


# ***CR 2010/55 - Income tax: demerger of Macquarie Atlas Roads Limited by Intoll Trust (II)***

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## Class Ruling

### Income tax: demerger of Macquarie Atlas Roads Limited by Intoll Trust (II)

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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

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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 45B of the ITAA 1936;
- section 104-135 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- subsection 109-5(2) of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- Division 125 of the ITAA 1997; and

- Division 855 of the ITAA 1997.

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

## **Class of entities**

3. The class of entities to which this Ruling applies are the holders of units in Intoll Trust (II) who:

- (a) were listed on the security register of Intoll Trust (II) as at 1 February 2010 (the Record Date for the demerger);
- (b) held their Intoll Trust (II) units on capital account on that date;
- (c) for unit holders that were Australian resident companies, did not hold their Intoll Trust (II) units as part of a business conducted through a permanent establishment in a foreign country; and
- (d) were not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their Intoll Trust (II) units.

(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 'Intoll Trust (II) unit holder'.

## **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 was carried out in accordance with the scheme described in paragraphs 9 to 26 of this Ruling.

6. If the scheme actually carried out was 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 was 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 2009 to 30 June 2010. The Ruling continues to apply after 30 June 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 the Applicant. The following documents, or relevant parts of them, form part of and are to be read with the description:

- Class Ruling application dated 30 July 2010;
- Macquarie Infrastructure Group (MIG) (now known as Intoll Group): Restructure Proposal Explanatory Memorandum and Notices of Meeting dated 18 December 2009;
- Macquarie Atlas Roads Prospectus dated 18 December 2009;
- MIG 2009 Annual Report; and
- correspondence received from the Applicant in relation to the Class Ruling application.

**Note:** where certain information has been provided by the Applicant on a commercial-in-confidence basis, it will not be disclosed or released under the Freedom of Information legislation.

## **Intoll Group**

10. Intoll Trust (I), formerly Macquarie Infrastructure Trust (I), is an Australian resident unit trust taxed under Division 6 of Part III of the ITAA 1936.

11. Intoll Trust (II), formerly Macquarie Infrastructure Trust (II), is an Australian resident public trading trust which is taxed under Division 6C of Part III of the ITAA 1936. Intoll Trust (II) has made a choice, under section 713-130 of the ITAA 1997, to form a tax consolidated group with itself as the head company. Generally, for income tax purposes, Intoll Trust (II) is treated as if it were a company.

12. Intoll International Limited (IIL), formerly Macquarie Infrastructure Group International Limited, is a company incorporated in, and a resident of, Bermuda.

13. Units in Intoll Trust (I) and Intoll Trust (II), and shares in IIL, are stapled together and listed on the Australian Securities Exchange (ASX) as Intoll Group stapled securities. The effect of stapling is that the three interests comprising each Intoll Group stapled security may only be dealt with together. In this Ruling, Intoll Trust (I), Intoll Trust (II) and IIL and their subsidiaries are together referred to as the 'Intoll Group'.

14. As at 2 February 2010, there were 2,261,732,048 Intoll Group stapled securities on issue, reflecting the same number of units in Intoll Trust (I) and Intoll Trust (II) and ordinary shares in IIL.

15. There were no other ownership interests (as defined in subsection 125-60(1)) in Intoll Trust (II) just before the demerger.

16. The principal activity of the Intoll Group is the development and operation of toll roads, bridges and tunnels and investment in entities in the same industry sector.

17. Before 2 February 2010, the Intoll Group owned interests in nine toll roads (407 ETR, M6 Toll, APRR, Westlink M7, Dulles Greenway, Indiana Toll Road, Chicago Skyway, South Bay Expressway and Warnow Tunnel) in Australia and in other countries.

## **Restructure of the Intoll Group**

18. At separate general meetings of Intoll Trust (I), Intoll Trust (II) and IIL on 22 January 2010, Intoll Group stapled security holders approved ordinary resolutions authorising the implementation of a restructure to separate its toll road assets based on their maturity and risk profile.

