

# ***CR 2010/10 - Income tax and fringe benefits tax: lump sum payments under the ANZ New Career Training Fund and the Past Employee Care Fund***



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This document has changed over time. This is a consolidated version of the ruling which was published on *7 April 2010*



## Class Ruling

### Income tax and fringe benefits tax: lump sum payments under the ANZ New Career Training Fund and the Past Employee Care Fund

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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 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 15-2 of the ITAA 1997;
- Division 82 of the ITAA 1997;
- section 103-10 of the ITAA 1997;
- section 104-25 of the ITAA 1997;
- Division 110 of the ITAA 1997;
- Division 112 of the ITAA 1997;

- section 115-25 of the ITAA 1997; and
- Part XIB of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)

All subsequent legislative references in this Ruling are to the ITAA 1997, unless stated otherwise.

## Class of entities

3. The class of entities to which this Ruling applies is retrenched resident Australian former employees who have been granted and received lump sum payments from either the Australia and New Zealand Banking Group Limited (ANZBGL) Past Employee Care Fund (Care Fund), or the ANZBGL New Career Training Fund (Training Fund).

4. In this Ruling, a person belonging to this class of entities is referred to as an eligible former employee.

## Qualifications

5. 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 25 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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## Date of effect

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8. This Ruling applies from 1 June 2009. 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).

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## Scheme

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9. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them, form part of and are to be read with the description:

- Class Ruling Application from ANZBGL dated 14 September 2009;
- Training Fund Policy Guidelines dated 16 June 2009;
- Care Fund Policy Guidelines dated 20 July 2009;
- Arrangement between ANZ and the Finance Sector Union (FSU);
- ANZ Media Release dated 12 June 2009;
- ANZBGL New Career Training Fund Application Form;
- ANZBGL Past Employee Care Fund Application Form;
- Correspondence from ANZBGL dated 18 November 2009 and 9 December 2009.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

10. On 12 June 2009, ANZBGL announced a new arrangement with the FSU for a package of measures to support resident Australian former employees whose positions have been made redundant as a result of ANZ's transition of technology and transfer of operations work from Australia to a location overseas (off-shoring).

11. ANZBGL has established two funds:

- (a) the Training Fund, to support eligible former employees to re-train and re-skill for their next job; and
- (b) the Care Fund, to assist eligible former employees who face genuine financial hardship following retrenchment due to ANZ's change program decisions such as off-shoring.

## Training Fund

12. The Training Fund has been established, with up to \$10 million in funding, to support vocational training to help impacted former employees find new jobs and career success outside of ANZBGL and transition to a new career.

13. Each eligible former employee can apply for grants of up to \$10,000 to cover costs associated with further education or vocational training. Such grants may be made by lump sum payment either directly to the relevant educational institution, or by way of reimbursement of costs incurred by the eligible former employee.

14. To be eligible for the funding from the Training Fund, the eligible former employee must have:

- been a permanent full time or part time ANZ employee in Australia or New Zealand on or after 1 June 2009;
- been retrenched due to a decision by ANZ to off-shore roles from Australia or New Zealand; and
- applied for, or been accepted into, the relevant course within 6 months of the exit date from ANZ.

15. Training Fund Policy Guidelines state that each eligible former employee:

- can submit only one successful application to the Training Fund;
- must make the application on the approved form provided by ANZBGL which must be validly submitted within 6 months of the eligible former employee's exit date from ANZ;
- should provide all necessary documentation including proof of payment to a training institution or invoice of fees to support the application. Where applicants have applied for, but have not yet been accepted into a relevant course, a quotation of course fees from the educational institution is required; and
- understands that, if the application is approved, the payment may be paid directly to the educational institution or reimbursed to the eligible former employee, as determined by the ANZBGL New Career Training Fund Council (Training Fund Council).

16. Notwithstanding the eligibility criteria set out above, approval of funding is determined at the discretion of the Training Fund Council, which consists of:

- 5 representatives from ANZ; and
- 1 representative from the FSU (Australia).

