



## Class Ruling

### Income tax: demerger of DuluxGroup Limited by Orica Limited

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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.

### Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 44 of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45BA of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 115-30 of the ITAA 1997; and
- Division 125 of the ITAA 1997.

## Class of entities

3. The class of entities to which this Ruling applies is the shareholders of Orica Limited (Orica) who:

- (a) participated in the scheme that is the subject of this Ruling;
- (b) were residents of Australia as defined in subsection 6(1) of the ITAA 1936 on the Implementation Date of the scheme;
- (c) owned ordinary shares in Orica at the Record Date for the scheme and held those on capital account at the time of the Scheme; and
- (d) are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their Orica shares.

(Note – Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.)

In this Ruling, a person belonging to this class of entities is referred to as an Orica shareholder.

## 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 9 to 45 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 October 2009 to 30 September 2010. The Ruling continues to apply after 30 September 2010 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 documents and information provided by Orica's advisors, PricewaterhouseCoopers (PwC), the applicant for this Ruling.

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

### Background

10. The scheme that is the subject of this Ruling involved the demerger by Orica of DuluxGroup Limited (DuluxGroup Ltd).

### Orica

11. Orica was, at the time of the demerger, an Australian resident company listed on the Australian Securities Exchange (ASX). Orica is the head company of a consolidated tax group for the purposes of Part 3-90 of the ITAA 1997.

12. Orica operates four businesses:

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

These four businesses between them provide products and related services globally to the mining, water treatment, industrial chemical and household consumer markets. The product and service range offering extend from explosives, to lawn and garden care, paints, trading and distribution services, and chemicals.

13. At the time of undertaking the scheme, Orica had on issue:

- 362,100,430 fully paid ordinary shares; and

- 5,000,000 Step-up Preference shares (SPS).

14. The SPS were issued on terms such that their value was not adversely affected by the demerger. Orica does not allow any Holders to request conversion as a consequence of the demerger.

15. Prior to the time of undertaking the scheme, Orica had on issue 40,600 options under the Employee Share Option Plan. All of the options were cancelled prior to the demerger.

16. At the time of undertaking the scheme, the SPS on issue represented less than 10% of the total of all ownership interests in Orica.

17. There were no other ownership interests in Orica just before the demerger.

### **DuluxGroup Ltd, or, together with its wholly owned subsidiaries, DuluxGroup**

18. DuluxGroup Ltd was incorporated on 24 September 2008 as a wholly-owned subsidiary of Orica prior to the demerger.

19. At the time of the demerger DuluxGroup Ltd was an Australian resident company. At the time of the demerger, the DuluxGroup was undertaking the business of manufacturing and marketing branded consumer products and services that enhance, protect and maintain the places and spaces in which people live and work.

20. Just before the demerger, DuluxGroup Ltd had a total of 362,100,430 ordinary shares on issue. Orica owned all of the shares on issue in DuluxGroup at the time of the demerger.

21. There were no other ownership interests in DuluxGroup Ltd just before the demerger.

22. DuluxGroup Ltd listed on the ASX, first trading on 12 July 2010, initially on a deferred settlement basis.

### **The demerger of DuluxGroup**

#### ***Transfer of assets and liabilities to DuluxGroup***

23. Funding was provided to DuluxGroup Ltd (or wholly owned subsidiaries of DuluxGroup Ltd), to facilitate the acquisition of the assets from other Orica entities.

24. DuluxGroup then acquired the DuluxGroup assets from various Orica entities for consideration equal to either their book value or market value.

25. Orica Finance Limited, a member of the Orica tax consolidated group, transferred the DuluxGroup receivables and payables to DuluxGroup for market value.

26. The following transactions were undertaken to effect the transfer of the DuluxGroup business of the Orica Group to the Dulux Group as part of the proposed demerger:

- the transfer of shares in wholly owned Australian entities;
- the transfer of shares in wholly owned foreign entities;
- the transfer of shares in Australian corporate joint venture entities;
- the transfer of shares in foreign corporate joint venture entities; and
- the transfer of business assets (including land).

27. Only assets and liabilities relating to the DuluxGroup business were transferred to DuluxGroup.

28. All assets were transferred for book value consideration with the exception of certain foreign assets.

29. As transfers occurred at book value, no accounting profit or loss was generated on the transfers. However, while some transfers by foreign entities occurred at market value, accounting profit arose in foreign entities as a result of these transactions.