## 19. The restructure involved:

- the transfer of interests in M6 Toll, APRR, Dulles Greenway, South Bay Expressway and Warnow Tunnel to a group headed by Macquarie Atlas Roads International Limited (MQA Bermuda). MQA Bermuda, a then wholly-owned subsidiary of IIL, is an exempt mutual fund corporation incorporated in Bermuda on 15 December 2009. Except for the M6 Toll, interests in these toll roads were transferred at their carrying values for accounting purposes;
- the transfer of interests in Dulles Greenway, Indiana Toll Road and Chicago Skyway to a group headed by Macquarie Atlas Roads Limited (MQA Australia). MQA Australia, then wholly-owned by Intoll Trust (II), is an Australian resident company incorporated on 16 December 2009. All interests in the toll roads were transferred at their carrying values for accounting purposes;
- the acquisition by Intoll Trust (II) of Intoll Management Limited, formerly Macquarie Infrastructure Investment Management Limited, the responsible entity and manager of Intoll Trust (I) and Intoll Trust (II), resulting in the internalisation of the management of those two trusts;
- a distribution, on 2 February 2010, by IIL of 100% of its shares in MQA Bermuda to holders of IIL ordinary shares listed on the security register as at the Record Date, and Intoll Trust (II) distributing 100% of its shares in MQA Australia to holders of units in Intoll Trust (II) listed on the security register as at the Record Date. The holders received one share in MQA Bermuda for every five shares they held in IIL, and one share in MQA Australia for every five units they held in Intoll Trust (II); and
- the payment by Intoll Trust (II) of a Special Distribution of 10 cents per unit (comprising an unfranked dividend of 5.9 cents and a return of capital of 4.1 cents) on 12 February 2010 to holders of units in Intoll Trust (II) listed on the security register as at the Record Date.

(This Ruling does not consider the income tax consequences of receiving the Special Distribution, only its effect on the availability of demerger roll-over).

20. The shares in MQA Australia and MQA Bermuda are stapled together, with effect from 2 February 2010, and are listed on the ASX as Macquarie Atlas Roads Group (MQA) stapled securities. The effect of stapling is that the two interests comprising each MQA stapled security may only be dealt with together. In this Ruling, MQA Australia and MQA Bermuda and their subsidiaries are together referred to as the 'MQA Group'.

21. Intoll Trust (II) made the following entry in its accounts in relation to the distribution of 100% of its shares in MQA Australia to holders of units in Intoll Trust (II):

DR Contributed Capital	\$194,639,919
CR Investment in MQA Australia	\$194,639,919

The distribution equates to 8.61 cents per Intoll Trust (II) unit.

22. The demerger of MQA Australia was thus effected by reducing the contributed capital of Intoll Trust (II) by an amount equal to the value of 100% of its shares in MQA Australia (the capital reduction amount). For the purposes of debiting Intoll Trust (II)'s contributed capital, the value of each share in MQA Australia was 43.05 cents (8.61 cents multiplied by five). The capital reduction amount was satisfied by an *in specie* distribution of 100% of the shares owned by Intoll Trust (II) in MQA Australia.

### **Purpose of the restructure of the Intoll Group**

23. The purpose of the separation of the toll roads under the restructure of the Intoll Group was to increase business efficiencies by:

- promoting the more effective and targeted management of the toll roads. The mature toll roads (Westlink M7 and 407 ETR), having stable capital structures and mature cash flows, and therefore requiring less active management, have remained with the Intoll Group. The less stable toll roads (M6 Toll, APRR, Dulles Greenway, South Bay Expressway, Warnow Tunnel, Indiana Toll Road and Chicago Skyway), having higher levels of debt and less mature cash flows, and therefore requiring more active management, were transferred to the MQA Group;
- reducing management costs. The internalisation of the management of the toll roads of Intoll Trust (I) and Intoll Trust (II), together with the new management arrangements for the less stable toll roads of the MQA Group, are expected to result in an overall reduction in the management costs of the toll roads;

- providing greater financial flexibility (for example, access to debt and equity funding). The toll road portfolios of the Intoll Group and the MQA Group have distinct risk/return profiles which would assist each group to attract funding from investors; and
- increasing the combined market rating and market price of the Intoll Group and the MQA Group compared to the market rating and market price of the Intoll Group alone.