17. Payments from the Training Fund will be made in the form of a lump sum cash amount as approved by the Training Fund Council.

18. An eligible former employee has to notify the Training Fund administrator within five business days should the eligible former employee withdraw from a training course after ANZBGL has made a payment in relation to that training course. The eligible former employee will be required within thirty days to repay the amount made by ANZBGL.

19. The Training Fund Council may exercise its discretion to relax the requirement to repay a Training Fund payment where the eligible former employee provides medical evidence or demonstrates extenuating or compassionate reasons which resulted in their withdrawal from the training course.

### **Care Fund**

20. The Care Fund was established to assist eligible former employees who experience genuine financial hardship following retrenchment due to ANZ's off-shoring decisions. Eligible former employees who are retrenched as a result of a change program other than off-shoring are also eligible to apply for assistance from the Care Fund.

21. An eligible former employee may receive a lump sum grant of up to \$15,000 from the Care Fund. In some cases, grants may be paid in instalments if the ANZBGL Past Employee Care Fund Council (Care Fund Council) considers in the particular circumstances that it will benefit the eligible former employee by assisting them to apply the funds, rather than receiving a lump sum amount and being unable to budget.

22. To be eligible for funding from the Care Fund, the eligible former employee must:

- have been employed by ANZ as a permanent full time or part time employee in Australia or New Zealand on or after 1 June 2009;
- have been retrenched by ANZ in Australia or New Zealand;
- submit the application within 12 months of the exit date from ANZ on the approved form provided by ANZBGL;
- be able to demonstrate that the former employee:
  - has exhausted all severance/termination payments paid by ANZ as a result of retrenchment;
  - is unable to meet reasonable and immediate living expenses as a result of retrenchment from ANZ;
  - does not have assets that could be reasonably used or sold to pay for immediate living expenses; and
  - is presently unemployed and actively seeking work.

23. Eligibility and approval of grants is determined by the Care Fund Council, which consists of:

- 4 representatives from ANZ;
- 1 representative from the Brotherhood of St. Laurence; and
- 1 representative from the FSU (Australia).

24. The Care Fund Council may consider applications that do not meet the eligibility criteria if the eligible former employee can demonstrate extenuating or compassionate grounds.

25. Payments from the Care Fund are not required to be repaid by the eligible former employee.

## Ruling

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### Training Fund

#### ***Employment termination payment***

26. A Training Fund payment made to either an educational institution on behalf of an eligible former employee; or, an eligible former employee as reimbursement of costs to the relevant educational institution is not an employment termination payment under Division 82.

#### ***Ordinary income***

27. A Training Fund payment is not assessable as ordinary income of an eligible former employee under subsection 6-5(1). This is the case regardless of whether ANZBGL makes the payment directly to the eligible former employee as a reimbursement of costs incurred in relation to the course of study, or directly to the educational institution on behalf of the eligible former employee.

#### ***Statutory income: allowances and other things provided in respect of employment***

28. A Training Fund payment is not assessable as an allowance, gratuity, compensation, benefit, bonus or premium of an eligible former employee under section 15-2.

***Fringe benefits tax***

29. A Training Fund payment, being the relevant benefit, made to either an educational institution on behalf of an eligible former employee; or to an eligible former employee as reimbursement of costs incurred to the relevant educational institution will not result in an eligible former employee having a reportable fringe benefit amount for the purposes of Part XIB of the FBTAA.

***Capital gains tax***

30. CGT event C2 under section 104-25 happens when an eligible former employee's entitlement to receive the Training Fund payment is satisfied.

31. The payment received by the eligible former employee is the capital proceeds from the event. The eligible former employee will make a capital gain if the capital proceeds are more than the cost base of the entitlement to receive the payment and a capital loss if the capital proceeds are less than the reduced cost base (subsection 104-25(3)).

