



# ***CR 2004/8 - Income tax: Approved Early Retirement Scheme - Energy Brix Australia Corporation Pty Ltd***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *23 December 2003*



## Class Ruling

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

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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**, **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.
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 Energy Brix Australia Corporation Pty Ltd (EBAC) who receive a payment under the arrangement described in paragraphs 12 to 31.

## 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 31.
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

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10. This Ruling applies from 23 December 2003 unless and 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**

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11. This Class Ruling is withdrawn and ceases to have effect after 6 October 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**

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### **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 EBAC; and
- records of telephone conversations with representatives of EBAC.

13. EBAC is seeking approval for an early retirement scheme known as the Voluntary Separation Process (VSP).

14. EBAC is part of Victoria's generator sector and operates a briquetting production complex in Morwell (Lalor Valley).

15. The briquetting market as a whole has been reducing consistently over the last 8 years meaning production manning exceeds the number necessary to produce the required tonnage. As a result EBAC needs to change from a 5 leg roster to a 4 leg roster in the briquetting business.

16. EBAC in its Business Plan – Secure the Future, has determined changes are required across the whole business, not just the briquette operation, to ensure critical issues are addressed.

17. The changes to be implemented include:

- a move to block release leave in the power operations;
- capital improvement projects such as the Launder project;
- a move to a single maintenance workgroup; and

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- rationalisation of duties and functions in support areas to improve efficiency.

18. All employees of EBAC will be offered early retirement.

19. It is noted, however, that EBAC retains a limited right of veto to be applied to applications by key personnel who cannot be readily replaced and whose loss would impair the efficiency of EBAC's business operations.

20. Further, the number of staff to retire under the scheme is limited to the number of surplus positions resulting from the changes. Where there are more applications than required within an area the employees with the longest periods of service will retire under the scheme.

21. If the move to a 4 leg roster is not implemented staff affected by the proposed change will not be able to retire under the scheme.

22. EBAC will determine the date of departure for employees under the scheme based on the changes being implemented. All staff who retire under the scheme will receive the payments and terminate employment before 7 October 2004.

23. The VSP payment consists of:

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

24. 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); and
- superannuation entitlements.

25. For a payment made under the above mentioned scheme to qualify as an approved early retirement scheme payment, the conditions set out in paragraphs 26 to 31 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**

26. 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.

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

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

29. 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.

30. Where the employee and the employer are not dealing with each other at arm's length (e.g. 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.

31. 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**

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32. The early retirement scheme offered by EBAC is an approved early retirement scheme for the purposes of section 27E of the ITAA 1936.

33. 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.

34. 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

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

36. 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.

37. 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)).

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

38. 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).

39. The class of employees to which the scheme is proposed to be offered is all employees of EBAC, which satisfies the requirements of subparagraph 27E(1)(a)(i).

40. However, EBAC will limit the number of staff employed who can retire under the scheme as set out in paragraphs 19 to 21. The limitation of the scheme in this way is acceptable to the Commissioner.

### **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**

41. 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).

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

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

43. The scheme is proposed to operate for a period from 23 December 2003 to 6 October 2004. Approval was granted prior to implementation therefore the third condition is satisfied.

44. The scheme will be in operation for approximately 10 months which is within the period recommended in TR 94/12.

**Other relevant information**

45. 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.

46. 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 (e.g. 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.

47. 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’.

48. 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’.

49. 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.

50. The total of the amount received on the termination of employment calculated in accordance with paragraph 23 qualifies as an approved early retirement scheme payment.

51. The total of the payments in the previous paragraph will be measured against the limit calculated in accordance with paragraph 49 to determine the ‘tax-free amount’.

52. 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.

53. 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.

54. 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.

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## Detailed contents list

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### Commissioner of Taxation

14 January 2004

*Previous draft:*

Not previously issued as a draft

- eligible termination payments components

*Related Rulings/Determinations:*

CR 2001/1; TR 92/1; TR 92/20;  
TR 97/16; TR 94/12

*Legislative references:*

- ITAA 1936 27A(1)  
- ITAA 1936 27A(19)  
- ITAA 1936 27CB

*Subject references:*

- approved early retirement scheme payments  
- eligible termination payments

- ITAA 1936 27E  
- ITAA 1936 27E(1)(a)  
- ITAA 1936 27E(1)(a)(i)  
- ITAA 1936 27E(1)(a)(ii)  
- ITAA 1936 27E(1)(a)(iii)

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- ITAA 1936 27E(1)(a)(iv)
  - ITAA 1936 27E(1)(a)(v)
  - ITAA 1936 27E(1)(b)
  - ITAA 1936 27E(1)(b)(i)
  - ITAA 1936 27E(1)(b)(ii)
  - ITAA 1936 27E(1)(b)(iii)
  - ITAA 1936 27E(1)(b)(iv)
  - ITAA 1936 27E(1)(b)(v)
  - ITAA 1936 27E(1)(b)(vi)
  - ITAA 1936 27E(1)(c)
  - ITAA 1936 27E(4)
  - ITAA 1936 27E(5)
  - Copyright Act 1968
  - TAA 1953 Pt IVAAA
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## ATO references

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