CR 2004/22 - Fringe benefits tax: Contribution to an Approved Worker Entitlement Fund: the Victorian CFMEU Building and Construction Industry Collective Bargaining Agreement 2002-2005

Class Ruling

Fringe benefits tax: Contribution to an Approved Worker Entitlement Fund: the Victorian *CFMEU Building and Construction Industry Collective Bargaining Agreement 2002-2005*

Contents Para

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**, **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 are:

- section 58PA of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986); and
- subsection 136(1) of the FBTAA 1986.

Class of persons

3. The class of persons to which this Ruling applies is all employers who have in place a certified *Construction, Forestry, Mining and Energy Union* (CFMEU) *Building and Construction Industry Collective Bargaining Agreement 2002-2005.*

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 actually carried out is carried out in accordance with the arrangement described in paragraphs 9 to 16.

6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:

- 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
- this Ruling may be withdrawn or modified.

Date of effect

8. This Ruling applies from 1 April 2004 to 31 March 2006. Further, the Class Ruling only applies to the extent that:

- there is no material change in the arrangement or in the class of persons involved in the arrangement;
- it is not later withdrawn by notice in the *Gazette*;
- it is not taken to be withdrawn by an inconsistent later public ruling; or
- the relevant tax laws are not amended.

Arrangement

9. The arrangement that is the subject of this 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 the description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- Class ruling application by Master Builders Australia Inc dated 2 December 2003
- *CFMEU Building and Construction Industry Collective Bargaining Agreement 2002-2005*;
- *National Building and Construction Industry Award 2000*; and
- *Victorian Building Industry Agreement 2000-2005*.

10. Master Builders Australia Inc is a national representative body for employers in the building industry.

11. The federal award which applies to the building and construction industry is the *National Building and Construction Industry Award 2000* (the Award).

12. Clause 16.2 of the Award creates an obligation on an employer to pay redundancy/severance amounts for individuals ceasing employment. Clause 16.2.1 outlines how this amount will be calculated. Clause 16.2.7 provides that an employer bound by this Award may utilise a fund to meet all or some of the liabilities created by this clause.

13. As well as the Award, Victorian employers in the building and construction industry may also have in place a certified agreement with the Construction, Forestry, Mining and Energy Union (CFMEU). The certified agreement is referred to as the *CFMEU Building and Construction Industry Collective Bargaining Agreement 2002-2005* (the Certified Agreement).

14. Clause 7 of the Certified Agreement provides that the Certified Agreement is to be read in conjunction with the award. Clause 7 states:

> 7. RELATIONSHIP TO PARENT AWARD AND VICTORIAN BUILDING INDUSTRY AGREEMENT
>
> a) This agreement is supplementary to, and shall be read and interpreted wholly in conjunction with, the National Building and Construction Industry Award 2000 [AW790741] and any successor to that award (hereinafter referred to as 'the award');

b) Where this Agreement is silent, the terms of the award shall apply, unless contrary to law;

c) In the event of any inconsistency between the award and an express provision of this Agreement, the terms of this Agreement shall prevail to the extent of such inconsistency, unless the express provision of the Agreement provides otherwise;

d) This agreement is supplementary to, and shall be read and interpreted wholly in conjunction with, the Victorian Building Industry Agreement 2000-2005 and any successor to that agreement (hereinafter referred to as the 'VBIA');

e) The terms and conditions of the VBIA are expressly preserved by this Agreement as if the same was set out in full herein and shall be binding upon the parties during the currency of the Agreement by the operation of this Agreement if not otherwise. Where this Agreement is silent, the terms of the VBIA shall apply, unless contrary to law;

f) In the event of any inconsistency between the VBIA and an express provision of this Agreement, the terms of this Agreement shall prevail to the extent of such inconsistency, unless the express provision of this Agreement provides otherwise; and

g) No employee shall be disadvantaged by the introduction of this Agreement.

15. Clause 25 of the Certified Agreement also creates an obligation on an employer to pay weekly contributions for each employee to the Redundancy Payment Central Fund Ltd (Incolink). Clause 25 states:

25. REDUNDANCY

The company is, and will remain during the life of this Agreement, a participating employer in the Redundancy Payment Central Fund Ltd (Incolink) and all employees will be enrolled in the Fund and be entitled to redundancy benefits in accordance with the terms of the Deed.

The company shall pay contributions on behalf of each employee into the Incolink Number 1 Fund on a weekly basis, as per the Trust Deed.

16. Clause 7 of the Certified Agreement provides that the agreement is also to be read in conjunction with the *Victorian Building Industry Agreement 2000-2005*. Clause 35.7.1 of the *Victorian Building Industry Agreement 2000-2005* provides the mechanism for employer contributions to the Incolink Redundancy Scheme to be adjusted annually. This clause states:

35.7.1 Redundancy Pay contributions by each employer in respect of each employee shall be calculated by the Victorian Building Industry Consultative Committee (VBIACC) each 1 October for any increase in the CPI during the 12 months ending 30 June, immediately preceding that 1 October and rounded to the nearest 10 cents. Incolink Management will be notified of this calculation and will be asked to notify employers of the CPI adjusted contribution as soon as practicable and make the necessary arrangements for the adjustment to the contribution rate, with affect from 1 October each year.

Ruling

17. An employer operating in the building industry in Victoria who makes a redundancy contribution for an employee to an approved worker entitlement fund pursuant to their obligations under a certified *CFMEU Building and Construction Industry Collective Bargaining Agreement 2002-2005*, will be providing an exempt fringe benefit for the purposes of section 58PA of the FBTAA 1986.

