



CR 2001/6 - Income tax: Approved Early Retirement Scheme - Department of Housing, NSW

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 February 2001*



Class Ruling

Income tax: Approved Early Retirement Scheme – Department of Housing, NSW

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Preamble

The number, subject heading, and the *What this 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.

What this Class Ruling is about

1. This Ruling sets out the Commissioner’s opinion on the way in which the ‘tax law’ identified below applies 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*.

Class of persons

3. The class of persons to whom this Ruling applies is the displaced employees of the Department of Housing, who are declared excess as a result of restructuring Departmental activities and receive a payment under the arrangement described below in paragraphs 10 to 25.

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 25 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 - (b) this Ruling may be withdrawn or modified.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

8. This Ruling applies from 1 February 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

9. This Class Ruling is withdrawn and ceases to have effect after 1 February 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

The scheme

10. The following details of the arrangement have been obtained from the Department of Housing by correspondence dated 18 January 2001.

11. The Department of Housing seeks the approval of an Approved Early Retirement Scheme (the Scheme).

Purpose of application

12. The Department is undergoing a major restructure which is ongoing. The restructuring process has required careful planning and staged implementation. The next phase is the implementation of the New Business Model which involves the closure of a Regional Office, re-organisation of regional support functions as well as the possibility of centralising certain functions within the Shared Services Network. It is anticipated that less than 30 officers will fall within the specified category.

Categories of employees

13. Displaced employees who are declared excess as a result of restructuring Departmental activities.

Veto criteria

14. A limited right of veto would be applied to applications by key personnel who cannot be readily replaced and whose loss would impair the efficiency of the Department's business operations.

Timing

15. The timing of the proposed scheme is for a period of 12 months commencing 1 February 2001 to 1 February 2002.

Age of employees

16. The applicant realises that no tax concession will apply to staff aged 65 years and over. Within the state public sector, there is no specified retirement age. No special restrictions will be applied to the age of the staff.

Payment details

17. Where employees accept the offer, they are entitled to the following payments over and above the payment they would receive if they voluntarily resigned or retired:

- four weeks notice or payment in lieu of notice, plus
- an additional one week's notice or pay in lieu of notice for employees aged 45 years and over with 5 or more years of completed service, plus
- severance pay at the rate of 3 weeks per year of continuous service with a maximum of 39 weeks, with pro-rata payments for incomplete years of service to be on a quarterly basis, plus
- pro rata annual leave loading in respect of leave accrued at the date of termination.
- and for those employees who accept an offer of voluntary redundancy within 2 weeks of the offer being made, and terminate employment within the time nominated by the employer will be entitled to the following additional payments:

• less than 1 year's service	2 weeks pay
• 1 year and less than 2 year's service	4 weeks pay
• 2 years and less than 3 year's service	6 weeks pay
• 3 year's service and over	8 weeks pay

18. Offers of Voluntary Redundancy will be made in conjunction with an offer of redeployment, in accordance with New South Wales Government policy.

Payments made under the scheme

19. The following describes the requirements of the type of payments made under the above mentioned scheme that are covered by this Ruling. In order for a payment to qualify as an approved early retirement scheme payment, it must satisfy the following requirements (as set out in subsections 27E(4) and (5) of the Act).

20. The payment must be an eligible termination payment made in relation to the employee in consequence of the termination of employment in accordance with an approved early retirement scheme.

21. The payment is not made from an eligible superannuation fund.

22. The payment must not be made in lieu of superannuation benefits.
23. 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.
24. If the Commissioner is satisfied that the employer and the taxpayer were not dealing with each other at arm's length in relation to the termination of employment of the taxpayer – the amount of the eligible termination payment is not greater than that could reasonably be expected to have been made if the employer and the taxpayer had been dealing with each other at arm's length in relation to the termination of the employment.
25. At the termination date, there was no agreement between the taxpayer and the employer, or the employer and another person, to re-employ the taxpayer after the date of termination.

