


# ***CR 2021/86 - Flinders Adelaide Container Terminal Pty Ltd - early retirement scheme***

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Status: **legally binding**

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## Class Ruling

# Flinders Adelaide Container Terminal Pty Ltd – early retirement scheme

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### **❶ Relying on this Ruling**

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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### **What this Ruling is about**

1. This Ruling sets out the income tax consequences of an early retirement scheme implemented by Flinders Adelaide Container Terminal Pty Ltd (FACT).
2. Full details of this scheme are set out in paragraphs 9 to 27 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

### **Who this Ruling applies to**

4. This Ruling applies to employees of FACT who receive a payment under this scheme.

### **When this Ruling applies**

5. This Ruling applies from 2 December 2021 to 31 December 2023.

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Status: **legally binding**

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## **Ruling**

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6. The FACT early retirement scheme (hereafter referred to as 'the Scheme') is an early retirement scheme for the purposes of section 83-180.

7. 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 their retirement will be an early retirement scheme payment.

8. In addition, so much of the Scheme payment as falls within the threshold calculated in accordance with section 83-170 is not assessable income and not exempt income.

## **Scheme**

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9. The following description of the Scheme is based on information provided by the applicant. If the Scheme is not carried out as described, this Ruling cannot be relied upon.

10. FACT provides container-stevedoring services and related activities at the Adelaide Container Terminal.

11. The purpose of the Scheme is to support FACT operating as a more effective and efficient organisation.

12. With an ageing workforce, FACT is seeing an onset of a number of degenerative health issues arising in stevedore employees. This affects the individual's ability to work in a heavy manual labour role.

13. FACT intends to increase productivity by replacing aging long-term stevedore employees who choose to take part in the Scheme with employees who are more capable of meeting the physical demands of the stevedore role.

14. The class of employees who may participate in the Scheme are stevedores who are:

- 55 years of age and above, and
- under pension age at the time of retirement.

15. The following employees are specifically excluded from participating in the Scheme:

- those who have resigned prior to the date of invitation or accepted a pre-retirement contract, or
- those with an active workers compensation claim where there is a payment made for loss of income.

16. The Scheme will be implemented in four rounds, with the number of employees who can retire in each round being limited. This is to enable the recruitment and training of suitable replacements, which takes up to six months. There are also capacity restrictions with the number of new recruits who can be trained at one time.

17. The number of packages available under the Scheme is limited to 48 over the period the Scheme will be implemented. If more employees wish to participate in the Scheme than the number of packages available, participation will be on the basis of tenure where the longest-serving employees will be able to retire under the Scheme.

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18. Following approval of the Scheme, a limited number of offers of early retirement under the first round of the Scheme will be made to the longest-serving employees. The other rounds will be implemented progressively over the period of the Scheme.

19. Employees who accept an offer to retire under the Scheme will receive a lump sum payment equivalent to three weeks of salary per completed year of continuous service with FACT, up to a maximum of 52 weeks of salary. Any unpaid time during their employment period will not count as service but will also not be treated as a break in service.

20. The enterprise agreement covering the stevedore employees contains provisions for voluntary separation packages (VSPs) over four years. FACT will not provide more than the minimum number of VSPs required under the enterprise agreement. The VSPs will be provided over the period of the Scheme. Furthermore, FACT will not include provision for VSPs in their next enterprise agreement or offer VSPs during the term of the next agreement. The Scheme is a one-off re-organisation of the FACT work force.

21. All employees retiring under the Scheme will receive payment and cease their employment prior to the expiration of the Scheme on 31 December 2023.

22. Any employee who terminates employment other than under the Scheme will not be entitled to receive the Scheme payment.

23. The payment under the Scheme is in addition to and not in lieu of any superannuation and any other benefits to which eligible employees would otherwise be entitled.

24. In order to receive a concessional-tax early retirement scheme payment, employees must retire under the Scheme before they reach age pension age.

25. Payments made under the Scheme will be at arm's length.

26. There is no agreement in place between an employee and FACT or between FACT and any other person to employ the employee after their retirement under the Scheme.

27. Participation in the Scheme is voluntary.

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**Commissioner of Taxation****1 December 2021**

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Status: **not legally binding**


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## Appendix – Explanation

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**❗** *This Explanation 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.*

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### Requirements for an early retirement scheme

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

29. 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.

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

30. In order to satisfy the first requirement of subsection 83-180(3), a scheme must be offered to all employees in a class approved by the Commissioner.

31. The class of employees to whom early retirement will be offered under the Scheme is set out in paragraphs 14 and 15 of this Ruling.

32. The Commissioner considers that, for the purposes of paragraph 83-180(3)(a), 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 FACT.

33. Therefore, the first requirement of subsection 83-180(3) is satisfied.

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***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 required by paragraph 83-180(3)(b).

35. Paragraphs 11 and 12 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 FACT. It is considered that the Scheme is to be implemented by FACT with a view to rationalising or re-organising the operations of the FACT for the purposes of paragraph 83-180(3)(b).

36. Accordingly, the second requirement of subsection 83-180(3) has been met.

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

37. The Scheme is proposed to operate from 2 December 2021 to 31 December 2023.

38. The Scheme will be in operation for a period considered appropriate due to the circumstances of the re-organisation.

39. As the approval provided by this Ruling was granted prior to implementation, the third requirement of subsection 83-180(3) is satisfied.

***Other relevant information***

40. 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.

41. 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), (5) and (6)):

- the retirement occurred before the employee reached pension age 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)).

42. The term 'pension age' has the meaning given by subsection 23(1) of the *Social Security Act 1991*.

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43. 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.
44. 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.
45. For the 2021–22 income year, the tax-free amount is limited to \$11,341 (base amount) plus \$5,672 (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 11 months do not count as a whole year for the purposes of this calculation.
46. For the 2022–23 income year, the base amount and the service amount are yet to be determined at the date of publication of this Ruling. Therefore, employees should check the ATO website for these indexed amounts at the relevant time.
47. The total of the amount received on the termination of employment calculated in accordance with paragraph 18 of this Ruling will qualify as an early retirement scheme payment.
48. The total payment calculated in accordance with paragraph 18 of this Ruling will be measured against the limit in accordance with the formula mentioned in paragraph 44 of this Ruling to determine the tax-free amount of the early retirement scheme payment.
49. The tax-free amount will not be:
- an employment termination payment (ETP), and
  - able to be rolled-over into a super fund.
50. 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.
51. 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.

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Status: **not legally binding**

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Legislative references:*

- ITAA 1997 82-135
- ITAA 1997 82-135(e)
- ITAA 1997 83-170

- 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
- Social Security Act 1991 23(1)

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ATO references

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