


# ***CR 2001/80 - Income tax: Approved Early Retirement Scheme - Energy Brix Australia Corporation Pty Ltd***

 This cover sheet is provided for information only. It does not form part of *CR 2001/80 - Income tax: Approved Early Retirement Scheme - Energy Brix Australia Corporation Pty Ltd*

 This document has changed over time. This is a consolidated version of the ruling which was published on *28 November 2001*



## **Class Ruling**

### **Income tax: Approved Early Retirement Scheme – Energy Brix Australia Corporation Pty Ltd**

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Contents	Para
<b>What this Class Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>8</b>
<b>Withdrawal</b>	<b>9</b>
<b>Arrangement</b>	<b>10</b>
<b>Ruling</b>	<b>26</b>
<b>Explanations</b>	<b>28</b>
<b>Detailed contents list</b>	<b>52</b>

#### ***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**

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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*.

##### **Class of persons**

3. The class of persons to whom this Ruling applies is all employees of Energy Brix Australia Corporation Pty Ltd who receive a payment under the arrangement described below in paragraphs 10 to 25.

##### **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 25 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

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8. This Ruling applies from 28 November 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

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9. This Ruling is withdrawn and ceases to have effect after 31 March 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.

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## Arrangement

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### 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 Energy Brix Australia Corporation Pty Ltd dated 20 November 2001;
- record of telephone conversation with a representative of Energy Brix Australia Corporation Pty Ltd on 20 November 2001;
- record of telephone conversation with a representative of Energy Brix Australia Corporation Pty Ltd on 30 November 2001;
- facsimile from Energy Brix Australia Corporation Pty Ltd dated 30 November 2001.

11. Energy Brix Australia Corporation Pty Ltd is seeking approval for an early retirement scheme.

12. Energy Brix Australia Corporation Pty Ltd is part of Victoria's generator sector and operates a briquetting production complex at Morell (Latrobe Valley). The company's largest briquette customer recently announced a 40 000 tonne (35%) reduction in demand for the company's product. This represents a 15% reduction in the company's briquetting market as a whole.

13. Energy Brix Australia Corporation Pty Ltd's current production manning clearly exceed that necessary to produce the required tonnage. The company must institute major change to adjust cost structures for the reduced demand. A critical step in this change process is a reduction in employee numbers.

14. The early retirement scheme will be opened to all permanent employees of Energy Brix Australia Corporation Pty Ltd to apply. Energy Brix Australia Corporation Pty Ltd will retain the right of veto in respect of key employees.

15. A maximum of 20 early retirement scheme departures will be granted.

16. The scheme is scheduled to begin on 28 November 2001 and will officially close on 31 March 2002.

17. The payment under the scheme is:

- a separation payment of 2 weeks for each completed year of continuous service;
- a lump sum payment of \$5 000.

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

- payment of accrued and pro rata recreation leave;
- payment of accrued long service leave (including pro rata of 1.3 weeks leave for each completed year of service if employment is less than 10 years);
- superannuation entitlements.

## **Payments made under the Scheme**

19. 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.

20. 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.

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

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

23. 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.

24. 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.

25. 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.

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## Ruling

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26. The early retirement scheme offered by Energy Brix Australia Corporation Pty Ltd is an approved early retirement scheme for the purposes of section 27E of the *Income Tax Assessment Act 1936*.

27. 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.

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## Explanations

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28. Where a scheme satisfies the requirements of section 27E of the *Income Tax Assessment Act 1936* (the Act) that scheme will be an 'approved early retirement scheme.'

29. 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.

30. 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***

31. 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).

32. The class of employees to whom the scheme is proposed to be offered is all employees of Energy Brix Australia Corporation Pty Ltd.

33. This class of employees is considered to have met the requirements of subparagraph 27E(1)(a)(i), that is, all employees of the employer.

34. Energy Brix Australia Corporation Pty Ltd retains a limited right of veto with regards to the early retirement scheme which means that it can veto applications by personnel who cannot readily be replaced and whose loss would impair the efficiency of Energy Brix Australia Corporation Pty Ltd's business operations. This veto 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***

35. 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).

36. The purposes of the scheme is described at paragraph 13 of this ruling. The proposed scheme meets the requirements set out in subparagraph 27E(1)(b)(iii); accordingly the second condition for approval has been met.

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

37. The scheme is proposed to operate for a period from 28 November 2001 to 31 March 2002. Since the implementation date has already passed, the scheme fails to meet the requirement of paragraph 27E(1)(c).

38. However, subsection 27E(2) allows the Commissioner to overlook the failure to comply with any of the three conditions if special circumstances exist in relation to the scheme. Paragraph 30 of TR 94/12 states:

“Special circumstances include circumstances where: a scheme is implemented before approval has been obtained because, for example, there has been a delay in processing an application made for its approval....”

39. Based on the full circumstances of the application it is considered that this case falls within special circumstances as set out in subsection 27E(2), and the Commissioner will waive compliance with the third requirement of subsection 27E(1).

40. The scheme will be in operation for approximately 4 months which is within the period recommended in TR 94/12.

***Other relevant information:***

41. 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.

42. 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.

43. 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.'

44. 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."

45. 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.

46. The total of the following payments qualify as an approved early retirement scheme payment:

- a separation payment of 2 weeks for each completed year of continuous service;
- a lump sum payment of \$5 000.

47. The total of the payments in the previous paragraph will be measured against the limit calculated in accordance with paragraph 45 to determine the "tax-free amount".

48. 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.

49. 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.

50. 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.

51. 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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52. Below is a detailed contents list for this Class Ruling:

	Paragraph
<b>What this Class Ruling is about</b>	<b>1</b>

Tax law(s)	2
Class of persons	3
Qualifications	4
<b>Date of effect</b>	<b>8</b>
<b>Withdrawal</b>	<b>9</b>
<b>Arrangement</b>	<b>10</b>
The Scheme	10
Payments made under the Scheme	19
<b>Ruling</b>	<b>26</b>
<b>Explanations</b>	<b>28</b>
<i>1. The scheme must be offered to all employees within a class identified by the employer</i>	31
<i>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</i>	35
<i>3. The scheme must be approved by the Commissioner prior to implementation</i>	37
<i>Other relevant information</i>	41
<b>Detailed contents list</b>	<b>52</b>

**Commissioner of Taxation**

12 December 2001

<i>Previous draft:</i>	- ITAA 1936 27E(1)(a)
Not previously released 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; TR 94/12; TR 94/12E	- 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 components	- ITAA 1936 27E(1)(b)(iii)
	- 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)
- ITAA 1936 27A(1)	- ITAA 1936 27E(5)
- ITAA 1936 27E	

ATO References

Class Ruling

# CR 2001/80

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Page 10 of 10

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