


# ***CR 2016/88 - Income tax: 'Nintendo Australia Early Retirement Scheme 2016'***

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## Class Ruling

### Income tax: 'Nintendo Australia Early Retirement Scheme 2016'

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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

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

### Relevant provisions

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 whom this scheme applies is those employees of Nintendo Australia Pty Ltd shown at paragraph 14 of this Ruling who receive a payment under the scheme described in paragraphs 9 to 25 of this Ruling.

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling. The class of entities defined in the Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described under the heading **Scheme**.

5. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- the Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- the Ruling may be withdrawn or modified.

## Date of effect

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6. This Ruling applies from 16 November 2016 to 31 August 2017. The Ruling continues to apply after 31 August 2017 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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7. The following description of the scheme is based on information provided by the applicant.

8. Nintendo Australia Pty Ltd (Nintendo Australia) is seeking the Commissioner's approval to implement an early retirement scheme in accordance with section 83-180.

9. The scheme will be titled '**Nintendo Australia Early Retirement Scheme 2016**', hereafter referred to as the 'Scheme'.

10. Nintendo Australia operates in the entertainment industry that is fast moving and competitive. Nintendo Australia handles the distribution, sales, and marketing of Nintendo products in Australia and New Zealand.

11. Nintendo Australia is adjusting its work force profile and redirecting resources from a traditional business model into new and diverse technologies to operate more effectively and efficiently, and sustain market competitiveness.

12. As such, Nintendo Australia will rationalise and re-organise its operations by reducing the number of staff it currently employs. The restructure will assist in regenerating and re-mapping business resources to key new areas in order to adapt to future challenges and accelerate the speed of this transition.

13. In addition, the Scheme will offer a pathway for those employees who have shown loyalty and contributed to the success of the business to retire early, if they wish, in a planned and organised manner.

14. The class of employees to whom the Scheme applies are those employees who meet the following criteria:

- are employed by Nintendo Australia on a permanent and continuing basis
- when combining years of service (rounded up) and age as at 21 December 2016, the employee reaches a combined score of 70, and
- are under 65 years as at 21 December 2016.

15. Eligible employees who retire under the Scheme will receive a payment comprising of:

- five weeks' salary in lieu of notice
- 23 weeks' salary, and
- two weeks' salary for each completed year of service.

16. In addition, all eligible employees terminated under the Scheme will receive their statutory entitlements such as annual leave and long service leave where applicable. However, these amounts will not form part of the payment made under the Scheme.

17. The Scheme will be implemented from 17 November 2016 and offers will be made to all eligible employees on the basis of the criteria specified in paragraph 14 of this Ruling.

18. Eligible employees will have 21 days to accept an offer to retire under the Scheme. Once an offer is accepted, withdrawal from the Scheme will not be permitted.

19. Employees who accept an offer to retire under the Scheme must terminate their employment and receive their payment no later than two weeks after the end of the offer period, or after a retention period determined by Nintendo Australia, which will be no later than 31 August 2017.

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

21. Employees who terminate their employment other than under the Scheme, will not be entitled to receive the Scheme payment.

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

23. Payments made under the Scheme will be at arm's length.
24. There is no agreement in place between any eligible employee and Nintendo Australia, or between Nintendo Australia and another person to employ the eligible employee after retirement under the Scheme.
25. Participation in the Scheme is entirely voluntary.

## Ruling

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26. The ***Nintendo Australia Early Retirement Scheme 2016*** is an early retirement scheme for the purposes of section 83-180.
27. Accordingly, so much of the payment received by an eligible employee that exceeds the amount that could reasonably be expected to be received by the employee in consequence of voluntary termination of their employment at the time of the retirement will be an early retirement scheme payment.
28. 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.*

29. A scheme will be an early retirement scheme if it satisfies the requirements of subsection 83-180(3).

30. 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**

31. 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).

32. The class of employees to whom early retirement will be offered under the Scheme is set out in paragraph 14 of this Ruling.

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

34. 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).

35. Paragraphs 10 to 13 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 work force 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).

36. Accordingly, the second condition for approval has been met.

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

37. The Scheme is proposed to operate for a period from 17 November 2016 to 31 August 2017. 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.

38. The Scheme will be in operation for approximately ten months. This is considered appropriate due to the circumstances of the re-organisation.

### **Other relevant information**

39. 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 their employment at the time of termination is an early retirement scheme payment.

40. 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 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 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)).

41. 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*'.

42. In accordance with section 83-170, 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.

43. For the 2016-17 income year, the tax-free amount is limited to \$9,936 (base amount) plus \$4,969 (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.

44. For the 2017-18 income year, the base amount and the service amount is yet to be determined at the publication of this Ruling. Therefore, employees should check the Australian Taxation Office website for the 2017-18 income year indexed amounts.

45. The total of the amount received on the termination of employment calculated in accordance with paragraph 15 of this Ruling may qualify as an early retirement scheme payment.

46. The total payment calculated in accordance with paragraph 15 of this Ruling will be measured against the limit in accordance with the formula mentioned in paragraphs 43 and 44 of this Ruling to determine the tax-free amount of the early retirement scheme payment.

47. The tax-free amount will:

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

48. Any payment in excess of this limit will be an ETP and will be split into tax-free and taxable components. The tax-free component of an ETP includes the pre-July 83 segment of the payment. The tax-free component is not assessable income and is not exempt income.

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

## Appendix 2 – Detailed contents list

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

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## References

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<i>Previous draft:</i>	- ITAA 1997 83-180(1)
Not previously issued as a draft	- ITAA 1997 83-180(2)
	- ITAA 1997 83-180(3)
<i>Related Rulings/Determinations:</i>	- ITAA 1997 83-180(3)(a)
TR 2006/10	- ITAA 1997 83-180(3)(b)
	- ITAA 1997 83-180(3)(c)
	- ITAA 1997 83-180(5)
<i>Legislative references:</i>	- ITAA 1997 83-180(6)
- ITAA 1997	- ITAA 1997 960-285
- ITAA 1997 82-135	- ITAA 1997 995-1(1)
- ITAA 1997 82-135(e)	- TAA 1953
- ITAA 1997 83-170	
- ITAA 1997 83-180	

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### ATO references

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