#### ***Distribution of DuluxGroup Ltd shares***

30. At a General Meeting on 8 July 2010, Orica shareholders and Orica SPS holders passed a resolution approving a capital reduction.

31. Orica then distributed 100% of the shares it owned in DuluxGroup Ltd to the Orica shareholders on the Implementation Date, 19 July 2010. Orica shareholders received 1 DuluxGroup Ltd share for each Orica share they owned as at 7pm on the Record Date of 16 July 2010. As a result of the demerger, Orica shareholders held ownership interests in both Orica and DuluxGroup Ltd.

32. The DuluxGroup Ltd shares were acquired by the Orica shareholders by applying the following amounts distributed to them by Orica to the acquisition of those DuluxGroup Ltd shares:

- the capital reduction amount – being a return of share capital in the amount of approximately \$0.60 on each Orica share; and
- the dividend amount – being the balance of the demerger distribution on a per share basis.

The total demerger distribution amount \$936,482,384 was ascertained by reference to the volume weighted average price of the DuluxGroup Ltd shares, \$2.59, as traded on the ASX (whether on a deferred or normal settlement basis) over the first five trading days after the Effective Date, 9 July 2010.

### ***Accounting for the distribution to effect the demerger***

33. Orica accounted for the distributions that effected the demerger by debiting its share capital account by \$215.900m (the total capital reduction) and its retained earnings account by the balance of the demerger distribution (the total dividend).

### ***Reasons for the demerger***

34. Orica believed that a number of advantages will accrue to its shareholders as a result of the demerger. The key advantages were said to include:

- the separation of businesses with fundamentally different characteristics which will allow each of Orica and DuluxGroup to focus more clearly on their strategies, growth objectives and core competencies;
- greater strategic freedom for DuluxGroup, including the ability to pursue growth opportunities without competing for capital with other Orica businesses;
- greater flexibility for Orica shareholder to choose whether to hold Orica and DuluxGroup shares after the demerger; and
- the opportunity for each of Orica and DuluxGroup to have a capital structure and financial policies (including dividend policy) tailored to its business profile.

### ***Alternatives to the demerger***

35. Once a commitment was made to proceed with the demerger (after evaluating alternative options), Orica has not approached any parties to discuss the disposal of DuluxGroup Ltd or the DuluxGroup business.

36. Since originally contemplating the demerger, no parties have approached Orica to discuss the acquisition of DuluxGroup Ltd or the DuluxGroup business.

37. To date, Orica is not aware of any interest expressed by any party in respect of the acquisition of DuluxGroup Ltd or the DuluxGroup business.

38. To the knowledge of the Orica group, no parties have approached Orica shareholders to discuss the disposal of DuluxGroup Ltd or the DuluxGroup business before the demerger.

39. There were no communications between Orica and any of its shareholders that in any way relates to the ownership of the DuluxGroup Ltd shares following the demerger.

***Ineligible Overseas Shareholders***

40. Orica shareholders whose addresses were not shown in the Orica Share Register on the Record Date as being in the following jurisdictions, were Ineligible Overseas Shareholders and were not entitled to have DuluxGroup Ltd shares transferred to them pursuant to the Scheme:

- Australia, New Zealand, the United Kingdom, the United States, Canada, Chile, China, Germany, Hong Kong, Ireland, Italy, Japan, Malaysia, the Netherlands, Norway, Singapore, Switzerland, and the United Arab Emirates; and
- any other jurisdiction in which Orica reasonably believes that it is not prohibited and not unduly onerous or impractical to implement the scheme and to transfer DuluxGroup Ltd shares to a scheme Participant.

***Sale Facility***

41. Eligible Shareholders with a registered address in Australia or New Zealand who held 1,000 Orica ordinary shares or less as at the Record Date could elect to have all the DuluxGroup Ltd Shares that they would receive under the demerger sold on the ASX by the Sale Agent and the proceeds remitted to them, free of any brokerage costs or stamp duty.

42. Ineligible Overseas Shareholders automatically had their DuluxGroup Ltd shares which they would otherwise have received transferred to the Sale Agent and sold, with the proceeds remitted to them, free of any brokerage costs or stamp duty.

