



# ***CR 2001/35 - Income tax: Approved Early Retirement Scheme - NSW Department of Industrial Relations***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *15 August 2001*



## **Class Ruling**

### **Income tax: Approved Early Retirement Scheme - NSW Department of Industrial Relations**

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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**

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 dealt with in this Ruling is section 27E of the *Income Tax Assessment Act 1936*.

#### **Class of persons**

3. The class of persons to whom this Ruling applies is

- all employees in the NSW Department of Industrial Relations,

who receive a payment under the Voluntary Early Retirement Scheme described below in paragraphs 10 to 24.

#### **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 described below at paragraphs 10 to 24 provided in this Ruling.

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

- (a) 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
- (b) this Ruling may be withdrawn or modified.

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## Date of effect

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8. This Ruling applies from 15 August 2001. The 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

## Withdrawal

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9. This Ruling is withdrawn and ceases to have effect after 31 March 2002. 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.

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## Arrangement

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### The Scheme

10. The arrangement that is the subject of the 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 NSW Department of Industrial Relations on 9 May 2001;
- record of telephone conversation with the NSW Department of Industrial Relations on 4 July 2001;
- correspondence from the NSW Department of Industrial Relations on 6 July 2001;
- record of telephone conversation with the NSW Department of Industrial Relations on 23 July 2001;
- record of telephone conversation with the NSW Department of Industrial Relations on 2 August 2001;
- facsimile from the NSW Department of Industrial Relations on 3 August 2001.

11. The NSW Department of Industrial Relations is seeking the Commissioner of Taxation's approval to implement a Voluntary Early Retirement Scheme under section 27E of the *Income Tax Assessment Act 1936*.

12. The scheme is offered to all employees in the NSW Department of Industrial Relations.

13. The scheme is to be implemented to finalise reorganisation of departmental operations resulting from a Treasury Directive to reduce staffing levels due to budget constraints and/or internal reviews and restructures.

14. The period requested for the scheme is 12 September 2001 until 31 March 2002.

15. Payments provided under the scheme are as follows:

- four weeks notice or payment in lieu; and
- one weeks notice or payment in lieu thereof for employees aged 45 years and over with 5 or more years of completed service; and
- severance pay at the rate of 3 weeks per year of continuous service with a maximum of 39 weeks, with

pro-rata payments for incomplete years of service to be on a quarterly basis.

16. In addition, those employees who accept an offer of voluntary early retirement within two weeks of the offer being made, and terminate within the time nominated by the employer will be entitled to the following payments:

- less than 1 year's service 2 weeks pay
- 1 year and less than 2 year's service 4 weeks pay
- 2 years and less than 3 year's service 6 weeks pay
- 3 years and over 8 weeks pay

17. The employees will also receive the following payments from the NSW Department of Industrial Relations but these do not form part of the approved early retirement scheme payment:

- the benefits allowable as a contributor to a retirement fund;
- pro-rata leave loading in respect of leave accrued at the date of termination.

## **Payments made under the Scheme**

18. For a payment made under the above mentioned scheme to qualify as an approved early retirement scheme payment, the following conditions must be met. Note: any payment made under the scheme that does not satisfy these requirements is not covered by this Ruling.

19. 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.

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

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

22. The employee terminated 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.

23. 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.

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

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## **Ruling**

25. The Voluntary Early Retirement Scheme offered by the NSW Department of Industrial Relations is an approved early retirement scheme for the purposes of section 27E of the *Income Tax Assessment Act 1936*.

26. Accordingly, so much of the eligible termination payment (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.

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## **Explanations**

27. Where a scheme satisfies the requirements of section 27E of the *Income Tax Assessment Act 1936* (the Act) that scheme will be an 'approved early retirement scheme.'

28. The Commissioner of Taxation (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.

29. 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)).’

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

30. 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).

31. The class of employees to whom the scheme is proposed to be offered is:

- all employees in the NSW Department of Industrial Relations.

32. This class of employees is considered to have met the requirements of subparagraph 27E(1)(a)(i), that is, all employees of the employer.

33. It is noted, however that the NSW Department of Industrial Relations 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 the NSW Department of Industrial Relations business operations. The limitation of the scheme in this way is acceptable to the Commissioner.

***2. 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***

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

35. The purpose of the scheme is to assist the NSW Department of Industrial Relations to reorganise departmental operations resulting from a Treasury Directive to reduce staffing levels due to budget constraints and/or internal reviews and restructures. The proposed scheme meets the requirements set out in subparagraph 27E(1)(b)(vi). Accordingly the second condition for approval has been met.

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

36. Application for approval of the scheme dated 9 May 2001, was received in this office on 14 May 2001. The scheme is proposed to operate for a period from 12 September 2001 to 31 March 2002. The

approval date of the scheme will be the date of publication of this Ruling and will be implemented by the organisation from 12 September 2001 after receiving written approval of the scheme. The third condition is therefore satisfied.

37. The scheme will be in operation for 6 months and 19 days which is within the period recommended in TR 94/12.

***Other relevant information***

38. 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 retirement or resignation is an approved early retirement scheme payment.

39. 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) of the Act):

- 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 re-employ the taxpayer after the date of termination.

40. The term 'agreement' is defined in subsection 27A(1) as meaning 'any agreement, arrangement or understanding whether



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formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings.’

41. 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.”

42. For the year ending 30 June 2002, the tax-free amount is limited to \$5 295 plus \$2 648 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.

43. The total of the following payments qualify as an approved early retirement scheme payment:

- four weeks notice or payment in lieu;
- one weeks notice or payment in lieu thereof for employees aged 45 years and over with 5 or more years of completed service;
- severance pay at the rate of 3 weeks per year of continuous service with a maximum of 39 weeks, with pro-rata payments for incomplete years of service to be on a quarterly basis;
- “termination within nominated time” payments in accordance with paragraph 16 of this Ruling.

44. The total of the payments described in the previous paragraph will be measured against the limit calculated in accordance with paragraph 42 to determine the “tax-free amount”.

45. 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.

46. Any payment in excess of this limit will be an ordinary ETP and split up into the pre-July 83 and post-June 83 (untaxed element) components. This ETP can be rolled-over.

47. 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.

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

## **Detailed contents list**

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

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### **Commissioner of Taxation**

15 August 2001

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*Previous draft:*

Not previously issued in draft form

*Related Rulings/Determinations:*

CR 2001/1; TR 92/1; TR 92/20;  
TR 97/16; TR 94/12; TR 94/12E;  
TD 94/62

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*Subject references:*

- approved early retirement scheme payments;
- eligible termination payments
- eligible termination payments components

- ITAA 1936 27E(1)(a)(ii)
- ITAA 1936 27E(1)(a)(iii)
- ITAA 1936 27E(1)(a)(iv)
- ITAA 1936 27E(1)(a)(v)
- 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(4)
- ITAA 1936 27E(5)

*Legislative references:*

- ITAA 1936 27A(1)
  - ITAA 1936 27E
  - ITAA 1936 27E(1)(a)
  - ITAA 1936 27E(1)(b)
  - ITAA 1936 27E(1)(c)
  - ITAA 1936 27E(1)(a)(i)
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ATO References

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