32. The cost base of the eligible former employee's entitlement to receive a payment is calculated under Division 110 as modified by Division 112 and will include the education expenses the subject of the payment to the extent that they are not otherwise deductible by the eligible former employee (subsection 110-45(2)).

33. If the payment is made on the eligible former employee's behalf to an educational institution, the CGT provisions apply as if the eligible former employee had received the amount (subsection 103-10(1)).

34. The capital gain is not a discount capital gain where the eligible former employee received the payment within 12 months of becoming entitled to receive the payment, being the date when the application was approved (subsection 115-25(1)).

***Care Fund***

35. This aspect of the ruling only applies to lump sum payments made from the Care Fund. It does not consider the tax implications of Care Fund payments that are paid in instalments.

***Employment termination payment***

36. A lump sum Care Fund payment received by an eligible former employee is not an employment termination payment under Division 82.

**Ordinary income**

37. A lump sum Care Fund payment is not assessable as ordinary income of an eligible former employee under subsection 6-5(1).

**Statutory income: allowances and other things provided in respect of employment**

38. A lump sum Care Fund payment is not assessable as an allowance, gratuity, compensation, benefit, bonus or premium of an eligible former employee under section 15-2.

**Fringe benefits tax**

39. A lump sum Care Fund payment, being the relevant benefit, made to an eligible former employee will not result in an eligible former employee having a reportable fringe benefit amount for the purposes of Part XIB of the FBTAA.

**Capital gains tax**

40. No CGT event happens when a lump sum Care Fund payment is made to an eligible former employee.

## Examples

**Example 1**

41. John, an eligible former employee of ANZ enrolled in an educational course. The course fees of \$10,000 were paid by John. He also applied and received a grant of \$10,000 from the Training Fund. John completed the course. John cannot claim the course fees as self education expenses.

The cost base of John's entitlement to receive payment includes \$10,000 which is how much John paid to acquire the entitlement to the payment of \$10,000. The amount received from the Training Fund is capital proceeds.

John works out his capital gain/(loss) as follows:

Capital proceeds	\$10,000
less Cost base	(\$10,000)
<b>Capital gain/(loss)</b>	<b>nil</b>

**Example 2**

42. The same facts as in Example 1, except that John did not complete the course and had to repay \$2,000 back to the Training Fund.

The cost base of John's entitlement to receive payment includes \$8,000 which is how much John paid to acquire the entitlement to the payment. As John did not complete the course he was only entitled to the payment of \$8,000. The amount received from the Training Fund less the amount John repaid to the Training Fund is capital proceeds (\$10,000 – \$2,000).

John works out his capital gain/(loss) as follows:

Capital proceeds	\$8,000
less Cost base	<u>(\$8,000)</u>
<b>Capital gain/(loss)</b>	<b>nil</b>

**Example 3**

43. The same facts as in Example 1, except that in John's particular circumstances, he is able to claim the course fees as self education expenses.

The cost base of John's entitlement to receive payment is reduced by the amount deductible as self education expenses.

John works out his capital gain as follows:

Capital proceeds	\$10,000
less Cost base	<u>Nil</u>
<b>Capital gain</b>	<b>\$10,000</b>

Assuming John has received the payment within 12 months of becoming entitled to receive the payment, has not made any other capital losses or capital gains in the income year, and does not have any unapplied net capital losses from earlier years, the net capital gain included in his tax return is \$10,000.

## 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.*

44. In arriving at the decisions in this Ruling the Commissioner has considered whether the lump sum payments made to eligible former employees under the Training Fund and Care Fund are:

- employment termination payments;
- assessable as ordinary income;
- assessable as statutory income as an allowance, gratuity, compensation, benefit, bonus or premium;
- reportable fringe benefit amounts; and
- subject to the capital gains tax provisions.

### Training Fund

#### ***Employment termination payment***

45. From 1 July 2007 payments made in consequence of termination are either employment termination payments or genuine redundancy payments, unless there is a specific taxing provision. To the extent that a genuine redundancy payment is not tax-free it is also an employment termination payment.

