

# ***CR 2013/53 - Income tax: Essential Energy - Early Retirement Scheme***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *15 January 2014*



## Class Ruling

### Income tax: Essential Energy - Early Retirement Scheme

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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.

**[Note:** This is a consolidated version of this document. Refer to the Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

## 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 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 those employees of Essential Energy shown at paragraph 16, who receive a payment under the scheme described in paragraphs 8 to 37 of this Ruling.

## **Qualifications**

4. 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 8 to 37 of this Ruling.

5. 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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6. This Ruling applies from 10 July 2013 to 31 December 2014. The Ruling continues to apply after 31 December 2014 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).

## **Scheme**

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7. The following description of the scheme is based on information provided by the applicant.

8. Essential Energy is seeking the Commissioner's approval to implement an early retirement scheme in accordance with section 83-180.

9. The scheme will be titled 'Essential Early Retirement Scheme' referred to as the Scheme.

10. Essential Energy is a New South Wales (NSW) Government corporation, responsible for building, operating and maintaining Australia's largest electricity network delivering essential services to homes and businesses across NSW and parts of southern Queensland and northern Victoria.

11. The sale of Essential Energy's retail business assets and brand to Origin Energy was completed as part of the NSW Government's energy reform process. The sale of the retail business assets did not involve the transfer of Essential Energy's employees.

12. The NSW Government established, in advance of the sale, a range of entitlements in order to support the future employment of the affected employees. Part of the entitlements for employees covered by their enterprise agreement includes guaranteed employment for five years from the date of the sale.

13. Essential Energy is currently supplying Origin Energy with services whilst it sets up its systems to cater for the acquired Essential Energy business. This arrangement is known as a Transitional Services Arrangement (TSA) and this arrangement is expected to end in the fourth quarter of the 2013 calendar year. At this time the employees working on the TSA will become surplus to Essential Energy's needs, as their roles will be redundant.

14. Employees affected by the sale of the retail business have the option of requesting voluntary redundancy when their roles are no longer required, or remaining employed with Essential Energy as per their entitlements.

15. The purpose of implementing the Scheme is to rationalise and re-organise the employer's operations and reduce, by voluntary means, the size of the company's workforce. Essential Energy intends to offer a scheme to allow some non-retail administrative staff to voluntarily leave the organisation so as to create vacant positions for retail employees to fill when they become surplus at the end of the TSA.

16. The class of employees to whom the Scheme applies is all permanent network line of business employees who are covered by the Essential Energy Enterprise Agreement 2011 or the Essential Energy Far West Electricity Enterprise Agreement 2011 (the Agreements), performing administrative-based roles, that are in the Admin/Clerical Pay Grade. These employees must also be in positions that can be backfilled by employees of the retail business whose roles are no longer required. This class can further be broken down into two sub-classes:

- Employees who will retire under the scheme before the day they turn age 65; and
- Employees who will be 65 years of age or older when they retire under the scheme.

17. Essential Energy will be seeking expressions of interest from employees who wish to voluntarily leave the organisation under the Scheme. Employees will be asked to nominate their expression by 3 October 2013.

18. Those employees whose roles can be successfully backfilled by retail employees will be eligible to express an interest.

19. The number of packages available for retiring employees under the Scheme will be limited.

20. All eligible employees covered by the Essential Energy Enterprise Agreement 2011 will receive a \*voluntary separation payment (VSP) under the Scheme as follows:

- (a) Four weeks' notice payment (five weeks' notice payment for those employees over 45 years of age) plus
- (b) An early acceptance payment, if accepted within two weeks of the written offer:
  - (i) Less than one years' service – two weeks' payment
  - (ii) One year and less than two years' service – four weeks' payment
  - (iii) Two years and less than three years' service – six weeks' payment
  - (iv) Three years' service or more – eight weeks' payment
- (c) Two weeks' payment for each completed year of service.

\*The total separation payment is capped at a maximum of 52 weeks.

21. All eligible employees covered by the Essential Energy Far West Electricity Enterprise Agreement 2011 will receive a voluntary separation payment (VSP) under the Scheme as follows:

- (a) Service between 1 year and 13 years:**
  - (i) Four (4) weeks' notice or payment in lieu, plus an additional one (1) week's notice or pay in lieu for employees aged 45 years and over with five (5) or more years of completed service.
  - (ii) Severance pay for each completed year of service at the rate of three (3) weeks per year of continuous service up to a maximum of thirty nine (39) weeks, with pro-rata payments for incomplete years of service to be on a quarterly basis.
  - (iii) An additional acceptance payment, if a severance offer is accepted within two (2) weeks of written offer:
    - Less than one (1) year service – 2 weeks' payment
    - One (1) year and less than two (2) years – 4 weeks' payment

- Two (2) years and less than three (3) years – 6 weeks' payment
- Three (3) years or more – 8 weeks' payment

**(b) Service between 14 years and 17 years:**

- (i) Fifty two (52) weeks with pro-rata payments for incomplete years of service to be on a quarterly basis.