### **Distributions by Intoll Trust (II)**

24. The Intoll Group's distribution policy is that distributions will reflect payments more in line with the free cash flow of their assets (after taking into account holding entity operating expenses). Intoll Trust (II) paid both unfranked and partially franked distributions in the income years ended 30 June 2005, 30 June 2006 and 30 June 2010. In addition, Intoll Trust (II) has returned capital in the income years ended 30 June 2007 to 2009, inclusive, through on-market share buy-backs.

### **Other matters**

25. Intoll Trust (II) unit holders acquired all of their Intoll Trust (II) units after 19 September 1985.

26. Intoll Trust (II)'s contributed capital, which is deemed by sections 713-135 and 713-140 to be a share capital account (as defined in section 975-300), is not tainted (within the meaning of Division 197) as no amounts have been transferred to the deemed share capital account.

## **Ruling**

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### **The demerger of MQA Australia**

#### **CGT event G1**

27. CGT event G1 happened in relation to each of the Intoll Trust (II) units (which are deemed to be shares by sections 713-135 and 713-140) owned by the Intoll Trust (II) unit holders at the time Intoll Trust (II) made the payment of the capital reduction amount (satisfied by the *in specie* distribution of shares in MQA Australia) (section 104-135).

## **Capital gain**

28. Intoll Trust (II) unit holders will make a capital gain from CGT event G1 happening if the capital reduction amount (8.61 cents per Intoll Trust (II) unit) exceeds the cost base of the Intoll Trust (II) unit. The capital gain is equal to the amount of the excess. No capital loss can be made from CGT event G1 (subsection 104-135(3)).

## **Reducing the cost base and reduced cost base of Intoll Trust (II) units**

29. If the capital reduction amount (8.61 cents per Intoll Trust (II) unit) is not more than the cost base of the Intoll Trust (II) unit, the cost base and the reduced cost base of the Intoll Trust (II) unit will be reduced (but not below nil) by the capital reduction amount (subsection 104-135(4)).

## **Demerger roll-over is not available**

30. A demerger, as defined under section 125-70, did **not** happen to the Intoll Trust (II) demerger group under the scheme. The payment by Intoll Trust (II) of the Special Distribution of 10 cents per unit infringed paragraph 125-70(1)(c).

31. Intoll Trust (II) unit holders cannot choose demerger roll-over under subsection 125-55(1) for their Intoll Trust (II) units. They cannot disregard, under subsection 125-80(1), any capital gain made when CGT event G1 happened in relation to each of their Intoll Trust (II) units.

## **Cost base of the MQA Australia shares**

32. The first element of the cost base and reduced cost base of each share in MQA Australia received by the Intoll Trust (II) unit holders will equal the capital reduction amount applied on behalf of each unit holder to acquire the MQA Australia share (subsections 110-25(2) and 110-55(2)). This is 43.05 cents (8.61 cents multiplied by five).

## **Acquisition date of the MQA Australia shares for the purpose of a discount capital gain**

33. For the purpose of determining eligibility to a discount capital gain, an MQA Australia share received by an Intoll Trust (II) unit holder will be taken to have been acquired when the responsible entity and manager of Intoll Trust (II) stopped being the owner of the MQA Australia shares (event number A1 (case 1) of the table in subsection 109-5(2)).

