

CR 2001/74 - Income tax: Approved Early Retirement Scheme - VAW Kurri Kurri Pty Limited

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Class Ruling

Income tax: Approved Early Retirement Scheme – VAW Kurri Kurri Pty Limited

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a ‘public ruling’ in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a **Ruling** is a public ruling and how it is binding on the Commissioner.*

What this Class Ruling is about

1. This Ruling sets out the Commissioner’s opinion on the way in which the ‘tax law(s)’ identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax law dealt with in this Ruling is section 27E of the *Income Tax Assessment Act 1936* (‘ITAA 1936’).

Class of persons

3. The class of persons to whom this Ruling applies is all persons engaged on a full time basis by VAW Kurri Kurri Pty Limited at its Aluminium Smelter, employed under staff conditions or under the VAW Kurri Kurri Pty Limited Enterprise Agreement, who receive a payment under the arrangement described below in paragraphs 10 to 26.

Qualifications

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

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement described below at paragraphs 10 to 26 is carried out in accordance with the details of the arrangement provided in this Ruling.

6. If the arrangement described in this Ruling is materially different from the arrangement that is actually carried out:
- (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
 - (b) this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 1 December 2001. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Withdrawal

9. This Ruling is withdrawn and ceases to have effect after 30 November 2002. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

The Scheme

10. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- correspondence from VAW Kurri Kurri Pty Limited dated 3 October 2001;
- record of telephone conversation with a representative of VAW Kurri Kurri Pty Limited on 7 November 2001;
- record of telephone conversation with a representative of VAW Kurri Kurri Pty Limited on 16 November 2001;
- record of telephone conversation with a representative of VAW Kurri Kurri Pty Limited on 20 November 2001.

11. VAW Kurri Kurri Pty Limited is seeking approval for a voluntary early retirement (VER) scheme for employees at its Kurri Kurri Aluminium Smelter.

12. The VER scheme has been established to facilitate VAW's efficiency and productivity improvements across the organisation to achieve international competitiveness by encouraging innovation and work redesign within the Kurri Kurri Smelter. As a consequence some employees will become excess to requirements.

13. VAW Kurri Kurri Pty Limited has advised that VER applies to a situation where a person who is employed on a full time basis by the company has voluntarily elected to take early retirement in circumstances where, because of the direct result of work redesign or changes in work practices or procedures, it has been established that the employee who has requested VER will not need to be replaced.

14. VAW Kurri Kurri Pty Limited has also advised VER conditions will not apply unless the work responsibilities of the organisation in which the staff member is currently engaged will continue to be efficiently and effectively carried out without replacement of the employee electing to take VER. Consequently, a VER is not available to employees in key roles where their retirement would be to the detriment of the company's efficient operation.

15. VAW Kurri Kurri Pty Limited would like the scheme to operate from 1 December 2001 to 30 November 2002.

16. VAW Kurri Kurri Pty Limited has advised that the VER scheme does not apply to the following:

- (a) Employees engaged on a temporary, part-time or time-limited basis;
- (b) Employees who resign where a replacement has to be hired;
- (c) Employees who are dismissed for disciplinary reasons, or for non-performance;
- (d) Employees taking normal retirement.

17. Staff employees who are eligible to take VER shall be entitled to the following payments:

The lesser of:

- (a) one month's salary (5 weeks if over 45) plus an additional one month's payment;
- (b) 3 weeks salary for each full year of service and proportionate amount for any part year service;
- (c) for employees with 10 years services, an additional 2 weeks for each 5 years service or part thereof, calculated on the total service period.

OR

- (d) 18 months' salary,

VAW Kurri Kurri Pty Limited has advised that for the purposes of calculating severance pay, salary means actual base salary or notional salary for salary package staff (Grade 8 and above).

18. Award covered employees who are eligible to take VER shall be entitled to the following payments:

- (a) six weeks wages;
- (b) 3 weeks ordinary pay for each continuous year of service and proportionate amount for complete months of service less than a full year;
- (c) where an employee has accumulated 10 years continuous service, an additional payment of 2 weeks ordinary pay will be made for each 5 years service of continuous service or part thereof, calculated on the total period of service;
- (d) payment for accumulated sick leave.

In relation to (d) VAW Kurri Kurri Pty Limited have advised that employees do not get paid for accumulated sick leave on normal termination.

