



## Class Ruling

### Income tax: Australian Construction Industry Redundancy Trust – deductibility of employer contributions

| Contents                                   | Para      |
|--------------------------------------------|-----------|
| <b>LEGALLY BINDING SECTION:</b>            |           |
| <b>Summary – what this Ruling is about</b> | <b>1</b>  |
| <b>Date of effect</b>                      | <b>7</b>  |
| <b>Previous Rulings</b>                    | <b>8</b>  |
| <b>Scheme</b>                              | <b>9</b>  |
| <b>Ruling</b>                              | <b>25</b> |
| <b>NOT LEGALLY BINDING SECTION:</b>        |           |
| <b>Appendix 1:</b>                         |           |
| <b>Explanation</b>                         | <b>28</b> |
| <b>Appendix 2:</b>                         |           |
| <b>Detailed contents list</b>              | <b>44</b> |

#### **① 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

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 provisions

2. The relevant provisions dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 8-1 of the ITAA 1997
- section 82-135 of the ITAA 1997.

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

#### Class of entities

3. The class of entities to which this Ruling applies is all employers who make contributions to the Australian Construction

Industry Redundancy Trust (ACIRT) on behalf of the workers who are members of ACIRT (members).

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
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 23 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.

## Date of effect

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7. This Ruling applies from 1 July 2018 to 30 June 2024. The Ruling continues to apply after 30 June 2024 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. 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*).

## Previous Ruling

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8. This Ruling is an extension of Class Ruling CR 2012/94 *Income tax: deductibility of employer contributions to the Australian Construction Industry Redundancy Trust* which was previously issued on 24 October 2012.

## Scheme

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9. The following description of the scheme is based on information provided by the applicant. The following documents submitted with the class ruling application from ACIRT dated 6 August 2018, or relevant parts of them, form part of and are to be read with the description:
  - a copy of ACIRT Redundancy Fund Trust Deed (ACIRT Trust Deed) as last amended at 13 July 2017

- a standard Deed of Adherence between ACIRT and an Employer
- a copy of clause 17 of the Building and Construction General On-site Award 2010, and
- a copy of an extract from an Enterprise Bargaining Agreement containing examples of typical redundancy clauses involving redundancy contributions to ACIRT.

10. ACIRT is an Australian resident trust fund governed by a trust deed (Trust Deed) which established the fund in Australia. The central management and control of the fund is in Australia.

11. The trustee of ACIRT is ACIRT Pty Limited (ACN: 062330170) (**Trustee**), an Australian resident company.

12. The Trustee has appointed an administrator of ACIRT and an investment manager to manage the investments of ACIRT on behalf of the Trustee.

13. ACIRT is an approved worker entitlement fund for fringe benefits tax (**FBT**) purposes.<sup>1</sup>

14. Employers can fully or partially fund employee redundancy entitlements that Employers are required to make under various industrial awards and enterprise agreements (**Industrial Instruments**) for the benefit of their employees through the payment of contributions to ACIRT.

15. As set out in clause 3.1 of the Trust Deed, an employer wishing to become a Participating Employer shall apply to the Trustee for admission to ACIRT and shall complete a Deed of Adherence to participate in ACIRT.

16. ACIRT accepts contributions to the fund for each member for each week of service in respect of which contributions are legally payable under an Industrial Instrument or Deed of Adherence, consisting of (clause 4.1 of the Trust Deed):

- (a) the Minimum Contribution (see Deed of Adherence), or
- (b) to fund the Employee's redundancy benefit as provided in an Industrial Instrument.

17. As set out in clause 5.1 of the Trust Deed, all contributions made to ACIRT by employers are placed into separate member (employee) accounts identifying contributions for that member.

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<sup>1</sup> See Class Ruling CR 2017/36 *Fringe benefits tax: employer contributions to the Australian Construction Industry Redundancy Trust (ACIRT)*.

18. A member who terminates employment is entitled to a payment under clause 19.2 of the Trust Deed. Clause 19.2 of the Trust Deed states:

A Member who was made Redundant, is entitled to a payment of the amount standing to the Member Account where:

- (a) claim for payment is made within twelve (12) months of being made Redundant; or
- (b) the Member Leaves the Industry.