***Other matters***

43. Orica confirmed that there have been no transfers to its share capital account, as defined in section 975-300 of the ITAA 1997, from any of its other accounts.

44. Just after the demerger, at least 50% of the market value of capital gains tax (CGT) assets owned by DuluxGroup Ltd or its subsidiaries were used directly or indirectly in one or more business carried on by DuluxGroup Ltd or any of its subsidiaries.

45. Orica has not elected under subsection 44(2) of the ITAA 1936 that subsections 44(3) and 44(4) of the ITAA 1936 are not to apply to the demerger dividend paid under the restructure.

## Ruling

### **CGT consequences**

#### **CGT event G1**

46. CGT event G1 happened in relation to each of the Orica ordinary shares owned by Orica shareholders at the time Orica made the payment of the capital reduction amount (section 104-135 of the ITAA 1997).

#### **Capital gain**

47. Orica shareholders made a capital gain under CGT event G1 if the capital reduction amount exceeded the cost base of the Orica share (subsection 104-135(3) of the ITAA 1997). No capital loss can be made from CGT event G1.

48. A capital gain made under CGT event G1 will be disregarded if the Orica shareholder acquired the Orica share before 20 September 1985 (pre-CGT Orica share) (subsection 104-135(5) of the ITAA 1997).

#### **Demerger roll-over relief**

49. A demerger, as described under section 125-70 of the ITAA 1997, happened under the scheme.

50. Therefore, Orica shareholders can choose demerger roll-over relief under subsection 125-55(1) of the ITAA 1997 for their pre-CGT and post-CGT Orica shares.

#### *Choosing demerger roll-over relief for pre-CGT Orica shares*

51. Orica shareholders who choose demerger roll-over relief for their pre-CGT Orica shares will be taken to have acquired the corresponding DuluxGroup Ltd shares under the demerger before 20 September 1985 (subsections 125-55(1), 125-80(5) and 125-80(6) of the ITAA 1997).

#### *Choosing demerger roll-over relief for post-CGT Orica shares*

52. Orica shareholders who acquired their Orica shares after 19 September 1985 (post-CGT Orica shares) will disregard any capital gain made under CGT event G1 if they choose demerger roll-over relief (subsections 125-55(1) and 125-80(1) of the ITAA 1997).

53. If an Orica shareholder chooses demerger roll-over relief for their post-CGT Orica shares, they must recalculate the cost base and reduced cost base of their Orica and DuluxGroup Ltd shares.

54. The first element of the cost base and reduced cost base of each post-CGT Orica share and corresponding DuluxGroup Ltd share received under the demerger is worked out as follows:

- take the sum of the cost bases of the post-CGT Orica shares (just before the demerger); and
- apportion that sum over the remaining post-CGT Orica shares and corresponding new DuluxGroup Ltd shares received under the demerger.

The apportionment of this sum is done on a reasonable basis having regard to the market values (just after the demerger) of the Orica shares and DuluxGroup Ltd shares, or a reasonable approximation of those market values (subsections 125-80(2) and 125-80(3) of the ITAA 1997).

*Demerger roll-over relief is not chosen for pre-CGT Orica shares*

55. For Orica shareholders who own pre-CGT Orica shares and do not choose demerger roll-over relief:

- none of the corresponding DuluxGroup Ltd shares acquired under the demerger will be taken to be pre-CGT shares;
- those DuluxGroup Ltd shares are acquired on the Implementation Date of the demerger (19 July 2010) (section 109-10 of the ITAA 1997); and
- the first element of the cost base and reduced cost base of those DuluxGroup Ltd shares is calculated in accordance with the rules in Division 110 of the ITAA 1997.

*Demerger roll-over relief is not chosen for post-CGT Orica shares*

56. For Orica shareholders who own post-CGT Orica shares and do not choose demerger roll-over relief:

- they are not entitled to disregard any capital gain made in respect of CGT event G1 that happened to their Orica shares under the demerger; and
- the first element of the cost base and reduced cost base of each post-CGT Orica share and the corresponding DuluxGroup Ltd share is calculated in the manner described in paragraph 54 of this Ruling (subsections 125-85(1) and 125-85(2) of the ITAA 1997).

