



CR 2016/17 - Income tax: the 'Endeavour Energy Early Retirement Scheme 2016'

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 This document has changed over time. This is a consolidated version of the ruling which was published on *14 December 2016*



Class Ruling

Income tax: the 'Endeavour Energy Early Retirement Scheme 2016'

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	6
Scheme	7
Ruling	31
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	34
Appendix 2:	
Detailed contents list	55

❗ 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.

[Note: This is a consolidated version of this document. Refer to the Legal Database (<https://www.ato.gov.au/law>) to check its currency and to view the details of all changes.]

What this Ruling is about

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 provision(s)

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 Endeavour Energy (or any successor entity or entities to which those employees are transferred) shown at paragraph 15,

subject to paragraph 17, who receive a payment under the scheme described in paragraphs 7 to 30A of this Ruling. Endeavour Energy or its successor entity or entities, as the context requires, are hereafter referred to as Endeavour Energy.

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

6. This Ruling applies from 23 March 2016 to 31 December 2017. The Ruling continues to apply after 31 December 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

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

8. Endeavour Energy, is seeking the Commissioner's approval to implement an early retirement scheme in accordance with section 83-180.

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

10. Endeavour Energy is a New South Wales state-owned corporation, responsible for the supply of electricity to 2.2 million people in households and businesses across Sydney's Greater West, Blue Mountains, Southern Highlands and the Illawarra.

11. Endeavour Energy is currently undergoing a period of substantial organisational reform which has been prompted by a number of factors including:

- The Australian Energy Regulator (AER) has significantly reduced the prices which Endeavour Energy may charge. In April 2015, an AER determination cut Endeavour Energy's revenue (from 2014 to 2019) by almost 25%. The AER determination also imposed a retrospective funding cut of approximately 17% to operating expenditure
- Endeavour Energy is reducing its capital expenditure in response to pricing pressures, patterns of reduced consumption, and disruptive technologies such as solar power. The AER has approved a capital expenditure program (for 2014 to 2019) which has been reduced by 49% from the previous five year regulatory period.

12. As a result, Endeavour Energy had approximately 255 unfunded positions costing \$2.7m per month.

13. Endeavour Energy is addressing these issues in a number of ways, including an ongoing capability and capacity review in order to safely reduce its overhead and operating costs. Endeavour Energy has determined that a range of functions in the organisation, across varying work force categories, need to be efficiently and effectively operated with streamlined practices requiring fewer employees.

14. The purpose of the Scheme is to reduce Endeavour Energy's work force in line with its funding cuts by providing an incentive to employees who meet the eligibility criteria to retire early.

15. The class of employees to whom the Scheme applies is all Endeavour Energy's permanent full-time and part-time employees who occupy a position that is to be backfilled by a 'reform-affected employee'.

16. A 'reform-affected employee' is an employee who occupies or occupied a position that is determined to be no longer required by Endeavour Energy, or whose position can be backfilled by a 'reform-affected employee' (as defined in this paragraph).

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

- employees on short-term fixed contracts
- employees classified as 'Apprentices' within the definition of the Australian Quality Training Framework, and
- employees identified within Endeavour Energy's records as 'redeployees'.

18. The Scheme will operate on staggered timeframe basis as follows:

- Eligible employees will be invited to express an interest in participating in the Scheme.
- Eligible employees who express interest will be provided with an indicative payout figure.

- Eligible employees who submit expression of interest will be notified of the outcome.
- All eligible employees who accept the offer to retire under the Scheme will terminate their employment within the duration of the Scheme. However, the actual date of termination will be negotiated with each individual employee based on operational requirements but will be no later than 31 December 2017.

19. All eligible employees who retire under the Scheme will receive a voluntary separation payment (VSP) as follows:

Employed on or prior to 27 July 1996:

- (a) Full-time EBA-covered staff who commenced employment on or prior to 27 July 1996 with up to 19 years of completed service, the payment would be comprised of the following:
 - two weeks' severance pay for each completed year of service;
 - one weeks' maturing/experience allowance for each completed year of service, to the extent eligible under the EBA;
 - eight weeks' Early Retirement Scheme payment; and
 - four weeks' pay in lieu of notice (five weeks if 45 years of age or older).
- (b) Full-time EBA-covered staff who commenced employment on or prior to 27 July 1996 with 20 years or more of completed service, the payment would be comprised of the following:
 - two weeks' severance pay for each completed year of service;
 - two weeks' maturing experience allowance for each completed year of service, to the extent eligible under the EBA;
 - eight weeks' Early Retirement Scheme payment; and
 - four weeks' pay in lieu of notice (five weeks if 45 years of age or older).

Employed after 27 July 1996:

Full-time EBA-covered staff who commenced employment after 27 July 1996, the following formula is standard regardless of years of service:

- two weeks' severance pay for each completed year of service;
- eight weeks' Early Retirement Scheme payment; and
- four weeks' pay in lieu of notice (five weeks if over 45 years or older with two or more years of service).

