

# ***CR 2004/126 - Income tax: Approved Early Retirement Scheme - Department of Justice - Corrections Victoria***

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *8 November 2004*



## Class Ruling

### Income tax: Approved Early Retirement Scheme – Department of Justice – Corrections Victoria

Contents	Para
<b>What this Class Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>10</b>
<b>Withdrawal</b>	<b>11</b>
<b>Arrangement</b>	<b>12</b>
<b>Ruling</b>	<b>47</b>
<b>Explanation</b>	<b>50</b>
<b>Detailed contents list</b>	<b>71</b>

#### **Preamble**

The number, subject heading, **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.

#### **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.
2. Broadly, this Ruling approves the particular early retirement scheme and acknowledges the availability of tax concessions for persons receiving payments under the scheme. There are many conditions attached to this Ruling and readers should be careful to ensure that these conditions are met before relying on this Ruling.

#### **Tax law(s)**

3. The tax laws dealt with in this Ruling are sections 27E and 27CB of the *Income Tax Assessment Act 1936* (ITAA 1936).

#### **Class of persons**

4. The class of persons to which this Ruling applies is all employees of Department of Justice-Corrections Victoria at the three decommissioning prisons at Bendigo, Won Wron and Beechworth who receive a payment under the arrangement described in paragraphs 12 to 46.

#### **Qualifications**

5. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

6. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 12 to 46.

7. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:

- 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
- this Ruling may be withdrawn or modified.

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

## Date of effect

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10. This Ruling applies from 8 November 2004 until it is withdrawn. However, this 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 this Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore this Ruling applies to the extent that the relevant tax laws are not amended.

## Withdrawal

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11. This Ruling is withdrawn and ceases to have effect after 30 September 2005. 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

12. The arrangement that is the subject of this 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 from a representative of the Department of Justice (DOJ);
- emails sent from DOJ; and
- records of telephone conversations with a representative of DOJ.

13. The DOJ is seeking approval for an early retirement scheme known as a Voluntary Departure Package (VDP) relating specifically to Corrections Victoria (CV).

14. A VDP will be offered to all ongoing non-executive staff within CV at the three decommissioning prisons at Beechworth, Bendigo and Won Wron to facilitate ongoing restructuring and organisational change.

15. The purpose of offering the VDP is to reorganise the operations of the employer with an identified purpose in mind, that is, the closure of three outdated and outmoded prison facilities operating under the control of CV.

16. The reorganisation will occur by way of moving the location of, or part of, the operations of the employer. CV will be decommissioning three prisons at Beechworth, Bendigo and Won Wron and progressively close them down. Three new prisons have been commissioned within Victoria.

17. The construction of three new CV prisons has commenced with a minimum security prison in Beechworth, a 300 bed Corrections Program Centre situated next to the existing maximum security prison in Barwon and a 600 bed remand prison situated next to the existing Dame Phyllis Frost Centre in Deer Park.

18. As each decommissioning prison prepares for closure, there will be a phase out process and prisoners will be transferred to alternate prisons across the state. As this sequence of events occur, staffing requirements will be reduced.

19. Due to the fluctuating nature of the decommissioning prisons, based largely on the speed of which the new prisons can be built and commissioned effectively, there will inevitably be transitional needs in regard to staffing levels.

20. CV proposes to use a scaled approach to granting a VDP. All staff at the decommissioning prisons will be given access to a VDP, however given the phased decommissioning process, offers may be made at different stages between November 2004 and 30 September 2005.

21. The number of employees affected by the rationalisation or re-organisation who will be subject to the scheme will be 102 however, it is envisaged that a proportion of these will be redeployed to the new prison facilities being commissioned.

22. All employees will be identified from the 'ongoing' 'non-executive' category of employees employed under the Victorian Public Service [Non Executive Staff – Victoria] Agreement 2004 (VPS Agreement) who are in roles that are identified as being employed at the three decommissioning prisons.

23. For non-executive staff the minimum age for retirement is 55 years, however this is not a mandatory condition of employment and there are no lump sum payments payable on termination of employment.

24. CV does not intend to exercise a right to veto on employees either on the grounds of specialist skills, qualifications or knowledge, or to limit the overall number of staff wishing to access the scheme, or under any other grounds either subjective or objective.

25. CV has funding available to cover the cost of a VDP for all staff affected by the decommissioning process. Approximately 15 to 20 staff are likely to accept the offer, however should staff in excess of this number accept a VDP, CV is prepared to grant and fund these.

26. All affected staff will be asked to consider taking a VDP through an expression of interest process.

27. CV will redeploy staff where possible, but acknowledges that the scheme will be necessary to achieve its targets.

28. Staff who do not participate in the proposed scheme, or who do not wish to relocate to the new facilities will be subject to redeployment to other areas of the Department. Where redeployment is not successful, these staff will be subject to a Targeted Separation Package.