46. At paragraph 5 of Taxation Ruling TR 2003/13 the Commissioner took the following view in relation to whether a payment was made in consequence of termination and was therefore an eligible termination payment (ETP):

The phrase 'in consequence of' is not defined in the ITAA 1936. However, the words have been interpreted by the courts in several cases. Whilst there are divergent views as to the correct interpretation of the phrase, 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.

47. This is the initial test to be applied to any particular facts. Would the payment have been made but for the termination of employment?

48. However, there remains a question as to the degree of connection between the termination and the payment in determining whether a payment is made 'in consequence' of termination, as stated at paragraph 6 of TR 2003/13:

The phrase requires a causal connection between the termination and the payment, although the termination need not be the dominant cause of the payment. The question of whether a payment is made in consequence of the termination of employment will be determined by the relevant facts and circumstances of each case.

49. While the connection need not be dominant it can still be too remote for the payment to qualify as an ETP. As stated at paragraph 6 of TR 2003/13, a determination as to the degree of connection between a payment and a termination is a question of fact in each case.

50. The Commissioner goes on to state at paragraph 7 of TR 2003/13 that a payment made a long time after a termination may be 'too remote' to be considered to be made in consequence of termination. Another circumstance where a payment would not be in consequence of termination is where there is an 'intervening event', such as the obtaining of a right to commute a pension after the termination of employment.

51. While TR 2003/13 applies to ETPs it is substantially about the concept of 'in consequence of termination'. This terminology has carried over into Division 82 which deals with employment termination payments and Division 83, which deals with, among other payments, genuine redundancy payments.

52. A Training Fund payment made to either an educational institution on behalf of an eligible former employee; or, to an eligible former employee as reimbursement of costs incurred to the relevant educational institution is not an employment termination payment under Division 82.

53. Applying the initial test, that is, whether the payment would have been made but for the termination of employment; payments under the Training Fund may be capable of being considered an employment termination payment. However, it is only once we examine the degree of connection that it can be concluded that the payments made under the Training Fund do not qualify as employment termination payments.

54. The substantial reason for the payment is an intervening event. As a result, the termination of employment is too weak a cause for the payment to be considered to be made in consequence of termination.

55. To receive a payment from the Training Fund requires the eligible former employee to undertake training assistance with a training or educational provider before a payment from the Training Fund becomes payable. It is not until after the employee is terminated that the undertaking occurs and therefore there has been an intervening event between termination of employment and the relevant payment. This intervening event makes the payment too removed from the termination for the payments to be in consequence of termination.

56. Therefore, a Training Fund payment is not an employment termination payment for the purposes of Division 82.

### **Ordinary income**

57. Subsection 6-5(1) states that the assessable income of a taxpayer includes income according to ordinary concepts (ordinary income).

58. The legislation does not provide specific guidance on the meaning of income according to ordinary concepts. However, a substantial body of case law exists which identifies likely characteristics.

59. In *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation*, the Full High Court stated:

To determine whether a receipt is of an income or of a capital nature, various factors may be relevant. Sometimes the character of receipts will be revealed most clearly by their periodicity, regularity or recurrence; sometimes, by the character of a right or thing disposed of in exchange for the receipt; sometimes, by the scope of the transaction, venture or business in or by reason of which money is received and by the recipient's purpose in engaging in the transaction, venture or business.<sup>1</sup>

60. Amounts that are periodical, regular or recurrent, relied upon and expected on a periodic basis by the recipient for their regular expenditure and paid to them for that purpose are likely to be ordinary income,<sup>2</sup> as are amounts that are the product in a real sense of any employment of, or services rendered by, the recipient.<sup>3</sup> Amounts paid in substitution for salary or wages foregone or lost may also be ordinary income.<sup>4</sup>

<sup>1</sup> (1990) 170 CLR 124 at 138; 90 ATC 4413 at 4420; (1990) 21 ATR 1 at 7.