**(c) Service of 18 years plus**

- (i) Three (3) weeks per year of continuous service, with pro-rata payments for incomplete years of service to be on a quarterly basis.

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22. Part-time employees will receive a pro-rated VSP based on the above formula.

23. In addition, all employees terminated under the Scheme will receive their statutory entitlements however they do not form part of the VSP made under the Scheme.

24. In the case where two or more non-retail employees with identical roles who have expressed an interest in leaving but there are not as many matching retail employees available to backfill the roles, then the employee who first submitted their expression of interest will be made the offer to receive the VSP.

25. Offers will be made to eligible employees subject to when their role can be backfilled which is also dependent on when the retail employees' responsibilities end and they are available to commence in their new role.

26. All employees who accept the offer to retire under the Scheme will terminate employment and receive the VSP by 31 December 2014. The actual date of termination will be negotiated with each individual employee based on their operational requirements but no later than 31 December 2014.

27. It is proposed the scheme will be implemented from the date after the Commissioner's approval to 31 December 2014.

28. The VSP made under the Scheme is in excess of any superannuation and any other benefits to which eligible employees would otherwise be entitled.

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

30. For payments made to eligible employees who have reached age 65 or over the VSPs will not be an early retirement scheme payment and will not be eligible for the tax free base limits under the Scheme. These payments will be concessional taxed as employment termination payments.
31. Employment termination payments cannot be rolled over into a superannuation fund.
32. Payments made under the Scheme will be at arm's length.
33. There is no agreement in place between the employee and Essential Energy, or between Essential Energy and another person to employ an employee after retirement under the Scheme.
34. The Scheme payments will not be made in lieu of superannuation benefits.
35. Participation in the Scheme is entirely voluntary.
36. If an employee chooses not to participate, his or her employment shall continue with no change.
37. All eligible employees are employed under the Essential Energy Enterprise Agreement 2011, or the Essential Energy Far West Electricity Enterprise Agreement 2011.

## Ruling

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38. The scheme to be implemented by Essential Energy is an early retirement scheme for the purposes of section 83-180.
39. 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 voluntary termination of his or her employment at the time of the retirement will be an early retirement scheme payment.
40. 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

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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.***

41. Where a scheme satisfies the requirements of subsection 83-180(3), that scheme will be an early retirement scheme.

42. 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***

43. 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).

44. The class of employees to whom early retirement will be offered is set out in paragraph 16 of this Ruling.

45. The Commissioner considers that this is an appropriate class of persons for the Scheme to 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***

46. 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).

47. The facts at paragraphs 9 to 15 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 therefore considered 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***

48. The Scheme is proposed to operate for a period from 10 July 2013 to 31 December 2014. The approval provided by this class ruling has been granted prior to implementation therefore for the purposes of paragraph 83-180(3)(c), this condition is satisfied.

49. The Scheme will be in operation for approximately 18 months. This is considered appropriate due to the circumstances of the restructure and the employees that will be given the option of early retirement under the Scheme.

***Other relevant information***

50. 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 termination is an early retirement scheme payment.

51. 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;
- it is not a payment mentioned in section 82-135 (apart from paragraph 82-135(e)).

52. 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'.

53. 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.

54. For the 2013-14 income year, the 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 6 months, 8 months or even 11 months do not count as a whole year for the purposes of this calculation. In accordance with section 960-285, the base limit and service amount limits will be indexed in line with average weekly ordinary time earnings for each income year.

55. The total of the amount received on the termination of employment calculated in accordance with paragraphs 20 to 22 of this ruling may qualify as an early retirement scheme payment.

56. The total payment calculated in accordance with paragraph 55 of this ruling will be measured against the limit calculated in accordance with the formula mentioned in paragraph 54 of this ruling to determine the 'tax free' amount of the early retirement scheme payment.

57. The 'tax free' amount will:

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

58. 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.

## Appendix 2 – Detailed contents list

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

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## References

<i>Previous draft:</i>	- ITAA 1997 83-170
Not previously issued as a draft	- ITAA 1997 83-180
	- ITAA 1997 83-180(1)
<i>Related Rulings/Determinations:</i>	- ITAA 1997 83-180(2)
TR 2006/10	- ITAA 1997 83-180(3)
	- ITAA 1997 83-180(3)(a)
	- ITAA 1997 83-180(3)(b)
<i>Subject references:</i>	- ITAA 1997 83-180(3)(c)
- early retirement	- ITAA 1997 83-180(5)
- employment termination	- ITAA 1997 83-180(6)
- redundancy or early retirement scheme payments	- ITAA 1997 960-285
	- ITAA 1997 995-1(1)
	- TAA 1953
<i>Legislative references:</i>	- Copyright Act 1968
- ITAA 1997	
- ITAA 1997 82-135	
- ITAA 1997 82-135(e)	

### ATO references

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