19. The employees will also receive the following but these do not form part of the approved early retirement scheme payment:

- accrued long service leave;
- accrued annual leave.

Payments made under the Scheme

20. For a payment made under the above mentioned scheme to qualify as an approved early retirement scheme payment, the following conditions must be met. Please note, any payment made under the scheme that does not satisfy these requirements is not covered by this Ruling.

21. The payment must be an eligible termination payment (ETP) made in relation to the employee in consequence of his or her employment being terminated under the approved early retirement scheme.

22. The payment must not be made from an eligible superannuation fund.

23. The payment must not be made in lieu of superannuation benefits.

24. The employee terminated his or her employment before the earlier of:

- age 65; or
- the date on which his or her employment would have necessarily terminated under the terms of employment because of the taxpayer attaining a certain age or completing a certain period of service.

25. Where the employee and the employer are not dealing with each other 'at arm's length' (for example, because they are related in some way), the payment does not exceed what would have been paid to the employee had they been dealing at arm's length.

26. At the termination time, there is no agreement in force between the employee and the employer or the employer and another person, to re-employ the employee after the date of termination.

Ruling

27. The voluntary early retirement scheme offered by VAW Kurri Kurri Pty Limited is an approved early retirement scheme for the purposes of section 27E of the ITAA 1936.

28. Accordingly, so much of the eligible termination payment (ETP) as exceeds the amount of an ETP that could reasonably be expected to have been made in relation to the taxpayer if the termination of employment had occurred at the termination time otherwise than in accordance with the approved early retirement scheme, is an approved early retirement scheme payment in relation to the taxpayer.

Explanations

29. Where a scheme satisfies the requirements of section 27E of the ITAA 1936 that scheme will be an ‘approved early retirement scheme.’

30. The Commissioner of Taxation (the Commissioner) has issued Taxation Ruling TR 94/12 titled: *‘Income tax: approved early retirement scheme and bona fide redundancy payments’* which sets out guidelines on the application of section 27E.

31. Paragraph 14 of TR 94/12 states that:

‘Three conditions need to be satisfied for a scheme to qualify as an approved early retirement scheme. Those conditions are:

- (i) the scheme must be offered to all employees within a class identified by the employer (paragraph 27E(1)(a));
- (ii) the scheme must be entered into with a view to rationalising or re-organising the operations of the employer with an identified purpose in mind (paragraph 27E(1)(b)); and
- (iii) the scheme must be approved by the Commissioner prior to its implementation (paragraph 27E(1)(c)).’

1. The scheme must be offered to all employees within a class identified by the employer

32. In order to satisfy the first condition, the scheme must be offered to all employees within one of the categories specified in subparagraphs 27E(1)(a)(i) to (v).

33. The class of employees to whom the scheme is proposed to be offered is:

- all persons engaged on a full time basis by VAW Kurri Kurri Pty Limited at its Aluminium Smelter employed under staff conditions or under the VAW Kurri Kurri Pty Limited Enterprise Agreement.

34. This class of employees does not come within any of subparagraphs 27E(1)(a)(i) to (iv), therefore it must be considered under subparagraph 27E(1)(a)(v), namely, all employees of the employer who constitute a class of employees approved by the Commissioner for the purposes of this paragraph. In approving this class of employees the Commissioner has considered the nature of the rationalisation or re-organisation of the operations of the employer. It is therefore considered that these employees meet the requirements of an approved class of employees for the purposes of subparagraph 27E(1)(a)(v).

35. It is noted, however that the VAW Kurri Kurri Pty Limited retains a limited right of veto to be applied to applications by key personnel who cannot be readily replaced and whose loss would impair the efficiency of the VAW Kurri Kurri Pty Limited's business operations. The limitation of the scheme in this way is acceptable to the Commissioner.

2. The scheme must be entered into with a view to rationalising or re-organising the operations of the employer with an identified purpose in mind

36. The proposed scheme must be implemented with a view to rationalise or re-organise the operations of the employer by means of one or more of the objectives set out in subparagraphs 27E(1)(b)(i) to (vi).

37. The purposes of the scheme are described at paragraph 12 of this ruling. The proposed scheme meets the requirements set out in subparagraph 27E(1)(b)(v); accordingly the second condition for approval has been met.