<sup>2</sup> *Federal Commissioner of Taxation v. Dixon* (1952) 86 CLR 540; (1952) 10 ATD 82; 5 AITR 443.

<sup>3</sup> *Hayes v. Federal Commissioner of Taxation* (1956) 96 CLR 570; (1956) 11 ATD 68; *Federal Commissioner of Taxation v. Rowe* (1995) 60 FCR 99; 95 ATC 4691; (1995) 31 ATR 392.

<sup>4</sup> *Federal Commissioner of Taxation v. Dixon* (1952) 86 CLR 540 at 568; (1952) 10 ATD 82 at 92; (1952) 5 AITR 443 at 456 (per Fullagar J).

61. Ultimately, whether or not a particular receipt is ordinary income depends on its character in the hands of the recipient.<sup>5</sup> The whole of the circumstances must be considered<sup>6</sup> and the motive of the payer may be relevant to this consideration.<sup>7</sup>

62. In *Scott v. Federal Commissioner of Taxation*, Windeyer J considered whether a gratuitous payment to the taxpayer's solicitor was income. His Honour held that, to be income, the gratuitous payment had to be in a relevant sense a product of the donee's income-producing activities.<sup>8</sup> In *Federal Commissioner of Taxation v. Harris*,<sup>9</sup> a bank made a lump-sum payment to supplement a former employee's pension so as to alleviate the negative effects of high inflation. The majority held that the payment was not a product of the former employment and this was an important element in finding that the payment was not income.

63. A lump sum payment from the Training Fund is not a product of employment or of any service rendered by the eligible former employee. Past service to ANZ is relevant only in so far as it is one of the conditions enabling the eligible former employee to apply for the payment.

64. The payment is not made in substitution for, or as a supplement to, ordinary income of the eligible former employee. Its purpose is to assist the person to re-train and find new employment. The payment is made *ex gratia* by virtue of a decision of the Training Fund Council.

65. The payment takes the form of a lump sum to meet a predetermined expense. It is not a form of periodic payment, even if the expense should arise more than once, as in the case where a liability for course fees arises each semester. The payment is not expected or relied upon by the eligible former employee to meet ordinary living expenses.

66. In these circumstances, a Training Fund payment is not ordinary income under subsection 6-5(1).

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<sup>5</sup> *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514 at 526; (1966) 14 ATD 286 at 293; (1966) 10 AITR 367 at 375; *Hayes v. Federal Commissioner of Taxation* (1956) 96 CLR 47 at 55; (1956) 11 ATD 68 at 73; (1956) 6 AITR 248 at 254; *Federal Coke Co Pty Ltd v. Federal Commissioner of Taxation* (1977) 34 FLR 375 at 402; 77 ATC 4255 at 4273; (1977) 7 ATR 519 at 539.

<sup>6</sup> *Squatting Investment Company Limited v. Federal Commissioner of Taxation* (1953) 86 CLR 570 at 627; (1953) 5 AITR 496; 24 ATR 527.

<sup>7</sup> *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514 at 527, 528; (1966) 14 ATD 286 at 293; (1966) 10 AITR 367 at 376.

<sup>8</sup> At 527.

<sup>9</sup> (1980) 43 FLR 36; 80 ATC 4238; (1980) 10 ATR 869.

67. If paid directly to an educational institution on behalf of the eligible former employee, the payment is not derived as income by the eligible former employee under subsection 6-5(4), as the payment would not be ordinary income if received personally.

***Statutory income: allowances and other things provided in respect of employment***

68. Section 6-10 provides that a taxpayer's assessable income includes statutory income amounts that are not ordinary income but are included as assessable income by another provision.

69. Section 10-5 lists provisions about statutory income and included in this list is section 15-2 (formerly paragraph 26(e) of the *Income Tax Assessment Act 1936* (ITAA 1936)).

