See also *Coxe v Employers' Liability Assurance Corporation, Limited* [1916] 2 KB 629, per Scrutton J at 634.

of her employment as project supervisor onward will therefore, subject to meeting the other requirements in section 23AG, qualify for exemption. Specifically, she must be engaged in that employment (the foreign service) for a continuous period of not less than 91 days before her earnings can qualify for exemption under section 23AG.

112. Similarly, in Example 5 of this Ruling, notwithstanding the other tasks Peter is required to perform while in the foreign country and which do not relate to Australian ODA, the immediate and controlling reason Peter is undertaking service in the foreign country is the delivery of the water sanitation facilities (the Australian ODA) by his employer. It is the most immediate reason for his foreign service. The whole of Peter's foreign earnings from this foreign service will therefore be exempt providing the other conditions in section 23AG are satisfied.

113. The result would be the same if Peter was already present in the foreign country and commenced work on the water sanitation facilities provided that the immediate and controlling reason for his continued presence is the building of those facilities. The foreign service from the point of commencing this work is directly attributable to the delivery of Australian ODA by Peter's employer.

114. However, the test would not be satisfied if Peter was sent to primarily undertake functions related to the non-Australian ODA component of the employer's functions and was asked to perform duties from time to time in respect of the water sanitation project. In these circumstances, none of the foreign earnings would be eligible for exemption.

115. In Example 10 of this Ruling, the delivery of Australian ODA is but one part of the international development fund's activities, which are carried out in respect of the combined funds. The delivery of the Australian ODA by the fund in this instance is not the immediate and controlling reason for Bill being engaged in foreign service. Bill is engaged as a result of the fund's activities in respect of all its projects and just because a portion of the funding comes from the Australian Government does not mean that Bill's foreign service then becomes directly attributable to the delivery of Australian ODA.

116. Similarly, an employee working overseas for a multi-lateral organisation, for example a Development Bank which is in receipt of Australian aid, will not qualify for exemption. Their most immediate reason for their foreign service is not the delivery of Australian ODA by their employer. However, if the employee is sent overseas to specifically oversee the distribution of these funds, as in Example 9 of this Ruling, this foreign service would be directly attributable to the delivery of Australian ODA by their employer.

117. Where an employee works for two separate employers, each employment must be separately considered to determine whether it constitutes foreign service which is directly attributable to one of the activities listed in subsection 23AG(1AA). As noted in this Ruling, 'foreign service' is defined as service in the foreign country 'as the holder of *an* office or in the capacity of *an* employee' (emphasis

added). This definition can be applied in respect of each employment relationship separately such that there is a period of foreign service in respect of each employment. Thus, if the foreign service in respect of the employer who is delivering ODA is directly attributable to that delivery of ODA by that employer, the foreign earnings from that foreign service qualify (providing the other conditions in section 23AG are met). However, the foreign earnings in respect of another employer, who is not delivering Australian ODA, do not qualify.

### ***Paragraph 23AG(1AA)(d)***

118. Paragraph 23AG(1AA)(d) provides that foreign earnings from foreign service directly attributable to the following are exempt:

the person's deployment outside Australia as a member of a disciplined force by:

- (i) the Commonwealth, a State or a Territory; or
- (ii) an authority of the Commonwealth, a State or a Territory.

119. The requirements in paragraph 23AG(1AA)(d) can be set out as follows:

- the person engaged in foreign service must be 'a member of a disciplined force'; and
- that person must be deployed by the Commonwealth, a State or Territory or an authority thereof in their capacity as a member of a disciplined force.

### ***Meaning of 'disciplined force'***

120. The meaning of 'discipline' in the Australian Oxford Dictionary is:

*noun*

1. control or order exercised over people or animals, especially children, prisoners, military personnel, church members etc.
  - The system of rules used to maintain this control.
  - The behaviour of groups subjected to such rules: *poor discipline in the ranks.*

121. Macquarie Dictionary defines the term, as relevant:

*noun*

1. Training to act in accordance with rules; drill: *military discipline.*
- ...
5. Subjection to rules of conduct of behaviour; a state of order maintained by training and control: *good discipline in an army.*
6. A set or system of rules and regulations.

122. The Australian Oxford Dictionary defines 'force' as relevant:

*noun*

3. Military strength.

- [in *pl.*] troops; fighting resources.
- An organised body of people, especially soldiers, police or workers.

