


# ***CR 2013/92 - Income tax: the Toorak College early retirement scheme***

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## Class Ruling

### Income tax: the Toorak College early retirement scheme

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#### **❶ This publication provides you with the following level of protection:**

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

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 83-170 of the *Income Tax Assessment Act 1997* (ITAA 1997), and
- section 83-180 of the ITAA 1997

All legislative references are to the ITAA 1997 unless otherwise indicated.

### Class of entities

3. The class of employees to whom this scheme applies is those employees of the Toorak College who receive a payment under the scheme described in paragraph 19 of this Ruling.

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## 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 9 to 34 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.

## Date of effect

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7. The Ruling applies from 27 November 2013 to 30 June 2014. The Ruling continues to apply after 30 June 2014 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, the 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 the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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8. The following description of the scheme is based on information provided by the applicant.
9. Toorak College (Toorak) is seeking the Commissioner's approval to implement an early retirement scheme (the Scheme) in accordance with section 83-180.
10. Toorak is an Australian company limited by guarantee and is registered as a charity with the Australian Charities and Not-for-profits Commission.
11. Toorak operates an independent school on the Mornington Peninsula, Victoria.
12. Toorak currently employs approximately 200 permanent staff and 30 temporary staff. The employment positions include both teaching and non-teaching staff.
13. As a result of a decrease in enrolments and a strategic restructure of its educational offering, Toorak proposes to rationalise and re-organise its operations by reducing the number of staff it currently employs.

14. Toorak intends to reduce the number of its employees with effect from the end of the 2013 Victorian school year, being 11 December 2013 (effective date).

15. Toorak proposes to reduce its staff numbers by offering an early retirement scheme to employees that meet the following eligibility criteria:

- are employed on a permanent and continuing basis for at least five years, and
- must be at least 55 years of age but under 65 years of age as at the effective date.

16. Toorak identifies that, based on the eligibility criteria, there are approximately 33 permanent employees that are eligible to apply for the Scheme. This represents approximately 16.5% of all current employees of Toorak.

17. Toorak retains a limited right of veto to exclude 'key employees' who fall within the class of employee able to participate in the Scheme.

18. Toorak considers that there is only one key employee who has essential or non-substitutable skills to whom the Scheme will not be offered..

19. Eligible employees that participate in the Scheme will receive the following payment:

- a minimum payment of six months' salary,
- an additional one month's salary payment if the employee has more than 15 years of service, and
- employees with over 20 years' service will receive two months payment, instead of the one month's payment for employees with over 15 years' service.

20. Participation in the Scheme is entirely voluntary.

21. Employees who participate in the Scheme will also be paid their full annual and long service leave entitlement, however these entitlements do not form part of the early retirement scheme payment.

22. Employees that participate in the Scheme would not have received any payment associated with a voluntary termination apart from their leave entitlements.

23. The maximum number of packages available for retiring employees under the Scheme is 15.

24. In the case where the number of employees seeking access to the Scheme exceeds the number of packages available, priority will be given to employees with the greater age, and if still oversubscribed, then to employees with the longest service.

25. If the Scheme is not fully subscribed at the end of the offering period, the offer will remain open to staff for a period for six months beyond the date the offer is made.

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26. Following approval of the Scheme, all eligible employees within the class will be invited to apply and submit their applications of interest in the Scheme.

27. Where a position can be filled or re-allocated to existing staff by the commencement of the School year on 28 January 2014, and this is deemed not to impact on Toorak's ability to educate their students, the termination date will be 11 December 2013. However, if the position cannot be filled by the commencement of the School year, termination will be either the end of Term 1 (4 April 2014) or the end of Term 2 (27 June 2014).

28. Any employee who terminates employment other than under the proposed Scheme, will not be entitled to receive the payment.

29. The retirement of employees who receive a payment under the Scheme will occur before they turn 65 years of age.

30. Recipients of the Scheme are required to agree not to seek or accept employment with Toorak for a period of at least 12 months.

31. Toorak currently has six employees that are aged over 65 years of age. Although these employees will not be eligible to apply for the Scheme, Toorak is considering offering a separate retirement package to some or all of these employees.

32. Employment termination payments cannot be rolled over into a superannuation fund.

33. Payments made under the Scheme will be at arm's length.

34. The Scheme payments will not be made in lieu of superannuation benefits.

## Ruling

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35. The early retirement scheme to be implemented by the Toorak is an early retirement scheme for the purposes of section 83-180.

36. Accordingly, so much of the payment received by an employee that exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of the retirement will be an early retirement scheme payment.

37. In addition, so much of the early retirement scheme payment as falls within the threshold calculated in accordance with section 83-170 is not assessable income and is not exempt income.

## 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.*

**Where a scheme satisfies the requirements of section 83-180 that scheme will be an 'early retirement scheme'.**

38. Subsection 83-180(3) states that:

A scheme is an **early retirement scheme** if:

- (a) all the employer's employees who comprise such a class of employees as the Commissioner approves may participate in the scheme; and
- (b) the employer's purpose in implementing the scheme is to rationalise or re-organise the employer's operations by making any change to the employer's operations, or the nature of the work force, that the Commissioner approves; and
- (c) before the scheme is implemented, the Commissioner, by written instrument, approves the scheme as an early retirement scheme for the purposes of this section.

