



CR 2004/27 - Fringe benefits tax: Contribution to an Approved Worker Entitlement Fund: the Queensland Building Industry Sub-Contractors Certified Agreement 31 October 2005

 This cover sheet is provided for information only. It does not form part of *CR 2004/27 - Fringe benefits tax: Contribution to an Approved Worker Entitlement Fund: the Queensland Building Industry Sub-Contractors Certified Agreement 31 October 2005*

 This document has changed over time. This is a consolidated version of the ruling which was published on *1 April 2004*

Class Ruling

Fringe benefits tax: Contribution to an Approved Worker Entitlement Fund: the *Queensland Building Industry Sub-Contractors Certified Agreement* 31 October 2005

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Preamble

*The number, subject heading, **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 laws dealt with in this Ruling are:

- section 58PA of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986);
- subsection 136(1) of the FBTAA 1986; and
- regulation 5.01 of the *Superannuation Industry (Supervision) Regulations 1994* (SISR 1994).

Class of persons

3. The class of persons to which this Ruling applies is all employers in the Queensland building and construction industry who have in place a certified *Queensland Building Industry Sub-Contractors Certified Agreement 31 October 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 18.
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.
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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 March 2004;
- *Queensland Building Industry Sub-Contractors Certified Agreement 31 October 2005*; and
- *National Building and Construction Industry Award 2000* [AW790741]; and
- *Building and Construction Industry Award- State 2003*.

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 Award 2000* (the Federal Award).

12. Clause 16.2 of the Federal 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. The State Award which applies to the building and construction industry is the *Building Construction Industry Award- State 2003* (the State Award).

14. Clause 4.6.3 of the State Award creates an obligation on an employer to pay redundancy/severance amounts for individuals ceasing employment and outlines how this amount will be calculated. Clause 4.6.7 provides that an employer bound by this award may utilise a fund to meet all or some of the liabilities created by clause 4.6.

15. As well as the Awards, Queensland employers in the building and construction industry may also have in place a certified agreement negotiated between the Construction, Forestry, Mining and Energy Union of Employees, Queensland (CFMEU) and the Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees (BLF). The certified agreement is referred to as the *Queensland Building Industry*

Sub-Contractors Certified Agreement 31 October 2005 (the Certified Agreement).

16. Clause 1.4 of the Certified Agreement provides that the Certified Agreement is to be read in conjunction with the Awards. Clause 1.4 states:

1.4 Relationship to Parent Awards

The Agreement herein is intended to be interpreted wholly in conjunction with, and is complementary to the National Building Construction Industry Award and the Building Construction Industry Award-State. Where this agreement is silent, the terms of the above Awards, the terms of the above Award, shall apply as at 31st December 1996.

In the event of any inconsistency between the above Awards 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.

Also movements and/or changes in award entitlements and conditions of employment of the awards which benefit employees, will be maintained during the life of the agreement.

Where there is conflict between the rates of pay, conditions, allowances and other matters in this Agreement and the National Building Construction Industry Award and the Building Construction Industry Award- State it is agreed that the higher wage outcome will apply.

17. Subclause 2.2 of the Certified Agreement creates an obligation on an employer to pay weekly contributions for each employee to the Building Employees Redundancy Trust (BERT). Subclause 2.2 states:

2.2 The Building Employees Redundancy Trust (BERT)

(i) Contributions to the BERT Redundancy Scheme shall be: \$55.00 per week to the 31st December 2003.

(ii) Contributions required for purposes of paying employee entitlements;

Contributions to the BERT Fund under clause 2.2(i) are required to ensure that an amount equal to the credit balance of the employee's account in the BERT Fund is paid to the employee when the employee is entitled to that payment as described in the Trust Deed creating the BERT Fund.

(iii) (a) The parties understand that the ATO is in the process of amending the F.B.T rules as it applies to redundancy funds. The outcome of this is that F.B.T may become payable on a component of the employer contribution to the redundancy funds. Should this occur the BERT redundancy Fund might have to restructure to comply with the new F.B.T rules. Should F.B.T not become payable then the Company will increase its current contribution from

\$55 per week to \$60 (additional payment) per week from 1st January 2004; and

- (b) In the event that F.B.T does become payable on contributions to redundancy funds then from the 1st January 2004, the company must pay the Trustee of the BEWT Fund at the same time contributions are made by the company to the BERT Fund, an amount equal to 1/11th of the payment required to be made to the BERT Fund under or in accordance with this agreement.

Where the employee's balance in the BERT Fund reaches \$8000.00 or an amount that meets the employee's maximum award entitlement, i.e. 8 weeks, the employee shall have the option to continue to have contributions paid into BERT or redirected to BUSSQ. It is the employee's option only.

Where an employee exercises (or has) this option, his or her redundancy entitlement shall be deemed met for all current and future entitlements.

Employer contributions to BERT must be made, at the minimum, on a monthly basis.

Details of the employer contribution, including when contribution was made and for how much, are to be shown on the employee's wage statement.

The level of contribution will be reviewed should the Redundancy provision contained in the relevant award be amended.