***Acquisition date of the DuluxGroup Ltd shares for the purposes of the CGT discount***

57. For the purposes of determining eligibility for a discount capital gain, the DuluxGroup Ltd shares received by an Orica shareholder in relation to post-CGT Orica shares are taken to have been acquired on the same date as the corresponding Orica shares (item 2 in the table in subsection 115-30(1) of the ITAA 1997). This will be the case irrespective of whether demerger roll-over relief is chosen.

58. For DuluxGroup Ltd shares acquired in relation to pre-CGT Orica shares under the demerger where demerger roll-over relief is not chosen, the acquisition date of these DuluxGroup Ltd shares is the Implementation Date of the demerger (19 July 2010) for the purposes of the CGT discount.

**Dividend consequences*****Demerger dividend***

59. Any dividend arising under the demerger is a demerger dividend (subsection 6(1) of the ITAA 1936).

60. The demerger dividend is neither assessable income nor exempt income of the participating Orica shareholders (subsections 44(3) and 44(4) of the ITAA 1936).

61. As the share capital reduction amount was debited to Orica's share capital account it is not a dividend, as defined in subsection 6(1) of the ITAA 1936 (see the exclusion contained in paragraph (d) of the definition of a dividend contained in subsection 6(1) of the ITAA 1936).

***Application of sections 45 and 45A***

62. The Commissioner will not make a determination under section 45 of the ITAA 1936 in respect of the proposed demerger as it cannot be concluded that shares will be provided to certain shareholder while other shareholder are provided with minimally franked dividends.

63. The Commissioner will not make a determination under section 45A of the ITAA 1936 in respect of the proposed demerger as it cannot be concluded that capital benefits will be provided to certain advantaged shareholder while other disadvantaged shareholder are provided with dividends.

***Application of sections 45B, 45BA and 45C***

64. The Commissioner will not make a determination under paragraph 45B(3)(a) of the ITAA 1936 that section 45BA of the ITAA 1936 applies to the whole or any part of any demerger benefit provided to Orica shareholders under the demerger.

65. The Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole or any part of the capital benefit provided to Orica shareholders under the demerger.

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**Commissioner of Taxation**4 August 2010

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## **Appendix 1 – Explanation**

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● *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.*

### **CGT event G1**

66. CGT event G1 happened in relation to the Orica ordinary shares owned by Orica shareholders at the time that Orica made the payment of the capital reduction amount. The payment is not a dividend as defined in subsection 995-1(1) of the ITAA 1997, nor an amount taken to be a dividend under section 47 of the ITAA 1936 (section 104-135 of the ITAA 1997).

67. An Orica shareholder will make a capital gain if the capital reduction amount is more than the cost base of their Orica shares. The amount of the capital gain is equal to this excess (subsection 104-135(3) of the ITAA 1997).

68. An Orica shareholder cannot make a capital loss when CGT event G1 happens (note 1 of subsection 104-135(3) of the ITAA 1997).

69. If the Orica share to which the payment relates was acquired by a Orica shareholder at least 12 months before the payment of the capital reduction amount, a capital gain made from CGT event G1 may qualify as a discount capital gain under subsection 115-25(1) of the ITAA 1997 (provided the other condition in Subdivision 115-A of the ITAA 1997 are satisfied).

70. An Orica shareholder who acquired their Orica shares before 20 September 1985 will disregard any capital gain made under CGT event G1 (subsection 104-135(5) of the ITAA 1997).

### **The demerger roll-over relief**

71. Demerger roll-over enables a shareholder to choose to disregard a capital gain made as a result of CGT event G1 happening when a non-assessable payment is made in relation to a share under a demerger.

72. The demerger roll-over provisions in Division 125 of the ITAA 1997 contain a number of conditions for eligibility to choose demerger roll-over relief. The main conditions that are relevant to the scheme are:

- (a) a shareholder owns a share in a company;
- (b) the company is the head entity of a demerger group;
- (c) a demerger happens to the demerger group; and
- (d) under the demerger, a CGT event happens to the original interest and a new or replacement interest is acquired in the demerged entity and nothing else.

73. Under the scheme to which this Ruling relates the conditions for demerger roll-over relief under Division 125 of the ITAA 1997 are satisfied. Further, the scheme to which this Ruling relates raises no novel issues of tax law interpretation and no further explanation of the application of those tax laws beyond that contained in the Ruling part of this document and the following paragraph is necessary.

