


# ***CR 2012/84 - Fringe Benefits Tax: employer contributions to the Australian Construction Industry Redundancy Trust (ACIRT)***

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## Class Ruling

### Fringe Benefits Tax: employer contributions to the Australian Construction Industry Redundancy Trust (ACIRT)

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This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

**Relevant provision(s)**

2. The relevant provisions dealt with in this Ruling are:

- section 58PA of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA);
- section 58PB of the FBTAA

All references in this Ruling are to the FBTAA unless otherwise indicated.

## Class of entities

3. The class of entities to which this Ruling applies are employers who make a contribution to the Australian Construction Industry Redundancy Trust (ACIRT) for an employee who is a member of ACIRT.

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 10 to 17 of this Ruling.

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

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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## Date of effect

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8. This Ruling applies from 1 April 2012 to 31 March 2017. The Ruling continues to apply after 31 March 2017 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Previous Rulings

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9. This ruling replaces Class Ruling CR 2008/83 which applied to contributions made to ACIRT during the period from 1 April 2008 to the date of its withdrawal on 31 March 2012.

## Scheme

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10. The scheme 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 and are part of and are to be read with the description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- class ruling application from DLA Piper Australia dated 15 May 2012;
- a copy of ACIRT Redundancy Fund Trust Deed (ACIRT Trust Deed) as last amended as at 3 September 2009;
- a copy of ACIRT Redundancy Fund Trust Deed, Deed of Amendment dated 30 July 2012;
- an example Deed of Adherence between ACIRT and an Employer;
- a copy of clause 17 of the Building and Construction General On-site Award 2010 (BCGOA); and
- a copy extract from an Enterprise Bargaining Agreement (EBA) containing examples of typical redundancy clauses (EBARC) involving redundancy contributions to ACIRT.

11. Employers provide redundancy entitlements for their workers pursuant to various awards and agreements (industrial instruments) of which the BCGOA is a representative example. In doing so, employers may choose to fund worker redundancy entitlements by making contributions to ACIRT.

12. ACIRT is an Australian resident trust fund governed by a trust deed, which established the fund in Australia. The central management and control of the fund is in Australia.

13. The trustee of ACIRT is ACIRT Pty Ltd ABN 317 736 023 07 (ACIRT Trustee), an Australian resident company.

14. ACIRT accepts contributions from employers to fund each worker's individual redundancy benefit. ACIRT and the employers execute an agreement called a 'Deed of Adherence' which sets out the amount to be contributed by the employer in respect of each worker. This can be calculated by reference to either:

- the 'minimum contribution' rate (as defined in ACIRT Trust Deed); or
- the rate provided for an industrial instrument – whichever is greater.

15. Clause 17 in the BCGOA deals with redundancy matters and how contributions are to be made. Clause 17.3(a) of the BCGOA states:

A redundant employee shall receive redundancy/severance payments, calculated as follows...

16. Clause 17.4 in the BCGOA states the following in relation to Redundancy pay schemes:

17.4(a) An employer may offset an employee's redundancy pay entitlement in whole or in part by contributions to a redundancy pay scheme.

17.4(b) Provided that where the employment of an employee is terminated and;

- (i) the employee receives a benefit from a redundancy pay scheme, the employee will only receive the difference between the redundancy pay in this clause and the amount of the redundancy pay scheme benefit the employee receives is attributable to employer contributions. If the redundancy pay scheme benefit is greater than the amount payable under clause 17.3 then the employee will receive no redundancy payment under clause 17.3; or
- (ii) the employee does not receive a benefit from a redundancy pay scheme, contributions made by an employer on behalf of an employee to the scheme will, to the extent of those contributions, be offset against the liability of the employer under clause 17.3, and payment to the employee will be made in accordance with the rules of the redundancy pay scheme fund or any agreement relating thereto. The employee will be entitled to the fund benefit or the award benefit whichever is greater but not both.

17.4(c) the redundancy pay scheme must be an Approved Worker Entitlement Fund ...

17. The EBARC deals with both the payment of the employer to a fund and also the payments that are required to be made to an employee being made redundant. It is worded in the following manner:

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 C of this agreement.

The entitlement for apprentices will be in accordance with Appendix D 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 BCGOA 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.

## **Ruling**

18. Contributions made by employers to the Australian Construction Industry Redundancy Trust under the terms of the Building and Construction General On-site Award 2010, for the same or similar reasons as described in paragraph 17 of this ruling, will be exempt benefits under section 58PA.

19. Contributions made by employers to the Australian Construction Industry Redundancy Trust under the terms of other 'industrial instruments' (as that term is defined in subsection 136(1)), for the same or similar reasons as described in paragraph 17 of this ruling, will be exempt benefits under section 58PA.

## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

### **Will a contribution made to ACIRT pursuant to an award or industrial agreement be an exempt benefit under section 58PA?**

20. Section 58PA sets out the conditions that must be satisfied for a contribution to ACIRT to be an exempt benefit. Section 58PA states:

#### **58PA EXEMPT BENEFITS - WORKER ENTITLEMENT CONTRIBUTIONS**

If:

- (a) a person makes a contribution to an approved worker entitlement fund; and
- (b) the contribution is made under an industrial instrument; and
- (c) the contribution is either:
  - (i) made 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.