'BERT Fund' means the fund established pursuant to a deed by B.E.R.T Pty Limited.'

'BEWT Fund' means the fund established pursuant to a deed by B.E.R.T Pty Limited and James Kristen Peterson.'

'Trustee of the BEWT Fund' means B.E.R.T Pty Limited or any trustee appointed under the BERT Redundancy Trust Deed.

18. BUSSQ is a superannuation fund which operates in the building and construction industry. It will accept 'mandated employer contributions'(refer to regulation 5.01 SISR 1994), which includes a contribution by an employer required under a certified agreement. As employer contributions, the contributions to BUSSQ will be subject to preservation rules.

Ruling

19. An employer operating in the building industry in Queensland who makes a redundancy contribution for an employee to an approved worker entitlement fund pursuant to their obligations under clause 2.2 of a certified *Queensland Building Industry Sub-Contractors Certified*

Agreement 31 October 2005, will be providing an exempt fringe benefit for the purposes of section 58PA of the FBTAA 1986.

20. An employer operating in the building industry in Queensland who makes a redundancy contribution for an employee to BUSSQ pursuant to their obligations under clause 2.2 of a certified *Queensland Building Industry Sub-Contractors Certified Agreement 31 October 2005*, will not be providing a fringe benefit.

21. 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. Contributions in excess of the amount that the employer is required to make will not be an exempt fringe benefit. The amount of redundancy contributions which the employer is required to make under clause 2.2 (iii)(a) of the *Queensland Building Industry Sub-Contractors Certified Agreement 31 October 2005* is \$60.00 per week.

Explanation

22. 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.

23. 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

24. Paragraph 58PA(a) of the FBTAA 1986 requires the contribution to be made to an approved worker entitlement fund. Section 58PB of the FBTAA 1986 deals with the meaning of 'approved worker entitlement funds'. Whether the employer makes the redundancy payments to an approved worker entitlement fund is a question of fact.

Payments to BERT

25. Under clause 2.2 of the Certified Agreement the employer is required to make the redundancy contribution/s for workers to BERT.

26. If BERT is an approved worker entitlement fund, contributions made to this fund under clause 2.2 of the Certified Agreement will meet the requirement of paragraph 58PA(a) of the FBTAA 1986.

Payments to BUSSQ

27. Under clause 2.2 of the Certified Agreement, after the maximum award entitlement of eight weeks pay has been accrued in their BERT account, an employee can elect that further redundancy contributions be made to BUSSQ. This ensures that the minimum award amount (found at clause 16.2.1 of the Federal Award and clause 4.6.3 of the State Award) is still in the BERT member account and able to be accessed if an employee were made redundant. This ensures that the employer's redundancy obligations can be met without relying on the contributions made to BUSSQ, as these will be mandatory employer payments and preserved in the fund until the member's preservation age.

28. Payments made to a superannuation fund to make provision for the superannuation benefits of an employee will not be a fringe benefit (refer to paragraph (j)(i) of the definition of 'fringe benefit' in subsection 136(1) of the FBTAA 1986). As such, these payments will not be subject to fringe benefits tax.

The contribution must be required under an industrial instrument
Is the Certified Agreement an industrial instrument?

29. 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'.

30. The agreement between the employer, the CFMEU and the Builders' Labourers' Federation 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?

31. The Certified 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 2.2 requires an employer to make redundancy contributions to the BERT Redundancy Scheme.

32. After 1st January 2004 the employer is required to make a contribution of \$60.00 per week for each employee. This contribution to BERT must be made at least monthly.

33. Clause 2.2 of the Certified Agreement allows for the review of the level of contribution if the redundancy entitlements in the Federal Award and/or the State Award are adjusted. It is accepted that any contribution increases under the awards will also be an amount required under an industrial instrument.

34. As an employer is required to make the contributions to BERT under clause 2.2 of the Certified Agreement (industrial instrument) the requirement of paragraph 58PA(b) of the FBTAA 1986 is satisfied.

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

35. 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.

36. Clause 2.2(ii) of the Certified Agreement specifies that the contributions are required for the purposes of paying employee's entitlements.

37. As the contributions under clause 2.2 of the Certified Agreement are contributions to provide for the payment of redundancy benefits to an employee, which will be paid on

termination, the requirement of paragraph 58PA(c) of the FBTAA 1986 will be satisfied.

Conclusion

38. The payment of redundancy contributions to an approved worker entitlement fund under clause 2.2 of the Certified Agreement meets the requirements of section 58PA of the FBTAA 1986. The amount of the employer's required redundancy contribution/s under clause 2.2 of the Certified Agreement will be an exempt fringe benefit.

Detailed contents list

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Commissioner of Taxation

24 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
- superannuation fund

Legislative references:

- FBTAA 1986 58PA
- FBTAA 1986 58PA(a)
- FBTAA 1986 58PA(b)
- FBTAA 1986 58PA(c)
- FBTAA 1986 58PB
- FBTAA 1986 136(1)
- FBTAA 1986 136(1)(j)(i)
- SISR 1994 Reg 5.01
- Copyright Act 1968
- TAA 1953 Part IVA

ATO references

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