29. Once an offer is made, the employee will have ten (10) business days to register their acceptance.

30. If an offer is accepted, the employment will be terminated ten (10) business days from the date the offer is made.

31. If a staff member terminates their employment outside of the proposed scheme, standard termination provisions would apply as per the VPS Agreement, that is, all applicable accrued entitlements would be paid out. A notice of one (1) week if not employed for more than one (1) year, or two (2) weeks if employed for more than one (1) year is also required.

32. The VDP payments under the approved early retirement scheme are:

- |           |  |
|-----------|--|
| Payment 1 | A flat payment of four (4) weeks pay at the employee's substantive rate of ordinary time pay immediately before resignation; plus                        |
| Payment 2 | Two (2) weeks pay per year of continuous service up to a maximum of fifteen (15) years (30 weeks pay); plus  |
| Payment 3 | A lump sum voluntary departure incentive of up to \$10,000 for a full-time employee (part-time employees are paid the appropriate fraction of \$10,000). |

A payment for a period of 'continuous service' in accordance with the following scale:

At less than one (1) year of service the identified employee will receive a corresponding fraction of the VDP they would have been paid at one (1) year, that is, six (6) months service gives half the VDP of an employee who has served for one (1) year.

Ordinary time pay is the final wage or salary only of the employee's substantive classification or grade and does not include any allowances.

Continuous service includes all periods of service in any Victorian Public Sector agency provided there are no breaks between or within each period other than breaks caused by approved leave and provided that no special separation payments have been made with respect to any of these periods.

33. In addition to the VDP payment, a Performance Incentive and Security Maintenance (PISM) payment will be made to staff who meet the PISM eligibility criteria.

A full PISM payment of \$13,000 (to be adjusted by wage rises between 1 October 2002 and closure of the prison) will be made to eligible ongoing staff employed at Beechworth, Bendigo and Wron Wron prisons provided they:

- were employed in an ongoing capacity at one of the prisons on 30 October 2002;
- continue to work at a closing prison until closure;
- meet the eligibility criteria for attendance and performance for the whole period from 1 April 2003 to actual closure; and
- on closure of the prison, separate from the DOJ.

A partial PISM payment of a pro-rata amount of \$13,000 (to be adjusted by wage rises between 1 October 2002 and closure) will be made to eligible ongoing staff employed at the decommissioning prisons provided they:

- were employed in an ongoing capacity at one of the prisons on 30 October 2002;
- continue to work at a closing prison until closure;
- meet the eligibility criteria for attendance and performance for the whole period from 1 April 2003 to actual closure;
- partially meet the eligibility criteria for attendance and performance for the period from 1 April 2003 to actual closure in that they meet it for certain calendar years. In the event that a staff member becomes ineligible during any one calendar year, they will be eligible for a pro-rata payment for the remaining years, providing all the eligibility criteria are met for each year; and
- on closure of the prison separate from the DOJ.

For the purpose of a partial payment of PISM, a year will be a calendar year or part thereof in the case of a final year of operation. To determine the partial PISM payment, the full PISM payment will be divided by the number of years between 1 January 2003 and the actual closure and then multiplied by the number of years where eligibility criteria is met.

The PISM payment will form part of the VDP.

34. The total of both the VDP and the PISM payments will be completely tax free provided the amounts received by the employee do not exceed the tax free threshold for the current financial year.

35. If both the amounts the employee receives as a VDP and a PISM are greater than the tax free limit, then the part of the amount over the tax free limit will be taxed as an eligible termination payment (ETP). As an ETP, the employee may rollover this portion of the package and it will count towards the employee's Reasonable Benefit Limits.

36. The tax free limit for the year ending 30 June 2005 is a flat dollar amount of \$6,194 plus \$3,097 for each completed year of service.

37. The employee will also receive other usual resignation or retirement entitlements, however these do not form part of the VDP payment. These may include:

- pay in lieu of long service leave in accordance with the employee's award or current conditions of employment;
- pay in lieu of recreation leave;

- any eligible leave loadings;
- superannuation retirement benefits, if applicable;
- superannuation resignation benefits – generally, the employee's contributions plus interest;
- a deferred superannuation benefit available when the employee retires; and/or
- other accrued entitlements that would usually be paid out to the employee on resignation or retirement.

38. The total package cannot exceed the gross ordinary time pay to which an employee would have been entitled had the employee continued employment to age 65 years.

39. Victorian Government Policy precludes re-employment within the Victorian Public Service for a period of 3 calendar years from receipt of a VDP.

#### **Payments made under the Scheme**

40. For a payment made under the above mentioned scheme to qualify as an approved early retirement scheme payment, the conditions set out in paragraphs 41 to 46 must be met. Please note, any payment made under the scheme that does not satisfy these requirements is not covered by this Ruling.

41. 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.

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

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

44. The employee must terminate 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.

45. 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.