3. The scheme must be approved by the Commissioner prior to its implementation

38. Application for approval of the scheme dated 3 October 2001, was received in this office on 5 October 2001. The scheme is proposed to operate for a period from 1 December 2001 to 30 November 2002. Approval will be granted prior to implementation therefore the third condition is satisfied.

39. The scheme will be in operation for one year which is within the period recommended in TR 94/12.

Other relevant information

40. Under section 27E, so much of the payment received by a taxpayer under the approved early retirement scheme, that exceeds the

amount that would ordinarily have been received on voluntary resignation or retirement is an approved early retirement scheme payment.

41. It should be noted that, in order for a payment to qualify as an approved early retirement scheme payment, it must also satisfy the following requirements (as set out in subsections 27E(4) and (5) of the Act):

- the payment must be an eligible termination payment (ETP) made in relation to the taxpayer in consequence of the taxpayer's employment being terminated under an approved early retirement scheme;
- the payment must not be from an eligible superannuation fund;
- the payment must not be made in lieu of superannuation benefits;
- if the taxpayer and the employer are not dealing with each other at arm's length (for example, because they are related in some way) the payment does not exceed what would have been paid to the taxpayer had they been dealing at arm's length;
- the date of termination was before age 65 or such earlier date on which the taxpayer's employment would necessarily have had to terminate under the terms of employment because of the taxpayer attaining a certain age or completing a certain period of service, whichever occurs first; and
- there was no agreement at the date of termination between the taxpayer and the employer, or the employer and another person to re-employ the taxpayer after the date of termination.

42. The term 'agreement' is defined in subsection 27A(1) as meaning 'any agreement, arrangement or understanding whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable by legal proceedings.'

43. An approved early retirement scheme payment made on or after 1 July 1994 that falls within the specified limit will be exempt from income tax and called the "tax-free amount."

44. For the year ending 30 June 2002, the tax-free amount is limited to \$5 295 plus \$2 648 for each whole year of completed employment service to which the approved early retirement scheme payment relates. Please note that 6 months, 8 months or even

11 months do not count as a whole year for the purposes of this calculation.

45. The following payments qualify as an approved early retirement scheme payment:

- for staff employees, the total of the amount received on termination calculated in accordance with paragraph 17;
- for award covered employees, the total of the amount received on termination calculated in accordance with paragraph 18.

46. For each VER recipient, the payments in the previous paragraph will be measured against the limit calculated in accordance with paragraph 44 to determine the “tax-free amount”.

47. The tax-free amount will:

- not be an ETP;
- not be able to be rolled-over;
- not include any amount from a superannuation fund or paid in lieu of a superannuation benefit; and
- not count towards the recipient’s Reasonable Benefit Limit.

48. Any payment in excess of this limit will be an ordinary ETP and split up into the pre-July 83 and post-June 83 (untaxed element) components. This ETP can be rolled-over.

49. It should be noted that the amount of an approved early retirement scheme payment that is over the tax-free amount may be subject to the provisions of the superannuation surcharge legislation, whether it is taken in cash or rolled-over.

50. A copy of this Ruling must be given to all employees eligible to participate in the approved early retirement scheme.

Detailed contents list

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Commissioner of Taxation

28 November 2001

<i>Previous draft:</i>	- ITAA 1936 27E(1)(a)
Not previously issued in draft form	- ITAA 1936 27E(1)(b)
	- ITAA 1936 27E(1)(c)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 27E(1)(a)(i)
CR 2001/1; TR 92/1; TR 92/20;	- ITAA 1936 27E(1)(a)(ii)
TR 97/16	- ITAA 1936 27E(1)(a)(iii)
	- ITAA 1936 27E(1)(a)(iv)
<i>Subject references</i>	- ITAA 1936 27E(1)(a)(v)
- approved early retirement scheme payments;	- ITAA 1936 27E(1)(b)(i)
- eligible termination payments	- ITAA 1936 27E(1)(b)(ii)
- eligible termination payments	- ITAA 1936 27E(1)(b)(iii)
components	- ITAA 1936 27E(1)(b)(iv)
	- ITAA 1936 27E(1)(b)(v)
	- ITAA 1936 27E(1)(b)(vi)
<i>Legislative references:</i>	- ITAA 1936 27E(4)
- TAA 1953 Part IVAAA	- ITAA 1936 27E(5)
- ITAA 1936 27A(1)	
- ITAA 1936 27E	

ATO References

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