



CR 2004/28 - Fringe benefits tax: Contribution to an Approved Worker Entitlement Fund: the CFMEU Construction and General Division NSW Branch Collective Bargaining Agreement 31 October 2005

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 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 *CFMEU Construction and General Division NSW Branch Collective Bargaining Agreement 31 October 2005*

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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**, **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(s) 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 New South Wales building and construction industry who have a certified *CFMEU Construction and General Division NSW Branch Collective Bargaining 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 16 February 2004;
- *CFMEU Construction and General Division NSW Branch Collective Bargaining Agreement 31 October 2005*; and
- *National Building and Construction Industry Award 2000* [AW790741].

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 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, New South Wales 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 Construction and General Division NSW Branch Collective Bargaining Agreement 31 October 2005* (the Certified Agreement).

14. Clause 4 of the Certified Agreement provides that the Certified Agreement is to be read in conjunction with the Award. Clause 4 states:

4. RELATIONSHIP TO PARENT AWARD

- a) Subject to paragraph (b) hereunder, 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.

- b) Provided however that the terms and conditions of the Award as at 30 December 1996, (then known as the National Building and Construction Industry Award 1990 [NO122]), are expressly preserved by this Agreement as if the same were set out in full herein and shall be binding upon the parties during the currency of the Agreement by operation of this Agreement if not otherwise. Where this Agreement is silent, the terms of the Award, as at 30 December 1996 shall apply, unless contrary to law. Provided that increases in allowances and improvements in conditions to the benefit of Employees, introduced after 30 December 1996 by variation to the Award, shall also apply.
- 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.

15. Clause 10.3 of the Certified Agreement creates an obligation on an employer to pay monthly contributions for each employee to the Australian Construction Industry Redundancy Trust (ACIRT). Clause 10.3 states:

10.3 Redundancy

Redundancy or redundant means the termination or cessation of employment of an Employee for any reason.

In respect of redundancy benefits:

- a) The Company agrees to make redundancy contributions in respect of Employees covered by this agreement to the Australian Construction Industry Redundancy Trust (ACIRT) in accordance with Appendix B of this Agreement

The entitlement for apprentices will be in accordance with Appendix C of this Agreement.

The contributions shall be paid monthly into ACIRT in accordance with the requirements of the Trust.
- b) Employees will be entitled to a redundancy benefit for each week of service with the Company being the greatest of the following amounts:
 - i) the amount payable by the Company to ACIRT in accordance with this Agreement;
or
 - ii) the amount prescribed by the relevant Award; and or

- iii) any amount prescribed or awarded by a relevant industrial tribunal.

Where there is a higher entitlement under (b) ii) and or (b) iii) of this clause the Employee will be paid direct this entitlement minus the balance that has already been paid into ACIRT by the Company for this period of employment.

Consistent with Clause 23 of this Agreement, Employees of the Company authorise the Union to access ACIRT records of payment by the Company strictly for the purpose of ensuring all Employees receive their proper entitlement.

16. Appendix B entitled 'Extra Benefits and Provisions' details the amount of the redundancy contribution to be paid to ACIRT in respect to employees. After 8 weeks pay has accrued in the employee's ACIRT account (minimum award amount for four years continuous service under clause 16.2.1 of the Award) the employee may elect for the employer to pay any further redundancy contributions to cbus.

Redundancy Entitlement

The Company will contribute \$60.00 per week into the Australian Construction Industry Redundancy Trust (ACIRT).

To assist the Company tendering and securing work on smaller projects (i.e. where the builder's package is less than \$10 million) Employees may agree to a payment of \$35.00 per week.

Once an Employee has accrued 8 weeks pay in their ACIRT account they may elect to have their redundancy contribution paid into cbus.

17. Cbus 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 cbus will be subject to preservation rules.

18. Appendix C entitled 'Apprentices' details the amount of redundancy contribution/s to be paid to ACIRT in respect of apprentices.

Redundancy

The Company will contribute weekly \$25.00 for 1st and 2nd year apprentices and \$35.00 for 3rd and 4th year apprentices into the Australian Construction Industry Redundancy Trust (ACIRT). If not already paid, this level of contribution will apply from date of signature of this Agreement.

Ruling

19. An employer operating in the building industry in New South Wales who makes a redundancy contribution for an employee to the Australian Construction Industry Redundancy Trust pursuant to their obligations under clause 10.3 of a certified *CFMEU Construction and General Division NSW Branch Collective Bargaining Agreement 31 October 2005*, will be providing an exempt fringe benefit for the purposes of section 58PA of the FBTA 1986.

20. An employer operating in the building industry in New South Wales who makes a redundancy contribution for an employee to cbus pursuant to their obligations under a certified *CFMEU Construction and General Division NSW Branch Collective Bargaining Agreement 31 October 2005*, will not be providing a fringe benefit.