**Division 855 – foreign resident Intoll Trust (II) unit holders**

34. Intoll Trust (II) unit holders will disregard a capital gain from CGT event G1 happening in relation to each of their Intoll Trust (II) units if:

- they were a foreign resident just before the CGT event happened; and
- their Intoll Trust (II) units were not taxable Australian property (section 855-10).

**Distribution is not a dividend for income tax purposes**

35. The *in specie* distribution to Intoll Trust (II) unit holders of shares in MQA Australia under the scheme is not a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

**The application of section 45B**

36. The Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the *in specie* distribution of shares in MQA Australia to Intoll Trust (II) unit holders. Therefore, the distribution will not be taken to be a dividend.

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**Commissioner of Taxation**13 October 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.*

37. The modifications set out in section 713-140 apply to Intoll Trust (II) to treat it as a company for income tax purposes. Relevantly, a reference in the income tax legislation to:

- 'a body corporate' ('company' is defined in subsection 995-1(1) to mean, amongst other things, a body corporate) includes a reference to 'the trust or trustee (as appropriate)' (item 1 of the table in subsection 713-140(2));
- 'a dividend' includes a reference to 'a distribution from the trust, so far as the distribution is from profits' (item 2 of the table in subsection 713-140(2)); and
- 'a share capital account' includes a reference to 'the amount of the trust estate that is *not* attributable to profits' (item 3 of the table in subsection 713-140(2)).

### **Demerger roll-over is not available**

38. The capital gains tax consequences of the demerger of MQA Australia are described in paragraphs 27 to 34 of this Ruling.

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

- (a) a person owns a share in a company, or a unit or other interest in a trust (the original interest);
- (b) the company or trust 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 the person acquires a new or replacement interest in the demerged entity and nothing else.

40. The payment by Intoll Trust (II) of the Special Distribution of 10 cents per unit to the holders of units in Intoll Trust (II) has infringed the demerger roll-over condition in paragraph 125-70(1)(c). This is because unit holders acquired MQA Australia shares, and something else – 10 cents per unit. Accordingly, the demerger of MQA Australia by Intoll Trust (II) is not a 'demerger' as defined in section 125-70.

41. As a consequence, demerger relief in Division 125 is not available to the Intoll Trust (II) unit holders in respect of the demerger of MQA Australia.

**Distribution is not a dividend for income tax purposes**

42. Subsection 44(1) of the ITAA 1936 includes in a shareholder's assessable income any dividends, as defined in subsection 6(1) of the ITAA 1936, paid to the shareholders out of profits derived by the company from any source (if the shareholder is a resident of Australia) and from an Australian source (if the shareholder is a non-resident).

43. The term 'dividend' in subsection 6(1) of the ITAA 1936 includes any distribution made by a company to any of its shareholders. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) excludes a distribution from the meaning of 'dividend' if the amount of a distribution is debited against an amount standing to the credit of the company's share capital account.

44. The term 'share capital account' is defined in section 975-300 as an account which the company keeps of its share capital, or any other account created on or after 1 July 1998 where the first amount credited to the account was an amount of share capital.

45. Subsection 975-300(3) states that an account is not a share capital account if it is tainted.

46. The *in specie* distribution to Intoll Trust (II) unit holders of shares in MQA Australia was recorded as a debit to Intoll Trust (II)'s deemed share capital account. As the deemed share capital account of Intoll Trust (II) was not tainted within the meaning of Division 197, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 applies. Accordingly, the *in specie* distribution to Intoll Trust (II) unit holders of shares in MQA Australia is not a 'dividend' as defined in subsection 6(1).

**The application of section 45B**

47. Section 45B of the ITAA 1936 is an anti-avoidance provision which, if applicable, allows the Commissioner to make a determination that section 45C of the ITAA 1936 applies to treat all or part of a capital benefit as an unfranked dividend.

