



Explanatory Statement

Taxation Administration (Withholding Variation for Certain Payments Made by External Administrators and Trustees of Bankrupts' Estates) Legislative Instrument 2025

General outline of instrument

1. This instrument is made under section 15-15 of Schedule 1 to the *Taxation Administration Act 1953* (the Act).
2. This instrument varies the amount an external administrator or a trustee of a bankrupt's estate must withhold under the pay as you go (PAYG) withholding system for certain payments made to employees of the entity over which they are appointed.
3. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.
4. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Date of effect

5. This instrument commences on 1 July 2025.

Background

6. Under the PAYG withholding system, external administrators and trustees of bankrupts' estates may be required to withhold from certain payments they make, where the payment relates to employee entitlements that accrued prior to their appointment.
7. External administrator has the same meaning as in the *Corporations Act 2001* but also includes a receiver, and a receiver and manager.
8. This instrument provides a single withholding rate to be used by external administrators and trustees of bankrupts' estates when paying entitlements to employees of the entity which is under administration or bankruptcy. Without this instrument, these payers would need to use the multiple rates that would otherwise apply. The variation provided by this instrument is intended to lessen the administrative burden on external administrators and trustees of bankrupt's estates when paying such entitlements.
9. This instrument repeals and replaces the instrument titled *PAYG Withholding Variation: Variation of amount to be withheld from certain payments made by external administrators and trustees of bankrupt estates* (2015 Instrument) which would otherwise sunset on 1 October 2025. This instrument has the same effect as the 2015 Instrument, with the exception of the withholding rate, which has been changed from 34.5% to 32% to take account of changes to income tax rates.

Effect of this instrument

10. This instrument varies the withholding rate to be used by external administrators and trustees of bankrupts' estates when paying specific employee entitlements that accrued prior to their appointment.

Payments specified in section 6

11. The varied rate provided by this instrument applies to the following amounts:

- (a) back payment of wages, including for unpaid amounts of leave already taken, or for underpayment of wages over any period;
- (b) unused annual leave payments;
- (c) unused long service leave payments;
- (d) payments made in lieu of notice; and
- (e) genuine redundancy payments.

12. **Back payment of wages** refers to the payment of an amount of money that an employee was entitled to receive at an earlier date, but which was not paid at that earlier time and continued to be owed to them by the employer. This includes unpaid amounts that the employee was entitled to receive for leave that they have already taken, and the amount of any underpaid wages that accrued during their employment.

13. **Unused annual leave payments** and **unused long service leave payments** are defined in sections 83-10 and 83-75 (respectively) of the *Income Tax Assessment Act 1997* (ITAA 1997). They are payments made in consequence of a termination of employment for annual leave (including bonuses or other additional payments relating to that annual leave) and long service leave which:

- the employee has not used; or
- the employee was not entitled to at the time of termination but that would have been made available to them later, if not for the termination.

14. The *Fair Work Act 2009* (FWA 2009) and industrial instruments provide for minimum periods of notice that must be given when an employment relationship is terminated. Subdivision A of Division 11 of the FWA 2009 provides that, in place of that period of notice, a **payment in lieu of notice** may instead be paid.

15. **Genuine redundancy payments** are defined in section 83-175 of the ITAA 1997. They:

- are received by an employee who is dismissed from employment because their position is genuinely redundant; and
- represent the amount that would exceed the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of the dismissal.

16. Genuine redundancy payments are tax-free up to a limit based on the employee's years of service. Under subsection 83-170(2) of the ITAA 1997, the amount of a genuine redundancy payment up to this limit is non-assessable non-exempt income of the employee and is therefore tax-free. Consequently, the tax-free component of a genuine redundancy payment is excluded from the requirement to withhold.

Withholding rate varied to 32%

17. Under section 6, the amount to be withheld from these payments is varied to 32% of the payment.

18. This rate has been chosen as it represents the mid-point tax rate. The mid-point tax rate up until 30 June 2024 was 34.5% (that is, 32.5% tax rate plus 2% Medicare levy). From 1 July 2024, changes to income tax rates resulted in a new mid-point tax rate of 32% (that is, 30% tax rate plus 2% Medicare levy).

Compliance cost assessment

19. Compliance cost impact: Minor – There will be no additional regulatory impacts as the instrument is minor and machinery in nature (The Office of Impact Analysis reference: OIA25-09316).

Consultation

20. Subsection 17(1) of the *Legislation Act 2003* requires that the Commissioner be satisfied that appropriate and reasonably practicable consultation has been undertaken before they make a determination.

21. Public consultation was undertaken on drafts of this instrument and explanatory statements for a period of 4 weeks from 14 March to 11 April 2025.

22. The draft instrument and draft explanatory statement were published to the ATO Legal database and publication was advertised via the 'What's new' page on that website. Major tax and superannuation publishers and associations monitor these pages and include details in the daily and weekly alerts and newsletters that they provide to their subscribers and members.

23. No submissions were received during the consultation period.

Legislative references

Acts Interpretation Act 1901

Bankruptcy Act 1966

Corporations Act 2001

Fair Work Act 2009

Income Tax Assessment Act 1997

Legislation Act 2003

Taxation Administration Act 1953

Statement of compatibility with human rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

This instrument provides a flat withholding rate to be used by external administrators and trustees of bankrupts' estates when paying specific entitlements that accrued prior to their appointment. This reduces the administrative burden for these payers when addressing the historical payment obligations of the entity which is under administration or bankruptcy.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms. It merely provides a simple mechanism for external administrators and trustees of bankrupts' estates to calculate the amount required to be withheld when addressing historical payment obligations of the entity under administration or bankruptcy.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.