

CR 2008/83 - Fringe benefits tax: contributions to an approved worker entitlement fund: Australian Construction Industry Redundancy Trust



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Class Ruling

Fringe benefits tax: contributions to an approved worker entitlement fund: Australian Construction Industry Redundancy Trust

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❶ 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 58PA of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA); and
- section 58PB of the FBTAA.

All references in this Ruling are to the FBTAA unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is all employers who make contributions to the Australian Construction Industry Redundancy Trust (ACIRT) for workers who are members (members) of ACIRT.

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 10 to 17 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 1 April 2008 to 31 March 2012. The Ruling continues to apply after 31 March 2012 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. Class Ruling CR 2006/121 dealt with this issue and applied to all entities within the specified class who entered into the specific scheme described therein during the timeframe of that ruling. That is, from 1 April 2004 to 31 March 2008.

Scheme

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

- class ruling application from DLA Phillips Fox dated 6 March 2008;
- additional information provided in the letter dated 7 October 2008;
- a copy of the ACIRT Redundancy Fund Trust Deed (ACIRT Trust Deed);
- an example Deed of Adherence between ACIRT and an Employer;
- a copy of clause 16 of the National Building and Construction Industry Award 2000 (NBCIA);
- a copy of clause 16 of the NSW Building and Construction Industry (State) Award (NSW BCIA); and
- a certified Enterprise Bargaining Agreement (EBA) which contains an example of a redundancy clause (EBARC).

11. Employers provide redundancy entitlements for their workers pursuant to various awards and agreements (industrial instruments) of which the NBCIA and NSW BCIA are representative examples. In doing so, employers may fund the worker redundancy entitlements they are required to make by the payment of contributions to ACIRT.

12. ACIRT is an Australian resident trust fund governed by a trust deed, which established the fund in Australia. The central management and control of the fund is in Australia.

13. The trustee of ACIRT is ACIRT Pty Ltd ACN 062 330 170 (the ACIRT Trustee), an Australian resident company.

14. ACIRT is an approved worker entitlement fund for the purposes of section 58PB.

15. ACIRT accepts contributions from employers to fund each worker's individual redundancy benefit. ACIRT and the employers execute an agreement called a 'Deed of Adherence' which sets out the amount to be contributed by the employer in respect of each worker. This can be calculated by reference to either:

- the 'minimum contribution' rate (as defined in the ACIRT Trust Deed); or
- the rate provided for in an industrial instrument – whichever is greater.

16. Clause 16 in both the NBCIA and NSW BCIA deal with redundancy matters and are identical in terms of how contributions are to be made. Clause 16.2.1 of the NBCIA states:

A redundant employee shall receive redundancy/severance payments, calculated as follows...

Clause 16.2.7 of the NBCIA states:

An employer bound by this award may utilise a fund to meet all or some of the liabilities created by this clause. Where an employer utilises such a fund:

16.2.7(a) payments made by a fund designed to meet an employer's liabilities under this clause, to employees eligible for redundancy/severance pay shall be set off against the liability of the employer under this clause, and the employee shall receive the fund payment or the award benefit whichever is greater but not both; or

16.2.7(b) where a fund, which has been established pursuant to an agreement between unions and employers, does not make payments in accordance with this clause, contributions made by an employer on behalf of an employee to the fund shall, to the extent of those contributions, be set off against the liability of the employer under this clause, and payments to the employee shall be made in accordance with the rules of the fund or any agreement relating thereto and the employee shall be entitled to the fund benefit or the award benefit whichever is greater but not both.

17. The EBARC deals with both the payment of the employer to a fund and also the payments that are required to be made to an employee being made redundant. It is worded in the following manner:

Redundancy or redundant means the termination or cessation of employment of an Employee for any reason.

In respect of redundancy benefits:

- a) The Company agrees to make redundancy contributions in respect of Employees covered by this Agreement to the Australian Construction Industry Redundancy Trust (ACIRT) in accordance with Appendix C of this agreement.

The entitlement for apprentices will be in accordance with Appendix D of this Agreement.

The contributions shall be paid monthly into ACIRT in accordance with the requirements of the Trust.

- b) Employees will be entitled to a redundancy benefit for each week of service with the Company being the greatest of the following amounts:
- i) the amount payable by the Company to ACIRT in accordance with this Agreement or
 - ii) the amount prescribed by the relevant Award and or
 - iii) and amount prescribed or awarded by the relevant industrial tribunal.

Where there is a higher entitlement under (b)ii) and or (b)iii) of this clause the Employee will be paid direct this entitlement minus the balance that has already been paid into ACIRT by the Company for this period of employment.

Ruling

18. Contributions to ACIRT that are made on terms equivalent to those allowed by the NBCIA and the NSW BCIA will be exempt benefits under section 58PA.

19. Contributions to ACIRT that are made on terms equivalent to those allowed by the EBARC included in any industrial instrument in force under any such law of the Commonwealth or of a State or Territory will be exempt benefits under section 58PA.

Commissioner of Taxation

3 December 2008

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.*

Application of section 58PA

20. When an employer makes a contribution to an approved worker entitlement fund that contribution is an exempt benefit if it meets the requirements of section 58PA.

21. Section 58PA states:

If:

- (a) a person makes a contribution to an approved worker entitlement fund; and
- (b) the contribution is made under an industrial instrument; and
- (c) the contribution is either:
 - (i) made for the purposes of ensuring that an obligation under the industrial instrument to make leave payments (including payments in lieu of leave) or payments when an employee ceases employment is met; or
 - (ii) for the reasonable administrative costs of the fund;

the contribution is an exempt benefit.