48. Section 45B of the ITAA 1936 applies where certain amounts of a capital nature, including a distribution of share capital, are provided to shareholders in substitution for dividends. Specifically, the provision applies where:

- (a) there is a scheme under which a person is provided with a capital benefit by a company (paragraph 45B(2)(a) of the ITAA 1936);
- (b) under the scheme a person (the relevant taxpayer), who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b) of the ITAA 1936); and

- (c) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (other than an incidental purpose) of enabling a taxpayer to obtain a tax benefit (paragraph 45B(2)(c) of the ITAA 1936).

## **Scheme**

49. Section 45B of the ITAA 1936 applies to Intoll Trust (II) as if it were a company. The restructure of Intoll Trust (II), including the *in specie* distribution of MQA Australia shares by Intoll Trust (II) to Intoll Trust (II) unit holders, constitutes a scheme for the purposes of paragraph 45B(2)(a) of the ITAA 1936.

## **Capital benefit**

50. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) of the ITAA 1936. Under that definition, a person is provided with a capital benefit if they receive a distribution of share capital.

51. As the *in specie* distribution of MQA Australia shares was recorded by means of a debit to Intoll Trust (II)'s untainted deemed share capital account (as defined in section 975-300), Intoll Trust (II) unit holders will be taken to have been provided with a capital benefit by a company for the purposes of paragraph 45B(2)(a) of the ITAA 1936.

## **Tax benefit**

52. A relevant taxpayer 'obtains a tax benefit', as defined in subsection 45B(9) of the ITAA 1936, if:

- the amount of tax payable; or
- any other amount payable under the ITAA 1936 or the ITAA 1997,

would, apart from the operation of section 45B of the ITAA 1936:

- be less than the amount that would have been payable; or
- be payable at a later time than it would have been payable,

if the capital benefit had instead been an assessable dividend.

53. The relevant taxpayer under the scheme is each Intoll Trust (II) unit holder.

54. Ordinarily, a distribution of capital would be subject to the capital gains tax provisions of the income tax law. Unless the amount of the distribution exceeds the cost base of the shares, there will be a cost base reduction under CGT event G1 (section 104-135). It is only to the extent (if any) that the distribution exceeds the cost base of the shares that a capital gain arises. A capital gain may not arise at all for foreign resident shareholders: see paragraph 34 of this Ruling. By contrast, a dividend would generally be included in the assessable income of a resident shareholder, or in the case of a foreign resident be subject to dividend withholding tax. Therefore, an Intoll Trust (II) unit holder will generally obtain a tax benefit, as defined in subsection 45B(9) of the ITAA 1936, under the arrangement.

#### ***Requisite purpose***

55. 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 Intoll Trust (II) unit holders to obtain a tax benefit by way of a capital benefit is not present. In other words, having regard to the relevant circumstances of the scheme, set out in subsection 45B(8) of the ITAA 1936, it would not be concluded that any of the parties to the restructure entered into or carried out the scheme to obtain a tax benefit in the form of a capital benefit.

56. The relevant circumstances listed in subsection 45B(8) of the ITAA 1936 include the tax and non-tax implications of the scheme, the latter being covered, in the main, by the matters in paragraph 177D(b) of the ITAA 1936 which are included in subsection 45B(8) by paragraph (k). Having regard to the relevant circumstances in subsection 45B(8), some of the factors point towards a conclusion that the requisite purpose exists and others point against such a conclusion. However, it is apparent from the circumstances of the restructure that the treatment of the distribution as capital is consistent with the commercial circumstances of the transaction. Furthermore, the factors also indicate that the substantial purpose of the *in specie* distribution of MQA Australia shares, which formed part of the overall restructure of the Intoll Group, was to reorganise the business of the Intoll Group into two businesses characterised by their different asset and risk profiles, their separate management requirements, their different business strategies and their discrete commercial objectives.

57. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or any part, of the *in specie* distribution of shares in MQA Australia by Intoll Trust (II) to Intoll Trust (II) unit holders.

**Appendix 2 – Detailed contents list**

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

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- Not previously issued as a draft
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  - capital gains
  - CGT capital proceeds
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  - cost base adjustments
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