

CR 2009/69 - Income tax: early retirement scheme - Port Waratah Coal Services Limited

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Class Ruling

Income tax: early retirement scheme – Port Waratah Coal Services Limited

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ⓘ 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 entities to which this Ruling applies is all full time permanent staff at the Carrington and Kooragang Coal Terminals who are 55 years of age or over but under 65 years of age.

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 11 to 31 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

8. This Ruling applies from 25 November 2009 to 25 November 2010. The Ruling continues to apply after 25 November 2010 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

9. CR 2002/11 Income tax: Approved Early Retirement Scheme – Port Waratah Coal Services Limited and CR 2002/11W Income tax: Approved Early Retirement Scheme – Port Waratah Coal Services Limited.

Scheme

10. The following description of the scheme is based on information provided by the applicant.
11. The Early Retirement Scheme (the Scheme) applies to employees of Port Waratah Coal Services Limited (PWCS), a coal handling facility.
12. PWCS has negotiated a new Enterprise Agreement with its Operations and Maintenance employees.
13. The new Enterprise Agreement has been approved by both the employees it covers and on 29 September 2009, Fair Work Australia.
14. The Scheme will be open to all full time permanent staff who are 55 years of age or over but under 65 years of age.
15. The Scheme applies to all employees of at the Carrington and Kooragang Coal Terminals.
16. There are 98 employees eligible to apply for early retirement under the scheme. PWCS is looking towards a net reduction of approximately 30 people.
17. PWCS will supply all employees with a copy of the proposed new Enterprise Agreement including details of conditions relating to the Scheme. Employees will be able to request an indicative calculation of their proposed entitlements under the Scheme.
18. Employees will be provided with a reimbursement of up to \$500 to obtain independent financial advice on the Scheme.
19. PWCS does not intend to reject any applications under the Scheme. In order to ensure that they do not lose a significant number of employees over a short period of time PWCS will reserve the right to determine each successful applicant's retirement date.
20. PWCS may require successful applicants, prior to their retirement, to assist with the training of other employees and will take all reasonable steps to ensure that their knowledge and skills have been transferred.
21. Operation and Maintenance employees are covered by the new PWCS Enterprise Agreement 2009.
22. Staff employees are employed on common law contracts of employment, some of which might be underpinned by an industrial award.
23. The purpose of the Scheme is to reorganise operations. PWCS's short term objective is to:
 - reduce the number of employees required to man the plant;
 - introduce new processes and systems;

- improve the way and increase the effectiveness of how work is performed; and

The new equipment proposed to be introduced will include:

- video recognition technology in the five PWCS coal dump stations;
- infrared camera technology in the PWCS coal dump stations and wharf areas;
- laser technology, ultra sonic sensors and radar units the PWCS dump stations;
- reconfiguration of the shiploader cabin including ergonomic modification.
- new communication equipment.

The new technology will allow the following key changes to be implemented:

- operators in the new work stations making better informed decisions via the improved presentation of more appropriate information to them;
- decisions to be made by exception through technology without operator involvement;
- management of ergonomic risks by correct positioning of employees whilst operating equipment;
- efficient communication between the vessel representative and shiploader driver to align with International Maritime Organisation and Australian Maritime Safety Authority Guidelines;
- equipment alarming to be displayed from remote locations to the main control room;
- clearer accountabilities in operator roles between organisations to conform to the Interface Coordination Plan; and
- better management of interaction at wharf areas via camera technology.

24. The Scheme will come into effect no earlier than from the date that the Commissioner approves the Scheme.

25. Employees electing to participate in the Scheme will receive the following payments:

- 10 weeks ex gratia payment; and
- two weeks payment per year of service, pro rated for incomplete years. Prior service with MSB/HBA and/or KCL will be recognised where the total period of service is continuous.