123. The Macquarie Dictionary defines the term in a similar manner.

124. Thus, the combined phrase 'disciplined force' can be said to have a meaning specifically linked to the military. However, paragraph 23AG(1AA)(d) is not limited to military personnel. In this regard, assistance is provided by the broader statutory context (see *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation*).<sup>16</sup> Specifically, subject to certain conditions, section 23AD exempts the pay and allowances earned on overseas duty of a person serving as a 'member of the Defence Force'. The use of capitals indicates that the words 'Defence Force' derive their meaning from the *Defence Act 1903* and so refers to persons appointed or enlisted as members of the Australian Navy, Army and Air Forces within section 30 of that Act.<sup>17</sup> Accordingly, the use of a different phrase in lower case in paragraph 23AG(1AA)(d) – 'disciplined force' – suggests that it has a broader meaning and is not confined to Defence Force members.

125. However, while the term 'disciplined force' is not limited to military forces, neither is it correct to say that it can encompass any group of persons subject to a system or code of common rules.

126. In *New South Wales v Fahy*<sup>18</sup>, Gleeson CJ observed of the *Police Service Act 1990* (NSW):

Read as a whole, the *Police Service Act* demonstrated that the evident purpose of the legislation was, as may be expected, to create an hierarchical and disciplined force. Chief among the statutory provisions giving effect to that purpose was s 201 which made it a criminal offence for a police officer to neglect or refuse either to obey any lawful order or to carry out any lawful duty as a police officer.<sup>19</sup>

127. In *White v Director of Military Prosecutions*,<sup>20</sup> Kirby J said, of the defence forces:

It is of the nature of naval and military (and now air) forces that they must be subject to elaborate requirements of discipline. This is essential both to ensure the effectiveness of such forces and to provide the proper protection for civilians from service personnel who bear, or have access to, arms.<sup>21</sup>

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<sup>16</sup> [1981] HCA 26.

<sup>17</sup> See *Case T39* (1986) 29 CTBR (NS) 379; 86 ATC 330.

<sup>18</sup> [2007] HCA 20.

<sup>19</sup> [2007] HCA 20 at paragraph 21.

<sup>20</sup> [2007] HCA 29.

<sup>21</sup> [2007] HCA 29 at paragraph 152.

128. These passages show that the discipline to which the employees are subject must be more demanding and severe than that to which other groups of employees are subject to meet the description of 'disciplined force'. They further show that the discipline existing in the military and police setting governing those charged with the responsibility of performing the defence or operational policing functions is of the requisite degree to satisfy the description of 'disciplined force'.

129. This is confirmed by the statutory context. The phrase appears as part of the composite phrase 'deployment ...as a member of a disciplined force'. The word 'deploy', is referring to the act of sending into effective action by the person's employer. It is commonly used in police and military settings. The term 'member' denotes someone specifically appointed to a readily identifiable group of people. While these two terms are also capable of wider application, their combination with the phrase 'disciplined force' is highly suggestive of the paragraph being limited to military and police services.<sup>22</sup>

130. Limiting paragraph 23AG(1AA)(d) to the armed services is consistent with the language used in the EM and the Second Reading Speech. The EM contains the following statements:

1.31 A person's foreign earnings will be eligible for exemption if the foreign service is directly attributable to that person's deployment outside Australia as a member of a disciplined force by an Australian government or an authority thereof. A disciplined force is intended to refer to a defence force, including a peacekeeping force, and a police force.

1.32 In a defence force context, the exemption would apply to a person's deployment outside Australia as part of a non-warlike operation. In a police force context, the exemption would apply to Australian Federal Police employees deployed on an International Deployment Group mission who are subject to Commanders Orders to achieve operational policing outcomes.

131. In the Second Reading Speech to the Tax Laws Amendment (2009 Budget Measures No 1) Bill 2009 in the House of Representatives it was relevantly stated:

From 1 July 2009, an exemption will apply to income earned as an aid worker, a charitable worker or under certain types of government employment such as a defence or police deployment. It will also apply to income earned as prescribed under regulations.

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<sup>22</sup> While employees of other organisations can be said to be subject to a disciplinary code, these other disciplinary codes are not to the same level or extent of the code to which military and police personnel are subject. For example, in *Mines Rescue Board of NSW v. Singleton Council* [1998] NSWCA 144, Meagher JA referred to officers of the Mines Rescue Board as forming a 'disciplined force' (at 5). In *R v. Industrial Appeals Court and the Fire Fighters Board; Ex parte The Metropolitan Fire Brigades Board and the Country Fire Authority* [1959] VR 345 Dean J referred to the fire brigades as a 'disciplined force' (at 356). However, the courts, in both cases, were not interpreting the phrase 'disciplined force' and nothing turned on this phrase. It was merely used as a descriptor.

