

CR 2004/67 - Income tax: Approved Early Retirement Scheme - New South Wales Department of Commerce

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Class Ruling

Income tax: Approved Early Retirement Scheme – New South Wales Department of Commerce

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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**, **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.
2. Broadly, this Ruling approves the particular early retirement scheme and acknowledges the availability of tax concessions for persons receiving payments under the scheme. There are many conditions attached to this Ruling and readers should be careful to ensure that these conditions are met before relying on this Ruling.

Tax law(s)

3. The tax laws dealt with in this Ruling are sections 27E and 27CB of the *Income Tax Assessment Act 1936* (ITAA 1936).

Class of persons

4. The class of persons to which this Ruling applies is all employees of the New South Wales Department of Commerce (DOC (NSW)) who receive a payment under the arrangement described in paragraphs 12 to 27.

Qualifications

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

6. 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 12 to 27.

7. 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- this Ruling may be withdrawn or modified.

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

Date of effect

10. This Ruling applies from 10 June 2004 until it is withdrawn (see paragraph 11). However, this 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 this Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore this Ruling applies to the extent that the relevant tax laws are not amended.

Withdrawal

11. This Ruling is withdrawn and ceases to have effect after 31 December 2004. 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

12. 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 this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- correspondence from the DOC (NSW); and
- records of telephone conversations with representatives of the DOC (NSW).

13. The DOC (NSW) is seeking approval for an early retirement scheme known as the Voluntary Redundancy Program (VRP).

14. The DOC (NSW) was established in April 2003 through the amalgamation of the former Departments of Public Works and Services; Fair Trading; Industrial Relations; and the Office of Information Technology from the former Department of Information Technology and Management. On 1 July 2003 the Shared Corporate Services Reform business unit of Premier's Department also joined the new DOC (NSW).

15. The DOC (NSW) now comprises the following Offices:

- Office of Government Business;
- Office of Government Procurement;
- Office of Industrial Relations;
- Office of Fair Trading;
- Office of Information Technology; and
- Strategic Management and Corporate Support.

16. Each corporate service unit of the DOC (NSW) have undertaken restructuring and management reviews in order to implement the structure that provides for the service delivery objectives.

17. Accordingly, the following corporate service units will be restructured:

- Finance Shared Services;
- IM&T Shared Services;
- Corporate Finance;
- Director's Unit;
- Valuation Services;

- Document Reproduction Centre;
- Corporate IM&T;
- Corporate and Ministerial Communication;
- HR Shared Services;
- People, Planning and Communication; and
- Commerce Legal Services.

18. All displaced employees of the DOC (NSW) will be offered early retirement in accordance with the VRP. If more employees accept the offer than required then the employees who retire under the scheme will be determined in accordance with the process in the VRP.

19. All employees who retire under the scheme will receive the payments and terminate employment before 1 January 2005.

20. The VRP packages consists of:

- four weeks pay in lieu of notice;
- severance pay of three weeks pay for each year of continuous service, to a maximum of 39 weeks;
- enhancement payment of up to eight weeks pay, if the formal offer of early retirement is accepted within two weeks of the offer being made; and
- one weeks pay of gratuity for staff members aged 45 years or over who have more than five year service.

21. For a payment made under the above mentioned scheme to qualify as an approved early retirement scheme payment, the conditions set out in paragraphs 22 to 27 must be met. Please note any payment made under the scheme that does not satisfy these requirements is not covered by this Ruling.

Payments made under the Scheme

22. 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.

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

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

25. The employee must terminate 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.

26. 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.

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

Ruling

28. The early retirement scheme offered by the DOC (NSW) is an approved early retirement scheme for the purposes of section 27E of the ITAA 1936.

29. Accordingly, so much of the 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.

30. In addition, so much of the approved early retirement scheme payment as falls within the threshold calculated in accordance with subsection 27A(19) of the ITAA 1936 is non-assessable and is ignored in working out whether a capital gain has been made via the operation of section 27CB of the ITAA 1936.

Explanation

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

32. 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.

33. 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)).

These three conditions are discussed below.

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

34. 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).

35. The class of employees to which the scheme is proposed to be offered is set out in paragraph 18.

36. This class of employees does not come within any of the subparagraphs 27E(1)(a)(i) to (iv), therefore it must be considered under subparagraphs 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).

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

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

38. Paragraphs 14 to 17 describe the nature of the rationalisation or re-organisation of the DOC's (NSW) operations. The proposed scheme meets the requirements set out in subparagraph 27E(1)(b)(iii) accordingly the second condition for approval has been met.

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

39. The scheme is proposed to operate for a period from 10 June 2004 to 31 December 2004. Approval was granted prior to implementation therefore the third condition is satisfied.

40. The scheme will be in operation for approximately seven 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)):

- the payment must be an 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 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 2004, the tax-free amount is limited to \$5,882 plus \$2,941 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. The \$5,822 and \$2,941 limits will be indexed to rise in each subsequent year in line with increases in average weekly ordinary time earnings.

46. The total of the amount received on the termination of employment calculated in accordance with paragraph 20 qualifies as an approved early retirement scheme payment.

47. The total of the payments in the previous paragraph will be measured against the limit calculated in accordance with paragraph 47 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 1983 and post-June 1983 (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.

Detailed contents list

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

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Commissioner of Taxation

30 June 2004

<i>Previous draft:</i>	- ITAA 1936 27CB
Not previously issued as a draft	- ITAA 1936 27E
	- ITAA 1936 27E(1)(a)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 27E(1)(b)
CR 2001/1; TR 92/1; TR 92/20;	- ITAA 1936 27E(1)(c)
TR 94/12; TR 97/16; TD 2003/21	- ITAA 1936 27E(1)(a)(i)
	- ITAA 1936 27E(1)(a)(ii)
	- ITAA 1936 27E(1)(a)(iii)
<i>Subject references:</i>	- ITAA 1936 27E(1)(a)(iv)
- approved early retirement	- ITAA 1936 27E(1)(a)(v)
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)
<i>Legislative references:</i>	- ITAA 1936 27E(1)(b)(vi)
- ITAA 1936 27A(1)	- ITAA 1936 27E(4)
- ITAA 1936 27A(19)	- ITAA 1936 27E(5)
- ITAA 1936 27A(20)	

ATO references

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