



Government
of South Australia

Office for the Public Sector

DETERMINATION AND GUIDELINE 6:

RECOVERY OF OVERPAYMENTS

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Determination Revised 16 January 2017
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Who is covered by this Determination and Guideline?

Under section 16(1) of the *Public Sector Act 2009* ("PS Act"), the Commissioner for Public Sector Employment:

"...may issue determinations relating to

- a) employment in the Public Service; and
- b) public sector employment outside the Public Service that is declared by another Act or the regulations under this Act to be employment to which this section applies."

Accordingly, this document applies as a Determination to:

- Employees in the Public Service employed in a public sector agency that is an administrative unit or attached office, as defined by the PS Act; and also
- Public sector employees whose employment has been declared by another Act or the regulations under the PS Act to be employment to which the above Section 16(1) of the PS Act applies.

Under section 14(1)(d) of the PS Act, the Commissioner for Public Sector Employment may issue guidelines relating to public sector employment matters.

For agencies and employees to which Part 7 of the PS Act does not apply, this document is a Guideline of the Commissioner for Public Sector Employment. Agencies are encouraged to formally adopt the Guideline as agency policy.

If you are in any doubt as to whether this document applies to your employment, please contact your Human Resource unit to clarify your status.

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1. INTRODUCTION

Treasurer's Instruction No.5 Debt Recovery and Write Offs ("Treasurer's Instruction No. 5"), obliges chief executives and other agency heads to seek recovery of debts to the Crown. This includes debts created by the overpayment of wages.

Treasurer's Instruction No.5 provides that where a debtor is a South Australian Government employee, the debt is not to be written off and the person must be pursued for prompt repayment.

Pursuant to Treasurer's Instruction No.5, agencies have an obligation to recover debts arising from overpayments and employees have an obligation to repay debts created during their employment.

The transfer of an employee from employment in one public sector agency to employment in another agency does not affect the existence of a debt to the Crown. Likewise, termination of an employee's employment does not affect the existence of a debt to the Crown.

NOTE: the responsibility to seek recovery of debts created by overpayments rests with the agency in which the employee is or was working at the time the overpayment occurred. Shared Services SA is a service delivery business unit and not a stand-alone agency. Shared Services SA is instructed by public sector agencies to perform payroll-related functions, including related to the recovery of debts owed by public sector employees. In practice, the functions outlined in this Guideline may be performed by Shared Services SA.

For the purpose of this Determination and Guideline, nett fortnightly salary means gross fortnightly salary less income taxation.

2. DETERMINATION – ADVICE TO EMPLOYEES

As soon as possible after an overpayment to an employee has been identified, in addition to ensuring that steps are taken to ensure that further overpayments do not occur (as necessary), agencies are to advise or facilitate advice to the relevant employee or former employee that informs the employee:

- the detail of the overpayment including the reason and quantum;
- that there is an obligation on the agency to recover the overpayment and a *prima facie*¹ obligation on the employee to repay; and
- the proposed basis for an agreed repayment arrangement.

Agencies may agree with employees or former employees for repayment of overpayments by entering a written agreement that either the employee will repay the debt by fortnightly deductions from their after tax salary, or, in the case of a former employee, fortnightly transfer by them from a financial institution or electronic funds transfer. Agreement may be reached either for repayment in a lump sum or otherwise:

- on a fortnightly basis, at the rate of at least 10% of the employee's nett fortnightly salary or other greater rate as agreed; or
- in the case of large overpayments that would not be repaid within a period of a maximum five years were fortnightly deductions to occur at the rate of 10% of nett fortnightly salary, a percentage of nett salary necessary to repay the overpayment in full within a maximum of five years on a fortnightly basis.

In the case of former employees who are not presently in paid employment, agreement may be reached either for repayment in a lump sum or otherwise:

- on a fortnightly basis, at the rate of at least 10% of the nett salary being paid to the former employee at the time their employment in the public sector terminated; or
- in the case of large overpayments that would not be repaid within a period of a maximum five years were fortnightly deductions to occur at the rate of 10% of applicable nett prior fortnightly salary, a percentage of that nett salary necessary to repay the overpayment in full within a maximum of five years on a fortnightly basis.

Where the employee disputes the existence of the overpayment the employee should contact their Human Resources unit for advice on the appropriate grievance review process to be followed.

