



# ***CR 2001/62 - Income tax: Approved Early Retirement Scheme - Niro Australia Pty Ltd***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *30 September 2001*



## **Class Ruling**

### **Income tax: Approved Early Retirement Scheme – Niro Australia 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**

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* (‘ITAA 1936’).

#### **Class of persons**

3. The class of persons to whom this Ruling applies is all engineers employed with Niro Australia Pty Ltd who have attained sixty two years of age and receive a payment under the arrangement described below in paragraphs 10 to 22.

#### **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 22 is carried out in accordance with the details of the arrangement 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  - (b) this Ruling may be withdrawn or modified.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 30 September 2001. However, 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 December 2001. 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 Niro Australia Pty Ltd of 6 August 2001;
- record of telephone conversation with a representative of Niro Australia Pty Ltd on 21 September 2001; and
- facsimile from Niro Australia Pty Ltd dated 26 October 2001.

11. Niro Australia Pty Ltd is seeking approval for an early retirement scheme.

12. Niro Australia Pty Ltd's principal activity is the engineering, supply, erection and commissioning of process equipment for the food, chemical and mining industries. The company's equipment is installed in multi-level buildings and a certain level of fitness and agility is required to negotiate the ladders and landings for extended periods during installation and commissioning. As this work is an integral part of each engineers duties the company proposes to offer early retirement to all engineers who have attained sixty two years of age.

13. It is the company's objective to replace employees who reach sixty two years of age with younger employees leading to improved occupational health and safety risks.

14. Engineers who have attained sixty two years of age would be offered a lump sum payment based on their years of service as an incentive to take early retirement. The lump sum payment is calculated as two weeks pay for each completed year of service. This is over and above what they would have received on resignation and/or retirement.

15. Niro Australia Pty Ltd has advised that it reserves the right of veto should it receive an application from an employee who the company believes cannot be readily replaced. The right of veto is required to ensure that the company's operations are not adversely affected by the scheme.

## **Payments made under the Scheme**

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

17. 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.

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

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

20. 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.

21. 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.

22. 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.

## **Ruling**

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23. The early retirement scheme offered by Niro Australia Pty Ltd is an approved early retirement scheme for the purposes of section 27E of the ITAA 1936.

24. 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.

## Explanations

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

26. 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.

27. 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***

28. 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).

29. The class of employees to whom the scheme is proposed to be offered is all engineers employed with Niro Australia Pty Ltd who have attained sixty two years of age.

30. This class of employees is considered to have met the requirements of subparagraph 27E(1)(a)(iv), that is, all employees of the employer who have a particular occupational skill and who have attained a particular age.

31. It is noted, however that Niro Australia Pty Ltd 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 Niro Australia Pty Ltd’s 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***

32. 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).

33. The purpose of the scheme is scheme is described at paragraphs 12 and 13 of this ruling. The re-organisation is being implemented with a view to a restructuring of the work force or operations of the employer aiming for improved management of occupational health and safety risks. The proposed scheme meets the requirements set out in subparagraph 27E(1)(b)(ii). Accordingly the second condition for approval has been met.

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

34. Application for approval of the scheme dated 6 August 2001, was received in this office on 10 August 2001. The scheme is proposed to operate for a period from 30 September 2001 to 31 December 2001. Since the implementation date has already passed, the scheme fails to meet the requirement of paragraph 27E(1)(c).

35. However, subsection 27E(2) allows the Commissioner to overlook the failure to comply with any of the three conditions if special circumstances exist in relation to the scheme. Paragraph 30 of TR 94/12 states:

“Special circumstances include circumstances where: a scheme is implemented before approval has been obtained because, for example, there has been a delay in processing an application made for its approval...”

36. It is considered that this case falls within special circumstances as set out in subsection 27E(2), and the Commissioner will waive compliance with the third requirement of subsection 27E(1).

37. The scheme will be in operation for approximately 3 months 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

resignation or retirement 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 eligible termination payment (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 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. The \$5 295 and \$2 648 limits will be indexed each year in line with the movement in average weekly ordinary time earnings.

43. The following payment qualifies as an approved early retirement scheme payment:

- two weeks pay for each completed year of service.

44. The payment 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**

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

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**Commissioner of Taxation**

 7 November 2001
 

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<i>Previous draft:</i>	- ITAA 1936 27E(1)(a)
Not previously issued in draft form	- ITAA 1936 27E(1)(b)
	- ITAA 1936 27E(1)(c)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 27E(1)(a)(i)
CR 2001/1; TR 92/1; TR 92/20;	- ITAA 1936 27E(1)(a)(ii)
TR 94/12; TR 97/16	- ITAA 1936 27E(1)(a)(iii)
	- ITAA 1936 27E(1)(a)(iv)
<i>Subject references</i>	- ITAA 1936 27E(1)(a)(v)
- approved early retirement scheme payments;	- ITAA 1936 27E(1)(b)(i)
- eligible termination payments	- ITAA 1936 27E(1)(b)(ii)
- eligible termination payments components	- ITAA 1936 27E(1)(b)(iii)
	- ITAA 1936 27E(1)(b)(iv)
	- ITAA 1936 27E(1)(b)(v)
	- ITAA 1936 27E(1)(b)(vi)
<i>Legislative references:</i>	- ITAA 1936 27E(2)
- TAA 1953 Part IVAAA	- ITAA 1936 27E(4)
- ITAA 1936 27A(1)	- ITAA 1936 27E(5)
- ITAA 1936 27E	
- ITAA 1936 27E(1)	

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**ATO References**

NO T2001/017841

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ISSN: 1445 2014