21. The redundancy contribution/s made by the employer to ACIRT (as outlined in paragraph 19 above) 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 paragraph 10.3 b) of the Certified Agreement will be the greater of:

- i The equivalent of \$60.00 per week in accordance with Appendix B (for workers) of the Certified Agreement; or
- ii The equivalent of \$35.00 per week where the employees agree to that amount in accordance with Appendix B (for workers) of the Certified Agreement; or
- iii The equivalent of \$25.00 per week in accordance with Appendix C (for 1st and 2nd year apprentices) of the Certified Agreement; or
- iv The equivalent of \$35.00 per week in accordance with Appendix C (for 3rd and 4th year apprentices) of the Certified Agreement; or
- v The minimum award amount under clause 16.2.1 of the Award; or
- vi an amount prescribed/ awarded by an industrial tribunal.

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

Payments to ACIRT

24. 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.

25. Section 58PB of the FBTAA 1986 deals with the meaning of approved worker entitlement funds. Subsection 58PB(2) of the FBTAA 1986 states:

A fund is also an ***approved worker entitlement fund*** if:

- (a) the fund is prescribed for the purposes of this paragraph; and
- (b) a declaration under subsection (3) is not in force in relation to the fund.

26. Under clause 10.3 of the Certified Agreement the employer is required to make the redundancy contribution/s for workers to ACIRT.

27. ACIRT has been prescribed as an approved worker entitlement fund for paragraph 58PB(2) of the FBTAA 1936 under regulation 6(a) of the *Fringe Benefits Tax Regulations 1992*. There is no declaration under subsection 58PB(3) of the FBTAA 1936 in force in relation to this fund. As gazetted in *Commonwealth of Australia Gazette* No. S52, Thursday 26 February 2004 contributions made to this fund under clause 10.3 of the Certified Agreement will meet the requirement of paragraph 58PA(a) of the FBTAA 1986.

Payments to cbus

28. Under Appendix B, an employee, after the equivalent of eight weeks pay has been accrued in their ACIRT member account, can elect that further redundancy contributions be made to cbus. This ensures that the minimum award amount (found at clause 16.2.1 of the Award) is still in the ACIRT 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 cbus, as these will be mandatory employer payments and preserved in the fund until the member's preservation age.

29. Payments made to a superannuation fund, which an employer believes is a complying 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). The employer is aware that once the minimum award benefit is met their further payments will be made to cbus to provide for their employee's superannuation. As such the payment to cbus is not a fringe benefit.

The contribution must be required under an industrial instrument

Is the Certified Agreement an industrial instrument?

30. 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'.

31. The collective bargaining 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 collective bargaining 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 FBTA 1986.

Is the contribution required under an industrial instrument?

32. For the period that the Certified Agreement is in place an employer is required to make a weekly contribution of \$60.00 to ACIRT in respect of each fully qualified employee. This is a result of the combined effect of paragraph 10.3 a) of the Certified Agreement and Appendix B of the Certified Agreement.

33. For the period that the Certified Agreement is in place an employer is required to make a weekly contribution to ACIRT of \$25.00 for 1st and 2nd year apprentices, and \$35.00 for 3rd and 4th year apprentices. This is a result of the combined effect of paragraph 10.3 a) of the Certified Agreement and Appendix C of the Certified Agreement.

34. As an employer is required to make the contributions to ACIRT under paragraph 10.3 a) of the Certified Agreement (industrial instrument) the requirement of paragraph 58PA(b) of the FBTA 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 FBTA 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 expenses of the fund.

36. As the contributions under clause 10.3 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 FBTA 1986 will be satisfied.

Conclusion

37. As the requirements of section 58PA of the FBTA 1986 are met in relation to an employer's redundancy contributions made to ACIRT (for both qualified employees and apprentices) those contributions which are required under clause 10.3, Appendix B and Appendix C of the Certified Agreement, will be an exempt fringe benefit.

Detailed contents list

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Commissioner of Taxation24 March 2004

<i>Previous draft:</i>	- redundancy payment
Not previously issued as a draft	- superannuation fund
<i>Related Rulings/Determinations:</i>	<i>Legislative references:</i>
CR 2001/1; TR 92/1; TR 97/16	- Copyright Act 1968
	- TAA 1953 Pt IVAAA
<i>Subject references:</i>	- FBTA 1986 58PA
- approved worker entitlement fund	- FBTA 1986 58PA(a)
- fringe benefits tax	- FBTA 1986 58PA(b)
	- FBTA 1986 58PA(c)

- FBTA 1986 58PB
- FBTA 1996 58PB(2)
- FBTA 1996 58PB(3)
- FBTA 1986 136(1)
- FBTA 1986 136(1)(j)(i)
- Fringe Benefits Tax Regulations 1992 Reg 6(a)
- Superannuation Industry (Supervision) Regulations 1994 Reg
- Workplace Relations Act 1996(Cth)

ATO references

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