The term 'Redundant' is defined under clause 1.1 of the Trust Deed as:

'Redundancy' or 'Redundant' means, the termination or cessation of employment of a Member for any reason other than where paragraphs (a) or (b) of clause 17.1 applies.

The term 'Leaving the Industry' is defined under clause 1.1 of the Trust Deed as:

'Leaving the Industry' means ceasing employment:

- (a) with an Employer that has paid contributions to the Fund; or
- (b) with any employer in the Construction Industry,  
and having no intention to become employed by another Employer.

19. Contributions made to ACIRT by employers and payments made from ACIRT to a member under clause 19.2 of the Trust Deed do not include, and are not in lieu of, any of the payments in section 82-135.

20. Subject to any accumulation of income under clause 19.1(c) of the Trust Deed, ACIRT distributes all of its income each year after payment of expenses to members – clause 19.1(a).

21. The income available for distribution is divided amongst members in proportion to the members' account balances (subject to a minimum balance requirement).

22. Redundancy payments from ACIRT are treated as Employment Termination Payments (**ETPs**) and PAYG at the relevant ETP tax rates (including the Medicare levy) is deducted by the administrator of ACIRT.

23. Members can transfer the benefits they have accumulated in another Redundancy Fund into ACIRT where permitted by the other fund and that other redundancy fund is an 'approved worker entitlement fund'.

24. Clause 19.4 of the Trust Deed contains a facility for reimbursement of the employer, where it has paid the redundancy amount to the member directly.

## **Ruling**

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25. An employer who makes contributions for worker redundancy benefits to ACIRT under the Trust Deed is entitled to claim a deduction under section 8-1 for the amount of the contribution.

26. Where an employer pays an amount directly to a worker, which the worker is entitled to on redundancy under the Trust Deed, and then seeks reimbursement from ACIRT, the amount of the payment will be an allowable deduction under section 8-1.

27. Where a reimbursement is received by an employer from ACIRT for an amount which the employer paid directly to a worker, which the worker is entitled to on redundancy under the Trust Deed, the reimbursement will be assessable income under section 6-5 at the time the amount is derived by the employer.

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**Commissioner of Taxation**

24 October 2018

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## Appendix 1 – Explanation

**①** *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.*

### Application of section 8-1

28. Section 8-1 provides that you can deduct from your assessable income any loss or outgoing to the extent that it is incurred in gaining or producing assessable income or is necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income and is not:

- capital, private or domestic in nature
- incurred in gaining or producing exempt income or non-assessable non-exempt income, or
- prevented from being deductible by a provision of the ITAA 1997 or the *Income Tax Assessment Act 1936*.

### Positive limbs

#### ***Nexus to gaining and producing assessable income***

29. Employers, in the course of carrying on their business activities, are obligated by various industrial instruments to provide redundancy benefits for their workers. Employers can fund these worker redundancy benefits that they are required to make by the payment of contributions to ACIRT.

30. If an employer chooses to fund their worker redundancy benefits via contributions to ACIRT, a Deed of Adherence is executed between the employer and ACIRT.

31. In addition to the employer's legal obligations under the relevant industrial instrument, the employer is also required to meet the obligations under the Deed of Adherence and the Trust Deed. The administrative provisions require the employer to make monthly contributions to ACIRT in respect of worker entitlements.

32. There is a nexus between the business activities being carried on by the employer and the employer's obligation to provide for worker redundancy benefits, such that payment of the contributions is incidental and relevant to the production of the assessable income of the business.

#### ***Incurring the amount***

33. At the point at which an employer makes a contribution to the Trustee of ACIRT, the amount is placed into member accounts and the amount is no longer available to the employer. This differs from the situation in *Walstern Pty Ltd v. Federal Commissioner of Taxation*

[2003] FCA 1428; 2003 ATC 5076; (2003) 54 ATR 423 where there were no members of the trust. The contributions were not expenses incurred by the employer as they remained funds of the employer.

34. The fact that amounts may be returned to the employer under the Trust Deed when the employer is reimbursed for payments made directly to a worker (a factor which does not prevent ACIRT being an approved worker entitlement fund under section 58PB of the *Fringe Benefits Tax Assessment Act 1986*) does not affect whether the monthly contributions are incurred by the employer.

