


# ***CR 2010/42 - Income tax: demerger of DuluxGroup Limited by Orica Limited - General Employee Exempt Share Plan***

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## Class Ruling

# Income tax: demerger of DuluxGroup Limited by Orica Limited – General Employee Exempt Share Plan

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### **ⓘ 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.

2. In this Ruling, Division 13A of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936), as in force at the time occurring just before Schedule 1 to the *Tax Laws Amendment (2009 Budget Measures No. 2) Act 2009* commenced is referred to as 'former Division 13A' and the provisions in force at that time are referred to as 'former' provisions of the ITAA 1936.

### Relevant provision(s)

3. The relevant provisions dealt with in this ruling are:

- former section 139BA of the ITAA 1936;
- former section 139CE of the ITAA 1936;
- former Division 13A;

- Division 83A of the *Income Tax Assessment Act 1997* (ITAA 1997); and
- Section 83A-35 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1997 unless otherwise indicated.

## **Class of entities**

4. The class of entities to which this Ruling applies is Australian resident employees and former employees of Orica Limited (Orica) and its subsidiaries (Orica group as described in paragraph 10 of this Ruling) who:

- were granted Orica shares prior to 1 July 2009 under the 2007/2008 Orica Limited General Employee Exempt Share Plan (2007/2008 plan) and who:
  - made or were taken to have made an election in relation to those shares under former section 139E of the ITAA 1936; and
  - were entitled to reduce the amount included in assessable income in relation to those shares under former subsection 139BA(2) of the ITAA 1936, subject to the 2007/2008 plan continuing to be operated so that the exemption condition in subsection 139CE(3) of the ITAA 1936 is satisfied; and
- were granted Orica shares after 1 July 2009 under the 2009 Orica Limited General Employee Exempt Share Plan (2009 plan) and who:
  - were entitled to reduce the amount included in assessable income in relation to those shares under section 83A-35 of the ITAA 1997, subject to the 2009 plan continuing to be operated so that the exemption condition in subsection 83A-35(8) of the ITAA 1997 is satisfied.

In this Ruling, a person belonging to this class of entities is referred to as a participant.

## **Qualifications**

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 9 to 22 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

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8. This Ruling applies from 1 July 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 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).

## Scheme

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9. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- application for Class Ruling dated 9 June 2010 and attachments; and
- letter from the applicant dated 6 July 2010.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

## **The Orica Group**

10. The Orica group operated the following four businesses before the demerger described in paragraphs 18 and 19 of this Ruling (the demerger):

- Orica Mining Services;
- Minova;
- Chemical Services; and
- DuluxGroup.

11. DuluxGroup Limited (DuluxGroup Ltd) was incorporated as a wholly owned subsidiary of Orica in September 2008. Orica subsequently transferred the DuluxGroup business, including the transfer of some companies and some employees to DuluxGroup Ltd or its subsidiaries. DuluxGroup Ltd and its subsidiaries immediately prior to the demerger are referred to in this Ruling as the Dulux group.

12. The 2007/2008 plan and the 2009 plan (the plans) are schemes established by Orica to enable employees of the Orica group to acquire up to \$1,000 worth of Orica shares annually by a salary sacrifice arrangement.

13. Orica shares acquired by participants under the plans may not be disposed of until the earlier of three years after the date of acquisition of the shares and the time when the participant ceases to be employed by either Orica, any of its subsidiaries or any other entity declared by the board of Orica to be a group company for the purposes of the plan. This restriction is enforced by the imposition of a holding lock on the Orica shares.

## **The 2007/2008 Plan**

14. Orica shares acquired by participants under the 2007/2008 plan are qualifying shares within the meaning of former section 139CD of the ITAA 1936.

15. Prior to the demerger, the 2007/2008 plan was operated so that the exemption conditions under former section 139CE of the ITAA 1936 were satisfied.

## **The 2009 Plan**

16. Orica shares acquired by participants under the 2009 plan are subject to Subdivision 83A-B and meet the conditions in subsections 83A-35(3) to (7) and (9).

17. Prior to the demerger, the 2009 plan was operated so that the condition in subsection 83A-35(8) was satisfied.

**The demerger**

18. On 19 July 2010, the demerger by Orica of DuluxGroup Ltd was implemented following the necessary Court and shareholder approvals.

19. The demerger was implemented by the payment by Orica of a dividend and a capital reduction. These payments were satisfied by the distribution of the shares Orica held in DuluxGroup Ltd (DuluxGroup shares). Each eligible Orica shareholder (including participants in the plans) received one DuluxGroup share for every Orica share held at the record date.