26. The rate of pay applicable for the payments will be based on the greater of:
- (i) gross average earnings of the employee over the previous 12 months including non-rostered overtime, or
 - (ii) gross average earnings of the employee over the previous 36 months excluding non-rostered overtime.
27. Employees will also receive normal statutory payments of annual leave, long service leave and personal leave on cessation of employment.
28. There is no arrangement between the employee and employer and the employer and another person, to employ the employee after retirement.
29. No payments under the Scheme will be made in lieu of superannuation benefits.
30. The Scheme will remain open for a period of two months from the date of the Commissioner's approval of the Scheme.
31. PWCS has no formal retirement age due to the provisions of State and Federal laws which prohibit a prescribed retirement age. In their experience employees normally retire between 60 and 70 years of age.

Ruling

32. The early retirement scheme to be implemented by Port Waratah Services Limited is an early retirement scheme for the purposes of section 83-180.
33. 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.
34. 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.

Commissioner of Taxation

25 November 2009

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.***

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

36. 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 discussed below.

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

37. 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).

38. The class of employees is all full time permanent staff who are 55 years of age or over but under 65 years of age at the Carrington and Kooragang Coal Terminals.

39. 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.

40. 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

41. 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).

42. The facts of this Ruling describe the nature of the rationalisation or re-organisation of Port Waratah Coal Services Limited. This includes the introduction of new technology which will result in improved work processes, and the requirement of employees to hold or acquire new skills.

43. 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 therefore 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).

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

44. The scheme is proposed to operate for a period of two months from the date of the Commissioner's class ruling. The application period will remain open for this same two month period. Approval by the Commissioner will be granted prior to implementation, therefore this condition is satisfied.

Other conditions

45. Under subsection 83-180(1):

An **early retirement scheme payment** is so much of a 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 retirement.

46. In this case, the early retirement scheme payment is in addition to employee's entitlements on normal termination of employment. Consequently, this condition is satisfied.

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

- 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. Based on the information provided, the employees who retire under the scheme are full time employees who will be under 65 years of age, there is no arrangement between the employee and employer and the employer and another person, to employ the employee after retirement and the payment will not be made in lieu of superannuation benefits.

49. The term 'arrangement' is defined in subsection 995-1(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.

50. There is no evidence to show that the employee and employer are not dealing with each other at arm's length. Therefore the first four conditions mentioned above have been satisfied.

51. Regarding the last condition, section 82-135 includes (amongst others) payments such as pensions, foreign termination payments, unused annual leave and unused long service leave, as well as reasonable payments for personal injury. It is clear that the payment under the scheme is not a payment mentioned in section 82-135 except the tax free part of an early retirement scheme. Therefore this condition has also been satisfied.

52. As all the requirements of an early retirement scheme have been met, the Commissioner approves the scheme.

53. An early retirement scheme payment made on or after 1 July 2007 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.

54. For the year ending 30 June 2010, this amount is limited to \$7,732 plus \$3,867 for each whole year of completed employment service to which the early retirement scheme payment relates. Please note that six months, eight months or even eleven months do not count as a whole year for the purposes of this calculation. The \$7,732 and \$3,867 limits will be indexed to rise in each subsequent year in line with increases in average weekly ordinary time earnings.

55. The tax-free amount will:

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

56. Any payment in excess of this limit will be an employment termination payment and split up 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.

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

Appendix 2 – Detailed contents list

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

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References

- Previous draft:*
- ITAA 1997 82-135
- Not previously issued as a draft
- ITAA 1997 82-135(e)
 - ITAA 1997 83-170
- Related Rulings/Determinations:*
- ITAA 1997 83-180
 - ITAA 1997 83-180(1)
 - ITAA 1997 83-180(2)
 - ITAA 1997 83-180(3)
 - ITAA 1997 83-180(3)(a)
 - ITAA 1997 83-180(3)(b)
 - ITAA 1997 83-180(5)
 - ITAA 1997 83-180(6)
 - ITAA 1997 995-1(1)
 - TAA 1953
 - Copyright Act 1968
- Subject references:*
- approved early retirement scheme payments
 - employment termination payment
- Legislative references:*
- ITAA 1997
-

ATO references

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