If as a result of the application of Determination and Guideline 6 taxation amendments issues arise, employees should seek

taxation advice or refer to the following Australian Taxation Office link (if relevant):

<https://www.ato.gov.au/General/Correct-a-mistake-or-amend-a-return/>

¹ A fact presumed to be true unless it is disproved

3. DETERMINATION – UNILATERAL DEDUCTIONS

3.1 AMOUNTS OF \$50 OR LESS

Where an overpayment to an employee is \$50 or less, there will be an automatic deduction of the amount of the overpayment from nett fortnightly salary otherwise payable to the employee, by reliance on section 70 of the PS Act.

Employees will be notified of the overpayment and intended automatic deduction prior to the automatic deduction being actioned. Where an employee claims that an immediate automatic deduction would cause them significant financial hardship, they must contact their relevant Payroll Team to discuss the matter and attempt to negotiate alternative arrangements for incremental deductions from nett fortnightly salary to meet the amount of the overpayment. The relevant Payroll Team must ensure that an automatic deduction from fortnightly salary does not occur whilst discussions between the parties are underway. It is the obligation of the employee who has been overpaid to demonstrate within a reasonable period, not more than one month following notification of the overpayment, that an automatic singular deduction from their fortnightly salary would cause them financial hardship and that they seek to arrange for a smaller quantum of deductions from their salary in order to meet the debt created by the overpayment. Should an employee fail to objectively demonstrate that automatic deduction from their fortnightly salary of an overpayment would cause them financial hardship, the deduction will occur.

3.2 AMOUNTS GREATER THAN \$50

Where agreement with an employee for repayment of the debt created by an overpayment is not reached, agencies will rely upon section 70 of the PS Act, and facilitate unilateral deductions from the employee's salary as follows:

- on a fortnightly basis at the rate of at least 10% of the employee's nett fortnightly salary or other greater rate as agreed; or
- in the case of large overpayments that would not be repaid within a period of a maximum five years were fortnightly deductions to occur at the rate of 10% of net fortnightly salary, a percentage of nett salary necessary to repay the overpayment in full within a maximum of five years.

4. FINANCIAL HARDSHIP

The arrangements for repayment of overpayments will apply unless an employee or former employee demonstrates on an objective basis they are currently experiencing or would experience financial hardship if required to repay at the rate of a minimum of 10% of nett fortnightly salary. Only in such cases, may agencies agree to the employee repaying the overpayment at a lesser rate or over a longer period of time.

If an employee can demonstrate on an objective basis that having received an overpayment in good faith (i.e. they had no knowledge of it) and that they changed their circumstances in reliance on the monies to their detriment, they may not be required to repay the debt created by the overpayment. Agencies should consider seeking advice from the Crown Solicitor's Office when an employee asserts that they should not be required to repay a debt created by an overpayment on this basis.

Where an employee's employment in the public sector terminates, and the employee has a liability to the Crown, an agency is to ensure that section 70 of the PS Act is relied upon so as deductions from monies otherwise payable to the employee upon termination are made to the agency/Crown in satisfaction of the liability.

Where there are no monies otherwise payable to an employee upon termination of their employment or monies otherwise payable are insufficient to fully repay a liability, agencies are to attempt to reach agreement with the person for fortnightly repayment of the relevant amount, as above.

5. ACTION TO RECOVER

The Commissioner for Public Sector Employment determines that where an agency relies upon section 70 of the PS Act to recover a debt owed by an employee created by an overpayment, the agency may only commence recovery of the debt within six (6) years of the debt being created.

In the absence of agreement with a former employee, including when agreement for repayment is not reached after unilateral deductions from monies otherwise payable to the employee upon termination of their employment does not fully satisfy the debt, it may be appropriate to seek the assistance of the Crown Solicitor's Office to enable appropriate legal action to be taken to recover the debt to the Crown created by an overpayment.

6. RECREATION, LONG SERVICE AND RETENTION LEAVE

The taking by an employee of recreation, long service or skills and experience retention leave on the basis of an error (howsoever caused) as to actual accrued entitlements (i.e. where an employee has taken leave without the requisite accrued entitlement) does not give rise to an overpayment of salary, other than where an amount is paid for leave loading in respect of the period.

This is different to where an employee is permitted by management to take leave in the knowledge they have not accrued an entitlement (i.e. in advance of accrual). In such circumstances, where an employee's employment is terminated prior to their leave balance being neutral or positive, a debt will exist.

7. POTENTIAL MISCONDUCT

Where an employee knowingly allows a debt in the form of an overpayment of salary to accrue, they may have committed misconduct in contravention of the Professional Conduct Standards in the Code of Ethics for the South Australian Public Sector. Managers should seek advice from their Human Resources unit in the first instance where it is suspected that an employee has acted in this manner.