**Disposal restrictions**

20. After the demerger, the following participants will continue to hold their Orica shares subject to disposal restrictions under the plans that are enforced by a holding lock:

- participants who were employed by Orica or a subsidiary of Orica (excluding Dulux group companies) when they acquired their Orica shares and who continue their employment with their original employer after the demerger (continuing employees); and
- participants who were employed by a Dulux group company when they acquired their Orica shares and who continue their employment with their original employer after the demerger (Dulux group employees).

21. Orica shares acquired by the following participants will be released to that participant after the demerger free of any disposal restrictions:

- participants who were employed by Orica or a subsidiary of Orica (excluding Dulux group companies) when they acquired their Orica shares and who transferred employment to a Dulux group company (discontinuing employees).

22. DuluxGroup shares transferred to participants under the demerger are not subject to any disposal restrictions.

## Ruling

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23. Following the demerger:

- participants continue to be entitled to reduce the amount included in assessable income in relation to the Orica shares acquired under the 2007/2008 plan under former subsection 139BA(2) of the ITAA 1936 provided the plan continues to be operated so that the exemption condition in former subsection 139CE(3) of the ITAA 1936 is satisfied; and
- participants continue to be entitled to reduce the amount included in assessable income in relation to the Orica shares acquired under the 2009 plan under section 83A-35 of the ITAA 1997, provided the plan continues to be operated so that the exemption condition in subsection 83A-35(8) of the ITAA 1997 is satisfied.

24. The DuluxGroup shares acquired by participants under the demerger are not subject to former Division 13A or Division 83A of the ITAA 1997.

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**Commissioner of Taxation**

18 August 2010

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## 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.*

### **2007/2008 plan – entitlement to \$1,000 reduction**

25. Where Orica shares were acquired prior to 1 July 2009 and participants made or are taken to have made an election in relation to those shares under former section 139E of the ITAA 1936, section 83A-5 of the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997) does not apply in relation to those shares. Former Division 13A of the ITAA 1936 continues to apply to those shares pursuant to section 83A-10 of the IT(TP)A 1997.

26. Former section 139BA of the ITAA 1936 provides that where a taxpayer:

- makes an election under former section 139E of the ITAA 1936 (or is taken to have made an election under former the subsection 139E(2B)) covering shares acquired under an employee share scheme; and
- the exemption conditions in former section 139CE of the ITAA 1936 are satisfied in relation to those shares;

the assessable income of the taxpayer, otherwise included under former section 139B of the ITAA 1936 in relation to those shares, is only included to the extent that it is greater than \$1,000.

27. Former section 139CE of the ITAA 1936 sets out three exemption conditions that must be satisfied for former section 139BA of the ITAA 1936 to apply.

28. Former subsection 139CE(3) of the ITAA 1936 requires that the scheme under which a taxpayer acquired their shares be operated so that shares acquired under the scheme cannot be disposed of before the earlier of:

- 3 years after the time of acquisition of the shares; or
- ceasing employment within the meaning of former subsection 139CE(5) of the ITAA 1936.

29. Former subsection 139CE(5) of the ITAA 1936 provides that a taxpayer will cease employment when they are no longer employed by any of the following:

- the employer of the taxpayer in that employment;
- a holding company of the employer; or
- a subsidiary of the employer or of a holding company of the employer.

30. For the purposes of former subsection 139CE(5) of the ITAA 1936:

- continuing employees and Dulux group employees are not considered to have ceased employment as a result of the demerger; and
- discontinuing employees are considered to have ceased employment as a result of the demerger.

31. As the disposal restrictions under the 2007/2008 plan continue to apply to Orica shares acquired by continuing employees and Dulux group employees under the plan, the exemption condition in former subsection 139CE(3) of the ITAA 1936 will continue to be satisfied.

32. As a consequence, the former section 139BA of the ITAA 1936 will continue to apply to participants who acquired Orica shares pursuant to the 2007/2008 plan and any discount previously excluded from a participant's assessable income pursuant to former section 139BA in respect of those shares, will still be excluded.

## **2009 plan – entitlement to \$1,000 reduction**

33. Section 83A-35 provides that where:

- ESS interests acquired by an individual under an employee share scheme at a discount satisfy the conditions in subsections 83A-35(3) to (9); and
- the individual's taxable income for the income year plus the other amounts specified in paragraph 83A-35(2)(b) does not exceed \$180,000,

the total amount otherwise included in the individual's assessable income under subsection 83A-25(1) in relation to those ESS interests, is only included to the extent that it is greater than \$1,000.