35. Even though the Trust Deed enables the employer to seek reimbursement in certain circumstances, the contributions to ACIRT are definite payments which the employer is required to make to meet the legal obligations under the industrial instruments or Deed of Adherence which arise in the course of carrying on their business activities. As such, the employer incurs the expenditure on contributions when the liability to make the payment arises each month.

### **Conclusion**

36. Therefore, the employer's monthly contributions to ACIRT are outgoings necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income for the purposes of section 8-1.

### **Negative limbs**

#### ***Is the contribution revenue in nature?***

37. Whether the payment of contributions for worker redundancy benefits to ACIRT is revenue or capital in nature depends on the character of the payment when made by the employer. As stated in *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation* (1990) 90 ATC 4413 at 4419; (1990) 21 ATR 1 at 7:

The character of expenditure is ordinarily determined by reference to the nature of asset acquired or the liability discharged by the making of the expenditure, for the character of the advantage sought by the making of the expenditure is the chief, if not critical, factor in determining the character of what is paid: *Sun Newspapers Ltd v. F. C. of T.* (1938) 61 CLR 337 at p. 363.

38. In making the monthly contributions to ACIRT as required by clause 4.1 of the Trust Deed, the employer meets their immediate legal obligation under an industrial instrument or the Deed of Adherence.

39. The employer is making repetitive monthly contributions to discharge an immediate obligation and the obligation is directly connected to the income earning capacity of the business. Accordingly, the payment of the contributions is revenue in nature.

## **Payments by employer to employee**

40. There is a nexus between the business activities being carried on by the employer and the employer's obligation to provide for worker redundancy benefits, such that payment of the worker redundancy benefits directly to a worker by an employer is incidental and relevant to the production of the assessable income of the business.

41. Accordingly, the payment of a worker redundancy benefit directly to a redundant worker would be an allowable deduction under section 8-1 as an outgoing incurred in gaining or producing assessable income or in carrying on a business for that purpose.

## **Reimbursement of payment by employer**

42. Where an employer has paid a worker their worker redundancy benefit directly, the employer may apply to ACIRT for a reimbursement of this amount. ACIRT may reimburse the employer for this amount under clause 19.4 of the Trust Deed.

43. Where an employer has claimed or will claim a deduction for a worker redundancy benefit paid directly to a redundant worker under section 8-1, the reimbursement of this expense must be declared as income. In these cases the reimbursement is income received in the ordinary course of business and assessable under section 6-5 in the income year in which it is derived.

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

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

|                                                          | <b>Paragraph</b> |
|----------------------------------------------------------|------------------|
| <b>Summary – what this Ruling is about</b>               | <b>1</b>         |
| Relevant provisions                                      | 2                |
| Class of entities                                        | 3                |
| Qualifications                                           | 4                |
| <b>Date of effect</b>                                    | <b>7</b>         |
| <b>Previous Rulings</b>                                  | <b>8</b>         |
| <b>Scheme</b>                                            | <b>9</b>         |
| <b>Ruling</b>                                            | <b>25</b>        |
| <b>Appendix 1 – Explanation</b>                          | <b>28</b>        |
| Application of section 8-1                               | 28               |
| Positive limbs                                           | 29               |
| <i>Nexus to gaining and producing assessable income</i>  | 29               |
| <i>Incurring the amount</i>                              | 33               |
| Conclusion                                               | 36               |
| Negative limbs                                           | 37               |
| <i>Is the contribution revenue or capital in nature?</i> | 37               |
| Payments by employer to employee                         | 40               |
| Reimbursement of payment by employer                     | 42               |
| <b>Appendix 2 – Detailed contents list</b>               | <b>44</b>        |

## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10; CR 2007/28  
CR 2012/94; CR 2017/36

*Legislative references:*

- ITAA 1997
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 82-135
- FBTAA 1986
- FBTAA 1986 58PB
- TAA 1953
- ITAA 1936

*Case references:*

- GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation (1990) 21 ATR 1; 90 ATC 4413
- Walstern Pty Ltd v. Commissioner of Taxation [2003] FCA 1428; 2003 ATC 5076; (2003) 54 ATR 423
- Sun Newspapers Ltd and Associated Newspapers Ltd v. Federal Commissioner of Taxation (1938) 5 ATD 87; (1938) 61 CLR 337

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ATO references

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