21. Therefore, to determine whether a contribution to ACIRT will be an exempt benefit under section 58PA it is necessary to consider the following questions:

- (a) Is ACIRT an approved worker entitlement fund?
- (b) Is the contribution made under an industrial instrument?
- (c) Is the contribution made to ensure that an obligation under an industrial instrument to make leave payments (including payments in lieu of leave) or payments when an employee ceases employment is met or for the reasonable administrative costs of the fund?

#### **(a) Is ACIRT an approved worker entitlement fund?**

22. Section 58PB sets out the conditions that must be met for ACIRT to be an approved worker entitlement fund. This section was amended by the *Tax laws Amendment (2011 measures No.2) Act 2011* (No. 41 of 2011) with effect from 28 June 2011.

23. Prior to the amendment, subsection 58PB(2) stated:

**58PB(2)** 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.

24. ACIRT was an approved worker entitlement fund during the period from 1 April 2011 to 28 June 2011 as:

- ACIRT had been prescribed as an approved worker entitlement fund; and
- a declaration under subsection 58PB(3) of the FBTA was not in force in relation to the fund.

25. Following the amendment subsection 58PB(2) states:

**Endorsed funds**

**58PB(2)**

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

- (a) the fund is endorsed as an approved worker entitlement fund under subsection (3); or
- (b) the entity that operates the fund is endorsed for the operation of the fund under subsection (3A).

26. For the purpose of determining whether a fund is endorsed as an approved worker entitlement fund, *Tax Laws Amendment (2011 measures No. 2) Act 2011* included the following transitional provisions which gave existing funds a six-month period to obtain an ABN:

**13 Transitional provision - approved worker entitlement funds**

**Scope**

(1) This item applies to a fund that, just before the commencement of this item, was an approved worker entitlement fund under subsection 58PB(2) of the *Fringe Benefits Tax Assessment Act 1986*.

**Fund taken to have been endorsed**

(2) Treat the fund as having been endorsed, on that commencement, by the Commissioner under subsection 58PB(3) of that Act, as amended by this Part.

(3) To avoid doubt, subitem (2) does not prevent the Commissioner from revoking that endorsement at a later time under section 426-55 in Schedule 1 to the *Taxation Administration Act 1953*.

**Fund not required to have ABN for 6 months**

(4) Paragraph 58PB(4)(f) of the *Fringe Benefits Tax Assessment Act 1986*, as added by this Part, does not apply to the fund before the end of the period of 6 months starting on the day this item commences.



27. As ACIRT was an approved worker entitlement fund at the time of the amendment, it was treated as being endorsed as an approved worker entitlement fund as of 28 June 2011. To maintain that endorsement, either the fund, or the trustee that operates the fund was required to obtain an ABN by 28 December 2011.

28. As the trustee of ACIRT has obtained an ABN, ACIRT is taken to be endorsed as an approved worker entitlement fund for the period since 28 June 2011.

***(b) Is the contribution made under an industrial instrument?***

29. Paragraph 58PA(b) requires the contribution to be made under an industrial instrument. An 'industrial instrument' is defined in subsection 136(1) as follows:

***industrial instrument*** means 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 BCGOA will, therefore, be an 'industrial instrument' as defined in subsection 136(1). Consequently, contributions made by an employer in accordance with the terms of the BCGOA will satisfy the requirements of paragraph 58PA(b).

***(c) Is the contribution made for the required purposes?***

31. Contributions made by employers for the same reasons as those described in paragraph 17 of the ruling, regarding the EBARC, will be accepted as meeting the requirements of paragraph 58PA(c).

***Conclusions***

32. Contributions made by employers to ACIRT under the terms of the BCGOA, for the same or similar reasons as described in paragraph 17 of this ruling, will be exempt benefits under section 58PA.

33. Contributions made by employers to ACIRT under the terms of other 'industrial instruments' (as that term is defined in subsection 136(1)), for the same or similar reasons as described in paragraph 17 of this ruling, will be exempt benefits under section 58PA.

## **Appendix 2 – Detailed contents list**

34. The following is a detailed contents list for this Ruling:

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

CR 2008/83

CR 2012/28

*Subject references:*

- exempt benefits
- fringe benefits tax
- worker entitlement funds

*Legislative references:*

- FBTA 1986 58PA

- FBTA 1986 58PA(a)
- FBTA 1986 58PA(b)
- FBTA 1986 58PA(c)
- FBTA 1986 58PB
- FBTA 1986 58PB(2)
- FBTA 1986 58PB(2)(a)
- FBTA 1986 58PB(2)(b)
- FBTA 1986 58PB(3)
- FBTA 1986 58PB(4)(f)
- FBTA 1986 136(1)
- TAA 1953
- Copyright Act 1968
- Tax laws Amendment (2011 measures No.2) Act 2011 (No.41 of 2011)

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ATO references

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