74. For the purposes of the cost base and reduced cost base apportionment under subsections 125-80(2) and 125-80(3) of the ITAA 1997, the Commissioner accepts the volume weighted average price of the DuluxGroup Ltd shares, \$2.59, and Orica shares, \$24.42, as traded on the ASX (whether on a deferred or normal settlement basis) over the first five trading days after the Effective Date, 9 July 2010, as a reasonable approximation of the relative market value of those shares.

#### **Application of section 45**

75. Section 45 of the of the ITAA 1936 applies in respect of a company that, whether in the same year of income or in different years of income, streams the provision of shares (other than shares to which subsection 6BA(5) of the ITAA 1936 applies) and the payment of minimally franked dividends to its shareholders in such a way that:

- (a) the shares are received by some shareholders but not all shareholders; and
- (b) some or all of the shareholders who do not receive the shares receive or will receive minimally franked dividends.

76. A minimally franked dividend is defined in subsection 45(3) of the ITAA 1936 as one that is not franked or franked to less than 10%, in accordance with section 202-5 or section 208-60 of the of the ITAA 1997. Over the past 10 years Orica has franked all distributions at a rate in excess of 10%. If Orica were to maintain its current franking policy, it will not result in the payment of minimally franked dividends.

77. Under the proposed demerger, it is Orica's intention to demerge the DuluxGroup Ltd, a wholly owned subsidiary of Orica. It is to be implemented by means of a dividend and capital reduction of its shareholder's interest in Orica and satisfied by the distribution of shares in the DuluxGroup Ltd to Orica shareholders. The distribution of the shares in the DuluxGroup Ltd represents a distribution of both a capital and dividend component to all Orica shareholders.

78. Therefore, the Commissioner will not make a determination under section 45 of the ITAA 1936 in respect of the proposed demerger as it cannot be concluded that shares will be provided to certain shareholder while other shareholder are provided with minimally franked dividends.

#### **Application of section 45A**

79. Section 45A of the ITAA 1936 applies in respect of a company that whether in the same year of income or in different years of income, directs the payment of capital benefits and the payment of dividends to its shareholders in such a manner, that:

- (a) capital benefits are, or apart from the operation of the provision would be received by certain shareholders (the advantaged shareholders) who would in the year of income in which the capital benefits are provided, derive a greater benefit from the receipt of capital benefits than other shareholders; and
- (b) it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

80. For the purposes of the provision, subsection 45A(3) of the ITAA 1936 defines a capital benefit to include:

- the provision to the shareholder of shares in the company;
- the distribution to the shareholder of share capital or share premium;
- something that is done in relation to the share that has the effect of increasing the value of a share (which may or may not be the same share) held by the shareholder.

81. Under the proposed demerger, it is Orica's intention to demerge the DuluxGroup Ltd, a wholly owned subsidiary of Orica. It is to be implemented by means of a dividend and capital reduction of its shareholder's interest in Orica and satisfied by the distribution of shares in the DuluxGroup Ltd to Orica shareholders. The distribution of the shares in the DuluxGroup Ltd represents a distribution of both a capital and dividend component to all Orica shareholders.

82. Therefore, the Commissioner will not make a determination under section 45A of the ITAA 1936 in respect of the proposed demerger as it cannot be concluded that capital benefits will be provided to certain advantaged shareholder while other disadvantaged shareholder are provided with dividends.

**Application of sections 45B**

83. The purpose of section 45B of the ITAA 1936 is to ensure that relevant amounts distributed to shareholders of a company are treated as dividends for tax purposes if:

- (a) components of a demerger allocation as between capital and profit do not reflect the circumstances of the demerger; or
- (b) certain payments, allocations and distributions are made in substitution for dividends (subsection 45B(1) of the ITAA 1936).

84. In this case, while the conditions of paragraphs 45B(2)(a) and 45B(2)(b) of the ITAA 1936 are met, the requisite purpose of enabling the Orica shareholders to obtain a tax benefit (by way of a demerger benefit or a capital benefit) is not present.

85. Accordingly, the Commissioner will not make a determination under paragraph 45B(3)(a) or 45B(3)(b) of the ITAA 1936 that either section 45BA or 45C of the ITAA 1936 applies to the scheme to which this Ruling relates.

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

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

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Not previously issued as a draft

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ATO references

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