


# ***CR 2018/25 - Income tax: treatment of transfer payments to employees - Department of Human Services***

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## Class Ruling

### Income tax: treatment of transfer payments to employees – Department of Human Services

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#### **📌 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.

## Summary – what this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

#### Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:
- section 82-130 of the *Income Tax Assessment Act 1997* (ITAA 1997)
  - section 82-135 of the ITAA 1997.

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

#### Class of entities

3. The class of entities to which this scheme applies is those employees of the Department of Human Services (DHS) defined in paragraph 13 who receive a payment under paragraph 14 of this Ruling.

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## Qualifications

4. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described under the heading *Scheme*.
5. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
  - the Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
  - the Ruling may be withdrawn or modified.

## Date of effect

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6. This Ruling applies from 13 June 2018 to 30 June 2020. The Ruling continues to apply after 30 June 2020 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, the 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 the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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7. The following description of the scheme (the Scheme) is based on information provided by the applicant.
8. The DHS is a department of the State of South Australia (the State) which administers a number of human services functions for the State, including disability and aged care services.
9. The Scheme is an initiative of the DHS associated with the implementation of the National Disability Insurance Scheme (NDIS) in South Australia and Commonwealth Aged Care reforms (collectively known as the Reforms).
10. The NDIS was created by the Commonwealth Government under the *National Disability Insurance Scheme Act 2013* (NDIS Act 2013) to facilitate the development of a nationally consistent approach to the access to and the planning and funding of support for people with disability.
11. As a result of the roll out of the NDIS and the Reforms, a range of services which are currently provided by the DHS will transfer to the non-government sector (the Non-Government Sector Transfers).

12. The DHS proposes to offer transfer payments to enable affected employees to take up pathways or employment opportunities outside of the government sector while ensuring business and client continuity through the transition to the non-government sector.

13. The class of employees to whom the Scheme applies are those employees of the DHS who:

- (a) are employees of the State
- (b) at the time of a Non-Government Sector Transfer, cease employment with the State, and
- (c) commence employment in a permanent position with the relevant nominated non-government sector employer (that is, the new employer).

14. The DHS will provide the following incentive to each eligible employee who agrees to transfer to the non-government sector:

- a one off transfer payment of \$15,000.

15. The transfer payment will be paid by the State at the earliest time possible after the employee ceases employment with the State.

16. Employees' continuity of service will not be broken by the employees' acceptance of the offer and the new employer will recognise the employees' period of continuous service with the old employer for the purpose of determining all service-related entitlements with the new employer (less such entitlements already taken or paid).

17. Further, the employees' accrued leave entitlements will be assumed by the new employer and be recognised in the employees' service with the new employer.

18. There are no conditions imposed by DHS on the employees regarding continued employment with the new employer.

## **Ruling**

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19. The proposed transfer payment is in consequence of the termination of employment and will not be a payment mentioned in section 82-135. Accordingly, it will be an employment termination payment under section 82-130 where the payment is received within 12 months of the employee's termination of employment, or within any longer period allowed by a determination under subsection 82-130(4).

## Appendix 1 – Explanation

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

### **Employment termination payment (ETP)**

20. A payment made to an employee is an ETP if it satisfies all the conditions set out in section 82-130 and is not specifically excluded under section 82-135.

21. Subsection 82-130(1) states:

A payment is an **employment termination payment** if:

- (a) it is received by you:
  - (i) in consequence of the termination of your employment; or
  - (ii) after another person’s death, in consequence of the termination of the other person’s employment; and
- (b) it is received no later than 12 months after that termination (but see subsection (4)); and
- (c) it is not a payment mentioned in section 82-135.

22. Section 82-135 lists payments that are not employment termination payments. These include (among others):

- superannuation benefits
- unused annual leave or long service leave payments, and
- the tax free part of a genuine redundancy payment or an early retirement scheme payment.

23. Therefore, the transfer payment will be an ETP only if all the conditions in subsection 82-130(1) are satisfied.

### ***Is there a termination of employment?***

24. Paragraph 9 of Taxation Ruling IT 2152 titled: *Income Tax: retiring allowances paid to employees upon restructuring of a business* states:

Where a company or other employer ceases carrying on a business which has been transferred to an associated entity, it will be accepted that the employees of the company have had their employment terminated. This will apply in cases similar to the *Paklan Case* where it is clear that the business in question has been transferred to another entity and it is also clear that the employee’s employment has, in fact, been terminated...

25. In this case, the responsibility for a range of services will transfer from DHS to the non-government sector, to various private entities which are separate from the DHS and have different conditions of employment. It is only after an eligible employee accepts a permanent position with the new employer and completion of the broader transaction occurs, that their employment with DHS will be terminated.

26. Therefore, it is considered that eligible employees' employment with the DHS will be terminated.

***Paid in consequence of the termination of your employment***

27. The phrase 'in consequence of' is not defined in the ITAA 1997. However, the courts have interpreted the phrase in a number of cases. Whilst the courts have divergent views on the meaning of this phrase, the Commissioner's view on the meaning and application of the 'in consequence of' test are set out in Taxation Ruling TR 2003/13 *Income tax: eligible termination payments (ETP): payments made in consequence of the termination of any employment: meaning of the phrase 'in consequence of'*.

28. While TR 2003/13 considered the meaning of the phrase 'in consequence of' in the context of the eligible termination payments, TR 2003/13 can still be relied upon as both the former provision under the *Income Tax Assessment Act 1936* and the current provision under the ITAA 1997 both use the term 'in consequence of' in the same manner.

29. In paragraphs 5 and 6 of TR 2003/13 the Commissioner states:

5. ... 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.

6. 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.

30. In this case, the incentive payment is to be paid to employees whose employment with the DHS is terminated because they have accepted permanent positions in the non-government sector.

31. The transfer payments will not be paid to employees who continue their employment with the DHS, who transfer to other South Australian Government entities, or who resign or retire.

32. Therefore, the transfer payment is considered to be made in consequence of the termination of employment.

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***Payment is received no later than 12 months after termination***

33. It is intended that the payment date will not be more than 12 months from the date of termination of employment for current employees or former employees where applied retrospectively.

34. Therefore, this condition will be satisfied if the proposed payment is made within 12 months of the termination date.

***Payment is not a payment mentioned under section 82-135***

35. Section 82-135 lists payments that are not ETPs, none of which apply to the transfer payment.

36. As the proposed transfer payment is not a payment mentioned in section 82-135, this condition is satisfied.

37. As the proposed transfer payment will be made in consequence of the termination of employment and will not be a payment mentioned in section 82-135, it will be an ETP under section 82-130 where the payment is received within 12 months of the employee's termination of employment, or within any longer period allowed by a determination under subsection 82-130(4).

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

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

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## References

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<i>Previous draft:</i>	- ITAA 1997 82-130
Not previously issued as a draft	- ITAA 1997 82-130(1)
	- ITAA 1997 82-130(1)(a)
<i>Related Rulings/Determinations:</i>	- ITAA 1997 82-130(1)(b)
TR IT 2152; TR 2003/13;	- ITAA 1997 82-130(1)(c)
TR 2006/10	- ITAA 1997 82-130(4)
	- ITAA 1997 82-135
<i>Legislative references:</i>	- ITAA 1936
- ITAA 1997	- NDIS Act 2013
- ITAA 1997 82-135	- TAA 1953

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### ATO references

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