Employees on individual contracts of employment:

Contract employees that commenced employment on or prior to 27 July 1996 with up to 19 years of completed service will receive one week maturing/experience allowance for each completed year of service.

Contract employees that commenced employment on or prior to 27 July 1996 with 20 or more years of completed service will receive two weeks' maturing/experience allowance for each completed year of service.

Contract employees who have signed version 12.1 or later of Endeavour Energy Management Contracts will be paid their maturing allowances according to Schedule 1 of their contracts. The amounts of the maturing allowance payments for these employees will be specific to their individual circumstances.

Additionally, VSPs will be paid to employees on individual contracts of employment according to the terms of their contracts. Endeavour Energy has standard terms within its employment contracts which specify that employees are entitled to six months' total remuneration as their separation payments as well as ten weeks' pay in lieu of notice.

Employees on an earlier (and active) version of the employment contract, which contains different period of time to be used for the calculation of the separation payment, will receive the amount set out in that contract.

20. Part-time employees would receive a pro-rated VSP based on the above.
21. In addition, all employees terminated under the Scheme will receive their statutory entitlements, however they do not form part of the payment made under the Scheme.
22. Endeavour Energy reserves the right to refrain from allowing one employee, or up to 40% of employees in 'safety-critical workforce categories', whichever of the two numbers is higher, from each of its organisation units to depart under the Scheme.
23. 'Safety-critical work force categories' are those work force categories with field-based staff, and those work force categories involved in setting and/or monitoring safety compliance requirements.
24. The payment made under the Scheme is in excess of any superannuation and any other benefits to which eligible employees would otherwise be entitled.
25. Any employee who terminates their employment other than under the proposed Scheme, will not be entitled to receive the Scheme payment.
26. The retirement of employees who receive a payment under the Scheme will occur before they turn 65 years of age.
27. Payments made to eligible employees who have reached age 65 or over will not be eligible for the tax-free limits under the Scheme. These payments will be taxed as an employment termination payment (ETP).
28. Payments made under the Scheme will be at arm's length.

29. There is no agreement in place between any eligible employee and Endeavour Energy, or between Endeavour Energy and another person to employ the eligible employee after retirement under the Scheme.

30. Participation in the Scheme is entirely voluntary.

30A. Under NSW Government proposals, a transaction is expected to occur where a private sector entity or private sector entities may acquire an interest or interests in Endeavour Energy. The acquisition structure is still to be finalised.

Ruling

31. *Endeavour Energy Early Retirement Scheme 2016* is an early retirement scheme for the purposes of section 83-180.

32. 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.

33. 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.*

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

35. 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

36. 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).

37. The class of employees to whom early retirement will be offered under the Scheme is set out in paragraph 15, subject to paragraph 17 of this Ruling.

38. 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

39. 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).

40. Paragraphs 11 to 14 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).

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

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

42. The Scheme is proposed to operate for a period from 23 March 2016 to 31 December 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.

43. The Scheme will be in operation for approximately 21 months. This is considered appropriate due to the circumstances of the re-organisation.

Other relevant information

44. 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.

45. 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 age 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)).

46. 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'.

47. 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.

48. For the 2015-16 income year, the tax-free amount is limited to \$9,780 (base amount) plus \$4,891 (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.

49. For the 2016-17 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 ATO website for the 2016-17 income year indexed amounts.

50. The total of the amount received on the termination of employment calculated in accordance with paragraph 19 of this Ruling may qualify as an early retirement scheme payment.

51. The total payment calculated in accordance with paragraph 19 of this Ruling will be measured against the limit in accordance with the formula mentioned in paragraph 48 and paragraph 49 of this Ruling to determine the tax-free amount of the early retirement scheme payment.

52. The tax-free amount will:

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

53. 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.

54. 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

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	4
Date of effect	6
Scheme	7
Ruling	31
Appendix 1 – Explanation	34
All employees within a class approved by the Commissioner may participate in the scheme	36
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	39
The scheme must be approved by the Commissioner prior to its implementation	42
Other relevant information	44
Appendix 2 – Detailed contents list	55

References

Previous draft:

Not previously issued as a draft

– ITAA 1997 83-180

– ITAA 1997 83-180(1)

– ITAA 1997 83-180(2)

Related Rulings/Determinations:

TR 2006/10

– ITAA 1997 83-180(3)

– ITAA 1997 83-180(3)(a)

– ITAA 1997 83-180(3)(b)

Legislative references:

– ITAA 1997

– ITAA 1997 83-180(3)(c)

– ITAA 1997 82-135

– ITAA 1997 83-180(5)

– ITAA 1997 82-135(e)

– ITAA 1997 83-180(6)

– ITAA 1997 83-170

– ITAA 1997 995-1(1)

– TAA 1953

ATO references

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