70. Section 15-2 provides that the value of all allowances, gratuities, compensation, benefits, bonuses and premiums allowed, given or granted directly or indirectly in respect of employment or services rendered is included in assessable income.

71. A lump sum payment from the Training Fund will be statutory income under section 15-2 if it is provided to the eligible former employee in respect of, or for or in relation directly or indirectly to, any employment or services rendered by the eligible former employee.

72. In *Smith v. Federal Commissioner of Taxation*<sup>10</sup> Brennan CJ in the High Court indicated that if the employment (or some aspect of employment) is the reason or one of the reasons why the payment is made, it falls within paragraph 26(e) of the ITAA 1936. If employment or some aspect of employment is a substantial reason for the payment, it cannot be said that the payment is merely personal or that the payment is extraneous to employment.

73. In *J & G Knowles and Associates Pty Ltd v. Commissioner of Taxation*,<sup>11</sup> the full Federal Court considered the meaning of 'in respect of employment' in the FBTAA. The Court noted that what has to be established in determining if a benefit is 'in respect of employment' is whether there is a sufficient or material, rather than a causal, connection or relationship between the benefit and the employment.

74. Whilst there is a causal connection between a payment from the Training Fund and former employment, the connection is not sufficient or material. The material reasons for the payment are discussed in paragraph 82 of this Ruling.

75. In addition, although the eligible former employee is required to meet certain conditions before a Training Fund payment can be made, these do not amount to services rendered to ANZBGL.

<sup>10</sup> (1987) 164 CLR 513; 87 ATC 4883; (1987) 19 ATR 274.

<sup>11</sup> [2000] 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22.

76. As such, a Training Fund payment is not assessable income of an eligible former employee under section 15-2.

***Fringe benefits tax***

77. The definition of 'benefit' in subsection 136(1) of the FBTAA includes any right, privilege, service or facility. Therefore, Training Fund payments made to educational institutions on behalf of eligible former employees; or, Training Fund payments made to eligible former employees as reimbursement of costs incurred to the relevant educational institution comes within the definition of a benefit for the purposes of the FBTAA.

78. The definition of a fringe benefit is also contained in subsection 136(1) of the FBTAA and requires, amongst other things, that in order for a benefit to be a fringe benefit, the benefit is provided to an employee (or associate) in respect of the employment of the employee (the employment connection test).

79. The term 'employee' is defined in the FBTAA to mean a current employee, a future employee or a former employee with the term 'current employee' further defined in the FBTAA to mean a person who is entitled to receive salary or wages. An employee will meet this definition if at the time when the benefit is provided he or she is in receipt of salary or wages from the ANZ. Correspondingly, an eligible former employee belonging to the class of entities to which this Ruling applies (refer to paragraphs 3 and 4 of this Ruling), who at some time in the past has received salary or wages from the ANZ will meet the definition of 'former employee'.

80. For the Training Fund payment, being the relevant benefits provided to eligible former employees, to come within the definition of a fringe benefit, the primary criterion that must be satisfied is the employment connection test.

81. The term 'in respect of employment' has been considered by the courts on numerous occasions. In *J & G Knowles and Associates Pty Ltd v. Commissioner of Taxation*<sup>12</sup> the full Federal Court examined the definition of fringe benefit and noted that:

...Whatever question is to be asked, it must be remembered that what must be established is whether there is a sufficient or material, rather than a, causal connection or relationship between the benefit and the employment...

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<sup>12</sup> [2000] 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22.

82. The following are considered to be material reasons that explain why the benefits will be provided to eligible former employees under the Training Fund, namely:

- there will not be a right to a payment at the time of employment (or termination);
- there will be a post-employment qualifying condition for payment, that is, retraining; and
- payments to eligible former employees will remain entirely discretionary and subject to the approval of the Training Fund Council.