These three conditions are now considered.

***All employees within a class approved by the Commissioner may participate in the scheme***

39. In order to satisfy the first condition, the scheme must be offered to all employees in a class approved by the Commissioner under paragraph 83-180(3)(a).

40. The class of employees to whom early retirement will be offered is set out in paragraphs 15 to 18 of this Ruling.

41. The Commissioner considers that this is an appropriate class of persons to whom the scheme will be offered. 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 paragraph 83-180(3)(a).

***The employer's purpose in implementing the scheme is to rationalise or re-organise the employer's operations in a way approved by the Commissioner***

42. The proposed scheme must be implemented by the employer with a view to rationalising or re-organising the operations of the employer as described in paragraph 83-180(3)(b).

43. Paragraphs 11 to 14 of this Ruling describe the nature of the rationalisation or re-organisation of the employer's operations. In approving the scheme, the Commissioner has had regard to the changes in the operations and nature of the workforce of the employer. It is considered that the scheme is to be implemented by the employer with a view to rationalising or re-organising the operations of the employer for the purposes of paragraph 83-180(3)(b). Accordingly, the second condition for approval has been met.

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

44. The Scheme is proposed to operate for a period commencing from 27 November 2013 to 30 June 2014. The approval to be provided by the class ruling will have been granted prior to implementation therefore, for the purposes of paragraph 83-180(3)(c), this condition is satisfied.

45. The Scheme will be in operation for approximately seven months. This is considered appropriate due to the circumstances of the reorganisation and the employees that will be given the option of early retirement under the Scheme.

***Other relevant information***

46. Under subsection 83-180(1) so much of the payment received by an employee because the employee retires under an early retirement scheme as exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of the retirement is an early retirement scheme payment.

47. It should be noted that, in order for a payment to qualify as an early retirement scheme payment, it must also satisfy the following requirements (as set out in subsections 83-180(2), 83-180(5) and 83-180(6)):

- the retirement occurred before the employee turned age 65 or such earlier date on which the employee's employment would have terminated under the terms of employment because of the employee attaining a certain age or completing a particular period of service (as the case may be),
- if 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 the amount that could reasonably be expected to be made if the retirement was made at arm's length,

- at the time of retirement there was no arrangement between the employee and the employer, or between the employer and another person, to employ the employee after the retirement,
- the payment must not be made in lieu of superannuation benefits, and
- it is not a payment mentioned in section 82-135 (apart from paragraph 82-135(e)).

48. The term 'arrangement' is defined in subsection 995-1(1) as meaning 'any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings'.

49. An early retirement scheme payment that falls within the specified limit is referred to as the 'tax-free' amount and will not be assessable income and will not be exempt income.

50. For the 2013-14 income year, the proposed tax free amount is limited to \$9,246 (base amount) plus \$4,624 (service amount) for each whole year of completed employment service to which the early retirement scheme payment relates. It should be noted that six months, eight months or even eleven months do not count as a whole year for the purposes of this calculation.

51. The total of the amount received on termination of employment calculated in accordance with paragraph 19 of this ruling may qualify as an early retirement scheme payment.

52. The total payment calculated in accordance with paragraph 19 of this ruling will be measured against the limit calculated in accordance with the formula mentioned in paragraph 50 of this ruling to determine the 'tax-free' amount of the early retirement scheme payment.

53. The 'tax-free' amount will:

- not be an employment termination payment, and
- not be able to be rolled-over into a superannuation fund.

54. Any payment in excess of this limit will be an employment termination payment where the payment is received no later than 12 months after termination of employment and will be split into tax free and taxable components. The tax free component of an employment termination payment includes the pre-July 83 segment of the payment. The tax free component is not assessable income and is not exempt income.

55. The taxable component of the employment termination payment will be taxed at various rates depending on the person's age. It should be noted the 'whole of income' cap does not apply to any part of the early retirement scheme payment.



**Appendix 2 – Detailed contents list**

56. 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

- ITAA 1997 82-135(e)
- ITAA 1997 83-170
- ITAA 1997 83-180
- ITAA 1997 83-180(1)

*Related Rulings/Determinations:*

TR 2006/10

- ITAA 1997 83-180(2)
- ITAA 1997 83-180(3)
- ITAA 1997 83-180(3)(a)
- ITAA 1997 83-180(3)(b)

*Subject references:*

- early retirement scheme payment
- employment termination payment

- ITAA 1997 83-180(3)(c)
- ITAA 1997 83-180(5)
- ITAA 1997 83-180(6)
- ITAA 1997 995-1(1)
- TAA 1953
- Copyright Act 1968

*Legislative references:*

- ITAA 1997
  - ITAA 1997 82-135
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ATO references

NO: 1-52LFTWZ

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Assessable income ~~ employment termination payments - early retirement scheme

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