*Meaning of 'deployment'*

132. The term 'deployment' is not defined in the Act. The term 'deploy' is defined in the *Australian Oxford Dictionary* (2<sup>nd</sup> ed), as:

1. (Mil.) [*tr.*] cause (troops) to spread out from a column into a line.

[*intr.*] (of troops) spread out in this way.

2. [*tr.*] bring (arguments, forces, etc.) into effective action.

133. So, according to the dictionary, the word 'deploy' has both a specific meaning, linked specifically to a military context, and a more general meaning.

134. The statutory context indicates that the more specific meaning of 'deployment', in the sense of the spreading out of troops by way of military manoeuvre, is not readily applicable to paragraph 23AG(1AA)(d). As established in paragraphs 120 to 131 of this Ruling, the provision is not limited to military personnel and can apply to a member of the police services. Also, the provision contemplates that a single member of a disciplined force may be the subject of a 'deployment'.

135. In the context of paragraph 23AG(1AA)(d), a member of a disciplined force may be brought into effective action by being sent overseas to perform duties as directed by the Commonwealth, State or Territory, or authority thereof. It is in this sense of bringing into effective action that the word 'deployment' is to be understood.

136. The requirement for 'deployment' focuses on the actions of the Commonwealth, State or Territory or authority thereof. Thus, the deployment of the person as a member of a disciplined force must be 'by' the specified entity.

137. Thus, a person has been subjected to a 'deployment' by the Commonwealth, a State or Territory or an authority thereof if they have been directed to perform duties overseas by that specified government or authority in their capacity as a member of a disciplined force.

138. Therefore, the term 'deployment' does not require a distinction to be made on the basis of the nature of the task the member is undertaking. Accordingly, a member who undertakes or participates in study or training activities in their capacity as a member of the relevant disciplined force can be said to be the subject of a 'deployment'.

139. The examples in paragraph 1.32 of the EM, extracted in paragraph 130 of this Ruling, illustrate the more common types of activities intended to be covered by paragraph 23AG(1AA)(d), and are consistent with the view that 'deployment' does not take on a narrow meaning related to military usage only.



*Meaning of member*

140. As discussed in this Ruling, the term 'disciplined force' covers military and police services. These organisations are governed by legislation. There is often a distinction made in the legislation between appointees and members – appointees being all persons employed by the various bodies and members a subset thereof.

141. Thus, for example, under the *Australian Federal Police Act 1979*, section 40B allows the Commissioner to declare an AFP appointee to be a member of the AFP subject to the appointee meeting certain conditions. Within the Department of Defence, ADF 'members' are officers, soldiers, sailors or airmen (within the meaning of section 4 of the *Defence Act 1903*) and then there are APS appointees employed by the Department of Defence under the *Public Service Act 1999*. The various State and Territory statutes governing the police forces use slightly different formulations again.

142. Because paragraph 23AG(1AA)(d) covers more than one agency, the term 'member' cannot be said to derive its meaning from any one particular statute. Furthermore, because of variances in how the different statutes use and define 'member', and whether the term is used at all, the use of that term in those statutes cannot necessarily determine whether or not paragraph 23AG(1AA)(d) applies.

143. According to the Australian Oxford Dictionary 'member' means 'a person belonging to a society, team, etc.'

144. Therefore, in this context, 'member' means belonging to the disciplined force. As the term 'disciplined force' is closely connected to and informed by the code of conduct governing the relevant force, a person will belong to, and hence be a member of, the disciplined force if they are subject to the discipline of the relevant force. This would ordinarily be the case where the appointee has taken an oath or affirmation and so is required to follow orders in line with the organisation's command structure and subject to formal disciplinary procedures if orders are not followed or the code of conduct breached. That is, they are subject to the code of conduct 'essential to the effectiveness' of that force and which provides the 'protection for civilians from service personnel who bear, or have access to, arms'.<sup>23</sup> Without taking such an oath or affirmation, appointees are not permitted to carry out the operational duties of the armed service.

145. Therefore, appointees appointed as or meeting the description of members in the *Australian Federal Police Act 1979* and the *Defence Act 1903* are all 'members of a disciplined force' as that phrase appears in paragraph 23AG(1AA)(d). Similarly, any appointees appointed to a State or Territory police force carrying the designation of 'police officer' are also members. This includes protective service officers and persons seconded to the police force.

146. The personnel tasked with the performance of a particular overseas mission or operation can comprise not only persons

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<sup>23</sup> See *White v Director of Military Prosecutions* [2007] HCA 29 at paragraph 152.

specifically performing the defence, policing and peacekeeping functions but also those accompanying and providing assistance and support to those so engaged. The persons providing such ancillary support would not be performing, or be permitted to perform, operational duties.