83. Therefore, the Commissioner considers that the benefits provided to an eligible former employee under the Training Fund do not have a sufficient or material connection with any employment of the eligible former employees to fall within the definition of a fringe benefit for the purposes of the FBTAA.

84. Consequently, an eligible former employee will not have a reportable fringe benefit amount in relation to such benefits provided under the Training Fund for the purposes of Part XIB of the FBTAA.

## ***Capital gains tax***

85. An eligible former employee's entitlement to receive a Training Fund payment is a CGT asset under subsection 108-5(1) being a right that is acquired when the eligible former employee's application for the payment is approved.

86. CGT event C2 under section 104-25 happens when an eligible former employee's entitlement to receive the payment is satisfied. The time of the CGT event under subsection 104-25(2) is when the payment is made.

87. The cost base of an eligible former employee's entitlement is calculated under Division 110 as modified by Division 112. As an eligible former employee's entitlement does not arise unless they provide a receipt, invoice or quotation of eligible educational expenses, any such payment would be included under subsection 110-25(2) in the first element of the cost base of the right.

88. However, under subsection 110-45(2), expenditure incurred by an eligible former employee does not form part of the cost base to the extent that the expenditure has been, or can be deducted. Therefore, expenditure on eligible educational expenses cannot form part of the cost base of an eligible former employee's entitlement if it is deductible.

89. The amount paid to an eligible former employee, or to an educational institution on the eligible former employee's behalf, for eligible educational expenses represents the capital proceeds from CGT event C2. Under subsection 103-10(1), the CGT provisions apply as if the eligible former employee received the amount.

**Care Fund*****Employment termination payment***

90. A lump sum Care Fund payment received by an eligible former employee is not an employment termination payment under Division 82.

91. As with the Training Fund, applying the initial test, that is, whether the payment would have been made but for the termination of employment, payments under the Care Fund may be capable of being considered an employment termination payment. However, it is only once we examine the degree of connection that it can be concluded that the payments made under the Care Fund do not qualify as employment termination payments.

92. The substantial reason for the payment is an intervening event. As a result, the termination of employment is too remote a cause for the payment to be considered to be made in consequence of termination.

93. To receive a payment from the Care Fund requires the eligible former employees to demonstrate that they:

- have exhausted all severance/termination payments paid by ANZ as a result of retrenchment;
- are unable to meet reasonable and immediate living expenses as a result of retrenchment from ANZ;
- do not have assets that could be reasonably used or sold to pay for their immediate living expenses; and
- are presently unemployed and actively seeking work.

94. It is only once all of these four requirements are met, following the employee's termination, that a payment will be made under the Care Fund.

95. These requirements indicate that there are intervening events between the termination of employment and the relevant payment. These events make the payments too removed from the termination of employment for the payments to be in consequence of termination.

96. Therefore, a lump sum Care Fund payment is not an employment termination payment for the purposes of Division 82.

***Ordinary income***

97. The factors stated at paragraphs 57 to 67 of this Ruling apply equally to whether a lump sum Care Fund payment is assessable as ordinary income to an eligible former employee.

98. A lump sum payment from the Care Fund is not the product of employment or of any past services rendered by the eligible former employee. Past service to ANZ is relevant only in so far as it is one of

the conditions enabling the eligible former employee to apply for the payment.

99. An eligible former employee who applies for assistance is not automatically entitled to a payment from the Care Fund. Payments are voluntary and made at the sole discretion of the Care Fund Council. To apply for assistance from the Care Fund, an eligible former employee must demonstrate genuine financial hardship following retrenchment. The quantum of the payment is also at the sole discretion of the Care Fund Council and is determined according to need. For these reasons, a payment from the Care Fund can not be expected and relied upon in the sense that applied to the payments in *Federal Commissioner of Taxation v. Dixon*.<sup>13</sup>

100. In addition, a lump sum payment from the Care Fund is not periodical, regular or recurrent.

101. Given these circumstances, a lump sum payment from the Care Fund is not assessable as ordinary income to an eligible former employee under subsection 6-5(1).