Contribution to an approved worker entitlement fund

22. Paragraph 58PA(a) requires the contribution be made to an approved worker entitlement fund. Whether the employer makes the redundancy payments to an approved worker entitlement fund is a question of fact.

23. Section 58PB deals with the meaning of approved worker entitlement fund. Subsection 58PB(2) states:

A fund is also an **approved worker entitlement fund** if:

- (a) the fund is prescribed for the purposes of this paragraph; and
- (b) a declaration under subsection (3) is not in force in relation to the fund.

24. ACIRT has been prescribed as an approved worker entitlement fund for the purposes of paragraph 58PB(2)(a). There is no declaration under subsection 58PB(3) in force in relation to this fund.

25. Therefore, any contributions made by an employer to ACIRT will be to an approved worker entitlement fund for the purposes of paragraph 58PA(a).

Contribution made under an industrial instrument

26. Paragraph 58PA(b) requires that the contributions be made under an 'industrial instrument'.

27. An 'industrial instrument' is defined in subsection 136(1) as a 'law of the Commonwealth or of a State or Territory or an award, order, determination or industrial agreement in force under any such law'.

Contribution made under an award

28. The NBCIA and also the NSW BCIA are industrial instruments for the purposes of paragraph 58PA(b). Both these awards allow for employers to fund their redundancy obligations through contributions to a fund set up for that purpose, that is, a worker entitlement fund.

29. The use of ACIRT is optional in both the NBCIA and the NSW BCIA. Employers agree to utilise the fund for redundancy liabilities through the use of the 'Deed of Adherence' which creates a legal obligation on the part of the employers.

30. As provided for at clause 8.12 of the Explanatory Memorandum to the Tax Laws Amendment (2005 Measures No. 2) Bill 2005, related legal instruments may be used to determine quantum as well as other relevant matters regarding contributions in terms of the industrial instrument.

31. The 'Deed of Adherence' is an example of a related legal instrument that can be used for such purposes. In the case of an award with a provision equivalent to clause 16.2.7 of the NBCIA, the Deed of Adherence may specify a contribution amount to fund the redundancy entitlement in the award or a greater amount.

32. Therefore any contributions made by employers to ACIRT for redundancy payments arising through the application of the relevant award together with the 'Deed of Adherence' will satisfy the requirements of paragraph 58PA(b). That is, contributions made to ACIRT in these situations will be made under an industrial instrument.

Contribution made under a certified EBA

33. The redundancy clause provides that redundancy contributions are to be made to ACIRT. These contributions are to fund the employer's redundancy payment obligations.

34. Where an EBA is an industrial instrument, that is, where it is an industrial agreement in force under Australian law, paragraph 58PA(b) will be satisfied.

35. Contributions made to ACIRT under the terms of a certified EBA will be made under an industrial instrument.

Contribution made to ensure that leave or redundancy payment obligation is met

36. Paragraph 58PA(c) requires that the contribution is either for the purpose of ensuring that an obligation under the industrial instrument to make leave or redundancy payments is met or for the reasonable administrative expenses of the fund.

Obligation for redundancy payments to be made under an award

37. Under both the NBCIA and the NSW BCIA there is an obligation imposed on the employer to fund redundancy payments, even when those payments are made through the use of a worker entitlement fund. It is a requirement of subparagraph 58PA(c)(i) that this obligation is under the industrial instrument, so this particular requirement is met.

38. Each of the two awards provided are industrial instruments, and as the contributions are made to ACIRT for the purpose of ensuring that an obligation under the award to make leave payments or payments when an employee ceases employment is met, the requirements of paragraph 58PA(c) will be satisfied.

Obligation for redundancy payments to be made under a certified EBA

39. Under the terms of the EBA the employer has an obligation to make redundancy payments. Where this enterprise bargaining agreement is an industrial instrument subparagraph 58PA(c)(i) will be satisfied. Under the terms of the agreement, contributions to the fund are also made to ensure this obligation is met.

40. The certified EBA provided is an industrial instrument, and as the contributions made to ACIRT are made for the purpose of ensuring that the obligation under the industrial instrument to make leave payments or payments when an employee ceases employment is met, the requirements of paragraph 58PA(c) will be satisfied.

Conclusion on exemption under section 58PA

41. Contributions made by employers to ACIRT to meet the employer's obligations for redundancy payments arising under either the NBCIA, the NSW BCIA, the certified EBA provided, or equivalent arrangements will be exempt under section 58PA as all the necessary requirements are met.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

CR 2007/28; CR 2007/55;

TR 2006/10

Previous Rulings/Determinations:

CR 2006/121

Subject references:

- exempt benefits
- fringe benefits tax
- worker entitlement funds

Legislative references:

- FBTA 1986
- FBTA 1986 58PA

- FBTA 1986 58PA(a)
- FBTA 1986 58PA(b)
- FBTA 1986 58PA(c)
- FBTA 1986 58PA(c)(i)
- FBTA 1986 58PB
- FBTA 1986 58PB(2)
- FBTA 1986 58PB(2)(a)
- FBTA 1986 58PB(3)
- FBTA 1986 136(1)
- TA 1953
- Copyright Act 1968

Other references:

- Explanatory Memorandum to the Tax Laws Amendment (2005 Measures No. 2) Bill 2005

ATO references

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