147. Nonetheless, persons providing such ancillary support are considered a 'member of the disciplined force' for the purposes of paragraph 23AG(1AA)(d) provided they are effectively integrated into the force performing the primary functions of defence, peacekeeping, and policing. These people will be considered to be effectively integrated into the primary force where they are subject to the same or similar command structure and rules of conduct as those performing the primary functions of that 'disciplined force'.

148. For example, public service appointees of the Department of Defence, who are not members of the ADF (within the meaning of section 4 of the *Defence Act 1903*), may receive deployment orders from the Commonwealth for the purpose of performing operational support roles in a specified area outside Australia to support ADF operations. The public service appointees consent in writing to subject themselves to Defence Force discipline for the duration of the deployment. These appointees have the status of 'defence civilian' within the meaning of section 3 of the *Defence Force Discipline Act 1982*. As defence civilians, the appointees are subject to ADF command and control and the same rules of conduct as those who have taken the requisite oath or affirmation required to perform operational duties. Such appointees will be considered to be deployed as a member of a disciplined force for the purposes of paragraph 23AG(1AA)(d).

149. The Department of Defence may also engage a contractor to provide support services to the ADF on overseas missions. Employees of that contractor may then accompany the members of the ADF and, as with APS appointees, may have the status of 'defence civilians' subject to Defence Force discipline. However, they are not employees of the Department of Defence and may not be appointees of any Commonwealth or State agency. Such employees are not therefore, being deployed 'by' the Commonwealth, State or Territory or an authority thereof.<sup>24</sup>

150. The AFP may send both sworn (members within the meaning of section 40B of the *Australian Federal Police Act 1979*) and unsworn (APS appointees that have not taken the required oath or affirmation) appointees on active deployment as part of either the International Liaison Network or the International Deployment Group. Unsworn appointees often perform duties similar to and alongside sworn members that are deployed outside Australia. If the unsworn appointees, while on deployment, are subject to the same command structure and code of discipline as the members, the unsworn

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<sup>24</sup> However, if the ADF are delivering Australian ODA, the foreign earnings derived by the employees of the contractors may be eligible for exemption because of paragraph 23AG(1AA)(a).

appointees will be considered to be deployed as a member of a disciplined force for the purposes of paragraph 23AG(1AA)(d).

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

151. The following is a detailed contents list for this Ruling:

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
<b>Ruling</b>	<b>5</b>
Delivery of Australian official development assistance by an employer	5
Directly attributable to	7
Disciplined force	9
Deployed	10
Member	11
Examples	14
<i>Example 1 – Department of Foreign Affairs and Trade (DFAT) employee sent overseas as project adviser</i>	15
<i>Example 2 – Employees of an entity contracted by DFAT to deliver Australian ODA</i>	17
<i>Example 3 – Employees of an entity contracted by DFAT to provide services to workers delivering ODA</i>	22
<i>Example 4 – Non-government organisation employees delivering a training program not related to a specific Australian ODA activity</i>	25
<i>Example 5 – Multiple roles for the one employer</i>	28
<i>Example 6 – Co-funded project</i>	31
<i>Example 7 – Employment changes while overseas</i>	35
<i>Example 8 – Working for two employers</i>	38
<i>Example 9 – Same employer with two roles</i>	42
<i>Example 10 – Employee of an organisation funded by multiple governments</i>	46
<i>Example 11 – Australian Federal Police deployed overseas</i>	49
<i>Example 12 – APS employee acting in a support role to ADF</i>	52
<i>Example 13 – Contractor's employees acting in a support role to ADF</i>	56
<i>Example 14 – AFP employee who is not a member of the AFP</i>	58
<i>Example 15 – ADF member posted overseas</i>	61
<i>Example 16 – AFP member delivering training overseas</i>	64
<i>Example 17 – ADF member undertaking language studies overseas</i>	68

<i>Example 18 – ADF member of an international peacekeeping force</i>	72
<b>Date of effect</b>	<b>75</b>
<b>Appendix 1 – Explanation</b>	<b>77</b>
Delivery of Australian ODA by an employer	79
<i>Ascertaining whether or not the employer is delivering Australian ODA</i>	96
<i>'Directly attributable to'</i>	103
<i>Paragraph 23AG(1AA)(d)</i>	118
<i>Meaning of 'disciplined force'</i>	120
<i>Meaning of 'deployment'</i>	132
<i>Meaning of member</i>	140
<b>Appendix 2 – Detailed contents list</b>	<b>151</b>

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NO:	1-4WGYQL5
ISSN:	2205-6211
ATOlaw topic:	Income tax ~~ Exempt income ~~ Employment income ~~ Foreign sourced

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