18. The redundancy contribution/s made by the employer will only be an exempt fringe benefit up to the amount which the employer is required to make. From time to time employers may be notified by the respective approved worker entitlement fund under clause 25 of the *CFMEU Building and Construction Industry Collective Bargaining Agreement 2002-2005* of the required minimum redundancy contributions which must be made for their employees.

Explanation

19. When an employer makes a contribution to an approved worker entitlement fund that contribution may be an exempt fringe benefit if it meets the requirements in section 58PA of the FBTAA 1986.

20. Section 58PA of the FBTAA 1986 states:

If:

(a) a person makes a contribution to an approved worker entitlement fund; and

(b) the person is required to make the contribution under an industrial instrument; and

(c) the contribution is either:

(i) required for the purposes of ensuring that an obligation under the industrial instrument to make leave payments (including payments in lieu of leave) or payments when an employee ceases employment is met; or

(ii) for the reasonable administrative costs of the fund;

the contribution is an exempt benefit.

These elements are considered below.

The contribution must be made to an approved worker entitlement fund

21. Paragraph 58PA(a) of the FBTAA 1986 requires the contribution to be made to an approved worker entitlement fund. Whether the employer makes the redundancy payments to an approved worker entitlement fund is a question of fact. For the purposes of providing this advice, it is assumed that the contributions made pursuant to the Certified Agreement are being made to an approved worker entitlement fund.

The contribution must be required under an industrial instrument

Is the Certified Agreement an industrial instrument?

22. Paragraph 58PA(b) of the FBTAA 1986 requires the contributions to be made under an 'industrial instrument'. An 'industrial instrument' is defined in subsection 136(1) of the FBTAA 1986 as 'a law of the Commonwealth or of a State or Territory or an award, order, determination or industrial agreement in force under any such law'.

23. The enterprise agreement between the employer and the CFMEU will come into force once it meets certain criteria required by the *Workplace Relations Act 1996 (Cth)* and is certified by the Australian Industrial Relations Commission. Once certified, the agreement becomes an industrial agreement in force under the *Workplace Relations Act 1996 (Cth)*, which is a Commonwealth law. Therefore, the Certified Agreement will be an industrial instrument for the purposes of paragraph 58PA(b) of the FBTAA 1986.

Is the contribution required under an industrial instrument?

24. Clause 4 of the Certified Agreement provides that the Agreement is binding on the employer named in clause 1 (that is, the employer who is party to the Certified Agreement). For the period that the Certified Agreement is in place, clause 25 requires the employer to be a participating employer of the Redundancy Payment

Central Fund (Incolink) and states that the employer shall pay weekly contributions to the fund. As such paragraph 58PA(b) of the FBTAA 1986 is satisfied as the employer is required to make contributions under clause 25 of the Certified Agreement (an industrial instrument).

Is the amount of contribution an amount required under the industrial instrument?

25. Only the amount of contribution which the employer is required to make under the industrial instrument will be an exempt fringe benefit. Clause 25 of the Certified Agreement provides that the employer shall pay contributions on behalf of each employee into the fund on a weekly basis, as per the trust deed of that fund. Therefore, the amount of the contribution is established by the trust deed which is incorporated by reference into the Certified Agreement. It is accepted that the amount established by the trust deed of the fund will be an amount required under the industrial instrument.

26. Clause 7 of the Certified Agreement also provides that the *Victorian Building Industry Agreement 2000-2005* is to be read in conjunction with the Certified Agreement. Clause 35.7.1 of the *Victorian Building Industry Agreement 2000-2005* provides a mechanism for the contributions to be adjusted annually in line with increases in the CPI. It is also accepted that any increases as calculated under clause 35.7.1 of the *Victorian Building Industry Agreement 2000-2005* will also be an amount required under the industrial agreement. Any amount paid by the employer in excess of the required amount will not be an exempt fringe benefit.

The contribution must be to ensure that an obligation under an industrial instrument to make payments when an employee ceases employment are met

27. Paragraph 58PA(c) of the FBTAA 1986 requires that the contribution is either for ensuring that an obligation under the industrial instrument for leave or termination payment is met, or for the reasonable administrative purposes of the fund.

28. As the contributions under clause 25 of the Certified Agreement are contributions to provide for the payment of redundancy benefits to an employee, which will be paid on termination, paragraph 58PA(c) of the FBTAA 1986 will be satisfied.

Conclusion

29. As the requirements of section 58PA of the FBTAA 1986 are met the required redundancy contribution made by an employer to comply with its obligations under clause 25 of the Certified Agreement, clause 16.2.1 of the Award and clause 35.7.1 *Victorian Building Industry Agreement 2000-2005* will be an exempt fringe benefit.

Detailed contents list

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

Commissioner of Taxation
10 March 2004

Previous draft:
Not previously issued as a draft

Related Rulings/Determinations:
CR 2001/1; TR 92/1; TR 97/16

Subject references:
- approved worker entitlement fund
- fringe benefits tax
- redundancy payment

Legislative references:
- Copyright Act 1968
- FBTAA 1986 58PA
- FBTAA 1986 58PA(a)
- FBTAA 1986 58PA(b)
- FBTAA 1986 58PA(c)
- FBTAA 1986 136(1)
- TAA 1953 Part IVAAA
- Workplace Relations Act 1996

ATO references
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