



# ***CR 2001/67 - Income tax: Approved Early Retirement Scheme - Department of Administrative and Information Services (Ports Corporation South Australia)***

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## **Class Ruling**

### **Income tax: Approved Early Retirement Scheme – Department of Administrative and Information Services (Ports Corporation South Australia)**

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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.*

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## **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 are employees of the Department of Administrative and Information Services working in Ports Corporation who are not transferred to a position with the new owner and are identified as being excess who receive a payment under the Voluntary Early Retirement Scheme described below in paragraphs 10 to 27.

#### **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 27 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- (b) this Ruling may be withdrawn or modified.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 2 November 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 2 May 2002. 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.

## **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 dated 30 October 2001 from the Office of the Commissioner for Public Employment on behalf of the Department of Administrative and Information Services (DAIS) including a Memorandum of Understanding (MOU) between South Australian Government and the Maritime Union of Australia and the Australian Maritime Officers Union dated 20 April 2000.

11. South Australia's ports (operated by the South Australian Government's 'Ports Corporation') have been sold and settlement date was 2 November 2001. The new operators of South Australia's ports will be a consortium of private companies.

12. The State Government has had a Memorandum of Understanding (MOU) between the Maritime Union of Australia and the Australian Maritime Officers Union in place since 20 April 2000 for when Ports Corporation was eventually sold by the SA Government.

13. It is anticipated that the present 140 employees managed by Ports Corporation will be reduced to approximately 90 by the new owner. Under State Government policy and the MOU, there are to be no forced redundancies in Ports Corp. This means the 50 or so workers to lose positions would be offered voluntary separation packages or redeployment within the SA public sector.

14. Under the terms of the MOU and the sale contract, all employees will be made available to the purchaser for a "made available period".

15. During this period the new owner will identify and advise the Government of the positions it requires after having considered expressions of interest received from the current employees. Employees who are not required for any position with the new owner have the choice of accepting a Targeted Voluntary Separation Package (TVSP) or seeking redeployment with the Government.

16. It is important to note that all employees remain in the employment of the South Australian Government until such time as

they are nominated by the new owner or otherwise. Excess employees (i.e. those employees who are not required by the new owner) will remain employed by the Department of Administrative and Information Services.

17. Payments will be in accordance with Schedule 1 of the MOU and Cabinet approval of 24 September 2001. The calculation of an eligible employee's TVSP payment will be as follows:

- **Stage 1** – A minimum payment of twenty (20) weeks pay plus three weeks pay for each completed year of service with a maximum payout of 116 weeks pay if employees, having requested an offer, resign and separate up to 4 weeks after an offer is made;
- **Stage 2** – A minimum payment of four (4) weeks pay plus two weeks pay for each completed year of service with a maximum payout of 52 weeks pay if employees, having requested an offer, resign and separate more than 4 weeks after an offer is made. A Stage 2 offer would only apply if a Stage 1 offer has previously been made and not accepted.

18. The Stage 1 and Stage 2 TVSPs include an allowance representing the additional value of calculating the "weeks pay" component on the basis of average gross actual time earnings for the 36 months prior to resignation converted to a weekly rate. This means actual gross earnings including overtime and work related allowances, but excluding leave loading and locality allowance.

19. Separation payments for eligible Executive/Senior officers will be negotiated between the officers and the Commissioner for Public Employment in accordance with guidelines published by that Commissioner. These payments would be in excess of what would have reasonably been expected to be paid on normal resignation or termination.

20. DAIS has requested the scheme operate from 2 November 2001 to 2 May 2002 to ensure the terms of the MOU continue to be met. However, DAIS have advised that if the Human Resource Transition Management Process (as set out in the MOU) has ended before 2 May 2002, the scheme will terminate at that date.

## **Payments made under the Scheme**

21. 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.

22. 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.

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

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

25. 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.

26. 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.

27. 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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28. The early retirement scheme offered by Department of Administrative and Information Services is an approved early retirement scheme for the purposes of section 27E of the ITAA 1936.

29. 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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30. Where a scheme satisfies the requirements of section 27E of the ITAA 1936 that scheme will be an 'approved early retirement scheme.'

31. 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.

32. 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***

33. 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).

34. The class of employees to whom the scheme is proposed to be offered are:

- employees of the Department of Administrative and Information Services working in Ports Corporation who are not transferred to a position with the new owner and are identified as being excess.

35. This class of employees does not come within any of subparagraphs 27E(1)(a)(i) to (iv), therefore it must be considered under subparagraph 27E(1)(a)(v), namely all employees of the employer who constitute a class of employees approved by the Commissioner for the purposes of this paragraph. In approving this class of employees, the Commissioner has considered the nature of the rationalisation or re-organisations of the employer. It is therefore considered that these employees meet the requirements of an approved class of employees for the purposes of subparagraph 27E(1)(a)(v).

**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***

36. 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).

37. The purpose of the scheme is described at paragraphs 11 to 13 of this ruling. The South Australian Government has decided that it no longer wishes to operate South Australian ports through Ports Corporation and has sold off those operations. Clearly this would fall under subparagraph 27E(1)(b)(iii) i.e. cessation of part of the operations of the employer.

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

38. The final requirement for qualification as an approved early retirement scheme is that the Commissioner approve the scheme before it is implemented.

39. The scheme will be in operation from 2 November 2001 to 2 May 2002. Since the implementation date has already passed, the scheme fails to meet the requirements of paragraph 27E(1)(c). 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...'

The request for approval was received in this office prior to the implementation date of the scheme and after consideration of this and other circumstances of the application, the Commissioner considers the case falls within special circumstances as set out in subsection 27E(2). Accordingly the Commissioner will waive compliance with the third requirement of subsection 27E(1).

40. The scheme will be in operation for 6 months which is within the period recommended in TR 94/12.

***Other relevant information***

41. 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 retirement or resignation is an approved early retirement scheme payment.

42. 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 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.

43. 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.'

44. 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."

45. 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.

46. The following payments qualify as approved early retirement scheme payments:

- For Executive / Senior officers, the amount negotiated in accordance with paragraph 19 of this ruling;
- For all other employees, the amount calculated in accordance with paragraph 17 of this ruling.

47. For each employee, the total payment described in the previous paragraph will be measured against the limit calculated in accordance with paragraph 46 to determine the "tax-free amount".

48. 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.

49. 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.

50. 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.

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

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**Commissioner of Taxation**

14 November 2001

<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(4)
- TAA 1953 Part IVAAA	- ITAA 1936 27E(5)
- ITAA 1936 27A(1)	
- ITAA 1936 27E	

ATO References

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