34. Subsection 83A-35(8) requires that the scheme under which an individual acquires their ESS interests be operated so that any ESS interest (scheme interest) acquired under the scheme or a beneficial interest in a share acquired as a result of a scheme interest cannot be disposed of before the earlier of:

- 3 years after acquisition of the scheme interest; and
- ceasing employment within the meaning of section 83A-330.

35. Section 83A-330 provides that an individual is treated as ceasing employment when they are no longer employed by any of the following:

- their employer in that employment;
- a holding company of their employer; or
- a subsidiary of their employer or of a holding company of their employer.

36. For the purposes of section 83A-330:

- continuing employees and Dulux group employees are not considered to have ceased employment as a result of the demerger; and
- discontinuing employees are considered to have ceased employment as a result of the demerger.

37. As the disposal restrictions under the 2009 plan continue to apply to Orica shares acquired by continuing employees and Dulux group employees under the plan, the exemption condition in subsection 83A-35(8) will continue to be satisfied.

38. A beneficial interest in a share acquired as a result of a scheme interest for the purposes of subparagraph 83A-35(8)(c)(ii) is considered to be a share that is acquired under the operation of the employee share scheme under which the individual acquired the scheme interest. For example, this would apply to shares acquired on exercise of rights acquired under an employee share scheme.

39. The DuluxGroup shares acquired under the demerger are not shares acquired under the operation of the plans as a result of a scheme interest (see paragraphs 42 to 44 of this Ruling) for the purposes of subsection 83A-35(8), and are not required to be subject to disposal restrictions for the continuing application of subsection 83A-35.

40. As a consequence, for participants who acquired Orica shares pursuant to the 2009 plan, any discount previously excluded from their assessable income pursuant to section 83A-35 in respect of those shares, will still be excluded.

### **Transfer of DuluxGroup shares to participants**

41. Former Division 13A, was repealed on 14 December 2009 and does not apply to shares acquired on or after 1 July 2009 (unless those shares were acquired within the meaning of former Division 13A before 1 July 2009): subsection 83A-5(1) of the IT(TP)A 1997.

42. The DuluxGroup shares are acquired by participants after 1 July 2009 and are not subject to former Division 13A.

43. Division 83A, and in particular Subdivisions 83A-B and 83A-C, do not apply to the acquisition of a DuluxGroup share by a participant under the demerger because a participant does not acquire the DuluxGroup share under an employee share scheme within the meaning of subsection 83A-10(2): see subsection 83A-20(1) and paragraph 83A-105(1)(a).

44. Under subsection 83A-10(2), an employee share scheme is defined as a scheme under which ESS interests in a company are provided to employees (or associates of employees) of the company or subsidiaries of the company, in relation to the employee's employment.

45. The scheme under which DuluxGroup shares are acquired by participants is the demerger under which all eligible Orica shareholders on a designated record date will acquire a DuluxGroup share because they hold an Orica share. The DuluxGroup share is acquired by a participant in relation to their ownership of an Orica share and as a consequence of the demerger, rather than in relation to their employment.

## **Appendix 2 – Detailed contents list**

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

- demerger
- employee share schemes

*Legislative references:*

- ITAA 1936
  - ITAA 1936 Pt III Div 13A
  - ITAA 1936 139B
  - ITAA 1936 139BA
  - ITAA 1936 139BA(2)
  - ITAA 1936 139CD
  - ITAA 1936 139CE
  - ITAA 1936 139CE(3)
  - ITAA 1936 139CE(5)
  - ITAA 1936 139E
  - ITAA 1936 139E(2B)
  - ITAA 1997
  - ITAA 1997 Div 83A
  - ITAA 1997 83A-10(2)
  - ITAA 1997 Subdiv 83A-B
  - ITAA 1997 83A-20(1)
  - ITAA 1997 83A-25(1)
  - ITAA 1997 83A-35
  - ITAA 1997 83A-35(2)(b)
  - ITAA 1997 83A-35(3)
  - ITAA 1997 83A-35(4)
  - ITAA 1997 83A-35(5)
  - ITAA 1997 83A-35(6)
  - ITAA 1997 83A-35(7)
  - ITAA 1997 83A-35(8)
  - ITAA 1997 83A-35(8)(c)(ii)
  - ITAA 1997 83A-35(9)
  - ITAA 1997 Subdiv 83A-C
  - ITAA 1997 83A-105(1)(a)
  - ITAA 1997 83A-330
  - IT(TP)A 1997 83A-5
  - IT(TP)A 1997 83A-5(1)
  - IT(TP)A 1997 83A-10
  - TAA 1953
  - Copyright Act 1968
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ATO references

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