***Statutory income: allowances and other things provided in respect of employment***

102. The factors stated at paragraphs 68 to 76 of this Ruling apply equally to whether a Care Fund payment is assessable to an eligible former employee under section 15-2.

103. A lump sum payment from the Care Fund will be assessable under section 15-2 if it is provided to the eligible former employee in respect of, or for or in relation, directly or indirectly, to any employment or services rendered by the eligible former employee.

104. As with a payment from the Training Fund, we do not consider that the causal connection between a lump sum payment from the Care Fund and the former employment is sufficient or material to bring the Care Fund payment within the scope of section 15-2.

105. In addition, although the eligible former employee is required to meet certain conditions before a Care Fund payment can be made, these do not amount to services rendered to ANZBGL which would bring the lump sum Care Fund payment within the scope of section 15-2.

***Fringe benefits tax***

106. The discussion in paragraphs 77 to 84 of this Ruling are equally relevant as to whether an eligible former employee will have a reportable fringe benefit amount in relation to benefits provided under the Care Fund for the purposes of Part XIB of the FBTAA.

107. A Care Fund payment made to an eligible former employee is a benefit as defined in the FBTAA. The benefit provided does not

<sup>13</sup> (1952) 86 CLR 540; (1952) 10 ATD 82; 5 AITR 443.

have a sufficient or material connection with any employment of the eligible former employees to fall within the definition of a fringe benefit for the purposes of the FBTAA.

108. Therefore, a Care Fund payment will not result in an eligible former employee having a reportable fringe benefit amount in relation to such benefits provided for the purposes of Part XIB of the FBTAA.

***Capital gains tax***

109. There is no requirement for a Care Fund payment made to an eligible former employee to be repaid. Therefore the Care Fund payment is considered to be a gift and the CGT provisions do not apply.

## Appendix 2 – Detailed contents list

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

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## References

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2003/13; TR 2006/10

### *Subject references:*

- bona fide redundancy payments
- capital gains tax
- eligible termination payments
- employment relationship
- employment termination payment
- fringe benefits tax
- genuine redundancy payment
- lump sum payments
- ordinary income
- statutory income

### *Legislative references:*

- ITAA 1936 26(e)
- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 6-5(1)
- ITAA 1997 6-5(4)
- ITAA 1997 6-10
- ITAA 1997 10-5
- ITAA 1997 15-2
- ITAA 1997 Div 82
- ITAA 1997 Div 83
- ITAA 1997 103-10
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- ITAA 1997 104-25
- ITAA 1997 104-25(2)
- ITAA 1997 104-25(3)
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- ITAA 1997 Div 112
- ITAA 1997 115-25
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- Federal Coke Co Pty Ltd v. Federal Commissioner of Taxation (1977) 34 FLR 375; 77 ATC 4255; (1977) 7 ATR 519
  - Federal Commissioner of Taxation v. Dixon (1952) 86 CLR 540; (1952) 10 ATD 82; (1952) 5 AITR 443
  - Federal Commissioner of Taxation v. Harris (1980) 43 FLR 36; 80 ATC 4238; (1980) 10 ATR 869
  - Federal Commissioner of Taxation v. Rowe (1995) 60 FCR 99; 95 ATC 4691; (1995) 31 ATR 392
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  - J & G Knowles and Associates Pty Ltd v. Commissioner of Taxation [2000] 96 FCR 402; 2000 ATC 4151; (2000) 44 ATR 22
  - Scott v. Federal Commissioner of Taxation (1966) 117 CLR 514; (1966) 14 ATD 286
  - Smith v. Federal Commissioner of Taxation (1987) 164 CLR 513; 87 ATC 4883; (1987) 19 ATR 274
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## ATO references

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termination payments  
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C3 – end of a CGT asset  
Income Tax ~~ Assessable income ~~ allowances and  
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Income Tax ~~ Assessable income  
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