Ruling

26. The early Retirement Scheme offered by the Department of Housing is an approved early retirement scheme for the purposes of section 27E of the Income Tax Assessment Act 1936. Accordingly, so much of the eligible termination payment as exceeds the amount of an eligible termination payment 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

27. Where a scheme satisfies the requirements of section 27E of the Income Tax Assessment Act 1936 (the Act), that scheme will be an 'approved early retirement scheme.'
28. 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.
29. 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:

- * the scheme must be offered to all employees within a class identified by the employer (paragraph 27E(1)(a));
- * 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
- * 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

30. In order to satisfy the first condition, the scheme must be offered to all employees within one of the categories specified in subparagraphs 27E(a)(i) to (v).
31. Participation in the scheme is open to:
'displaced employees who have been declared excess as a result of restructuring Departmental activities'.
32. The class of employees to whom the scheme is proposed to be offered does not come within any of the subparagraphs 27E(a)(i) to (iv). So it must be considered under subparagraph 27E(a)(v), namely, all employees of the employer who constitute a class of employees approved by the Commissioner for the purposes of this paragraph.
33. In approving this special class of employees, the Commissioner has taken into account, the nature and purpose of the scheme. The class of employees specified by the Department are the 'displaced employees who are declared excess as a result of restructuring Departmental activities.' This group falls within the acceptable categories and is an approved class of employees for the purpose of subparagraph 27E(1)(a)(v).
34. It is noted that the employer retains a limited right of veto to be applied to applications by key personnel who cannot be readily replaced and whose loss would impair the efficiency of the Department's business operations. The limitation of the scheme in this way is acceptable to the Commissioner.

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

35. 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).

36. The purpose of the scheme is described at paragraph 12 of this ruling.

37. The proposed scheme meets subparagraphs 27E(1)(b)(iii) and (iv); accordingly the second condition for approval has been met.

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

38. Application for approval of the scheme dated 18 January 2001, was received in this office on 22 January 2001. The scheme is proposed to operate for a period from 1 February 2001 to 1 February 2002. Since the implementation date has already passed, the scheme fails to meet the requirement 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....”

39. It is considered that this case falls within special circumstances as set out in subsection 27E(2), and the Commissioner will waive compliance with the third requirement of subsection 27E(1).

40. The scheme will be in operation for 12 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 eligible termination payment 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 a superannuation fund;

- the payment must not be made in lieu of superannuation benefits;
- 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;
- if the Commissioner is satisfied that the employer and the taxpayer were not dealing with each other at arm's length in relation to the termination of employment of the taxpayer – the amount of the eligible termination payment is not greater than that could reasonably be expected to have been made if the employer and the taxpayer had been dealing with each other at arm's length in relation to the termination of the employment; 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.

[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.']

43. An approved early retirement scheme payment made on or after 1 July 1994 that falls within the specified limits will be exempt from income tax, and called the "tax-free amount."

44. For the year ending 30 June 2001, the tax-free amount is limited to \$5 062 plus \$2 531 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.

45. Furthermore, the tax-free amount will:

- not be an eligible termination payment (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.

46. 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.

47. It should be noted that the taxable amount of an approved early retirement scheme payment that is over the tax-free amount may be taxed under the provisions of the Superannuation Surcharge legislation, whether it is taken in cash or rolled-over.

48. The following payments qualify as an approved early retirement scheme payment, and are exempt from tax within the limits described above:

- four weeks payment in lieu of notice; plus
- an additional one weeks pay in lieu of notice for employees aged 45 years and over with 5 or more years of completed service; plus
- severance pay at the rate of three weeks per year of continuous service with a maximum of 39 week, with pro-rata payments for incomplete years of service to be on a quarterly basis; plus
- pro rata annual leave loading in respect of leave accrued at the date of termination;
- and for those employees who accept an offer of voluntary redundancy within two weeks of the offer being made, and terminate employment within the time nominated by the employer, payments as set out in the package.

49. A copy of this Ruling must be given to all employees eligible to participate in the approved early retirement scheme.

Detailed contents list

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

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Commissioner of Taxation
11 April 2001

<i>Previous draft:</i>	- ITAA 1936 27E(1)(b)
Not previously issued in draft form	- ITAA 1936 27E(1)(c)
	- ITAA 1936 27E(1)(a)(v)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 27E(1)(i)
CR 2001/1; TR 92/1; TR 92/20;	- ITAA 1936 27E(1)(b)(i)
TR 97/16; TR 94/12 TR 94/12E	- ITAA 1936 27E(1)(b)(ii)
	- ITAA 1936 27E(1)(b)(iii)
	- ITAA 1936 27E(1)(b)(iv)
<i>Subject references:</i>	- ITAA 1936 27E(2)
- Approved Early Retirement	- ITAA 1936 27E(a)(i)
Scheme Payments	- ITAA 1936 27E(a)(ii)
- Eligible Termination Payments	- ITAA 1936 27E(a)(iii)
	- ITAA 1936 27E(a)(iv)
<i>Legislative references:</i>	- ITAA 1936 27E(a)(v)
- ITAA 1936 27A(1)	- ITAA 1936 27E(4)
- ITAA 1936 27E	- ITAA 1936 27E(5)
- ITAA 1936 27E(1)	
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