46. At the termination time, there is no agreement in force between the employee and the employer or the employer and another person, to employ the employee after the date of termination.

## Ruling

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47. The early retirement scheme VDP offered by the Department of Justice-Corrections Victoria is an approved early retirement scheme for the purposes of section 27E of the ITAA 1936.

48. Accordingly, so much of the 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.

49. In addition, so much of the approved early retirement scheme payment as falls within the threshold calculated in accordance with subsection 27A(19) of the ITAA 1936 is non-assessable and is ignored in working out whether a capital gain has been made via the operation of section 27CB of the ITAA 1936.

## Explanation

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

51. 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.

52. 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)).

These three conditions are discussed below.

**The scheme must be offered to all employees within a class identified by the employer**

53. 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).

54. The class of employees to which the scheme is proposed to be offered is all ongoing non-executive staff within CV at the three decommissioning prisons at Beechworth, Bendigo and Won Wron to facilitate ongoing restructuring and organisational change where the three outdated and outmoded prisons facilities operating under the control of CV will be progressively closed.

55. This class of employees does not come within 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-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 subparagraphs 27E(1)(a)(i) to (v).

56. It is noted, however, that there are no employees within the class of employees identified which CV would veto from participating in the scheme.

**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**

57. The proposed scheme must be implemented by the employer with a view to rationalising or re-organising the operations of the employer by means of one or more of the objectives set out in subparagraphs 27E(1)(b)(i) to (vi).

58. Paragraphs 14 to 23 of this Ruling describe the nature of the rationalisation or re-organisation of CV operations. The proposed scheme meets the requirements set out in subparagraph 27E(1)(b)(iv); accordingly the second condition for approval has been met.

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

59. The scheme is proposed to operate for a period from 8 November 2004 to 30 September 2005. Approval was granted prior to implementation therefore the third condition is satisfied.

60. The scheme will be in operation for approximately 10 months which is within the period recommended in TR 94/12.

## Other relevant information

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

62. 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)):

- 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 employ the taxpayer after the date of termination.

63. 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'.

64. 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'.

65. For the year ending 30 June 2005, the tax-free amount is limited to \$6,194 plus \$3,097 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. The \$6,194 plus \$3,097 limits will be indexed to rise in

each subsequent year in line with increases in average weekly ordinary time earnings.

66. The total of the amount received on the termination of employment calculated in accordance with paragraphs 32 and 33 qualifies as an approved early retirement scheme payment.

67. The total of the payments in the previous paragraph will be measured against the limit calculated in accordance with paragraph 65 to determine the 'tax-free amount'.

68. 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.

69. Any payment in excess of this limit will be an ordinary ETP and split up into the pre-July 1983 and post-June 1983 (untaxed element) components. This ETP can be rolled-over.

70. 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.

## **Detailed contents list**

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

	<b>Paragraph</b>
<b>What this Class Ruling is about</b>	<b>1</b>
Tax law(s)	3
Class of persons	4
Qualifications	5
<b>Date of effect</b>	<b>10</b>
<b>Withdrawal</b>	<b>11</b>
<b>Arrangement</b>	<b>12</b>
The Scheme	12
Payments made under the Scheme	40
<b>Ruling</b>	<b>47</b>
<b>Explanation</b>	<b>50</b>

The scheme must be offered to all employees within a class identified by the employer	53
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	57
The scheme must be approved by the Commissioner prior to its implementation	59
Other relevant information	61
<b>Detailed contents list</b>	<b>71</b>

**Commissioner of Taxation**

17 November 2004

<i>Previous draft:</i>	- ITAA 1936 27E(1)(a)
Not previously issued as a draft	- ITAA 1936 27E(1)(a)(i)
	- ITAA 1936 27E(1)(a)(ii)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 27E(1)(a)(iii)
CR 2001/1; TR 92/1; TR 92/20;	- ITAA 1936 27E(1)(a)(iv)
TR 94/12; TR 97/16	- ITAA 1936 27E(1)(a)(v)
	- ITAA 1936 27E(1)(b)
<i>Subject references:</i>	- ITAA 1936 27E(1)(b)(i)
- approved early retirement scheme	- ITAA 1936 27E(1)(b)(ii)
payments	- ITAA 1936 27E(1)(b)(iii)
- eligible termination payments	- ITAA 1936 27E(1)(b)(iv)
- eligible termination payments	- ITAA 1936 27E(1)(b)(v)
components	- ITAA 1936 27E(1)(b)(vi)
	- ITAA 1936 27E(1)(c)
<i>Legislative references:</i>	- ITAA 1936 27E(4)
- ITAA 1936 27A(1)	- ITAA 1936 27E(5)
- ITAA 1936 27A(19)	- TAA 1953 Pt IVA
- ITAA 1936 27CB	- Copyright Act 1968
- ITAA 1936 27E	

## ATO references

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