



# ***CR 2011/59 - Income tax: off-market takeover of Crane Group Limited and Special Dividend***

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## Class Ruling

# Income tax: off-market takeover of Crane Group Limited and Special Dividend

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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.

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

## 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);
  - subsection 44(1) of the ITAA 1936;
  - section 128B of the ITAA 1936;
  - section 128D of the ITAA 1936;
  - former section 160APHD of the ITAA 1936;
  - former section 160APHE of the ITAA 1936;
  - former section 160APHM of the ITAA 1936;

- former section 160APHN of the ITAA 1936;
- former section 160APHO of the ITAA 1936;
- subsection 177EA(5) of the ITAA 1936;
- Division 1A of former Part IIIAA of the ITAA 1936 (former Division 1A);
- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 109-10 of the ITAA 1997;
- section 110-25 of the ITAA 1997;
- section 110-55 of the ITAA 1997;
- section 112-30 of the ITAA 1997;
- Division 115 of the ITAA 1997;
- section 116-20 of the ITAA 1997;
- Subdivision 124-M of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- subsection 855-10(1) of the ITAA 1997;
- section 855-15 of the ITAA 1997;
- section 855-20 of the ITAA 1997; and
- section 855-25 of the ITAA 1997.

## **Class of entities**

3. The class of entities to which this Ruling applies are the shareholders of Crane Group Limited (Crane) who:
- (a) held their Crane ordinary shares on capital account;
  - (b) received the Interim Dividend and/or Special Dividend;
  - (c) accepted the offer made by Fletcher Building (Australia) Pty Limited (FBA) to acquire their Crane ordinary shares or had their ordinary shares compulsorily acquired by FBA; 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 Crane shares.

(Note: Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them.)

### 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 23 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:

- Class Ruling application from Blake Dawson dated 10 February 2011;

- Bidder's Statement dated 22 December 2010;
- Replacement Bidder's Statement dated 10 January 2011;
- Bid Implementation Agreement dated 28 January 2011;
- Second Supplementary Bidder's Statement dated 4 February 2011;
- Target's Statement dated 4 February 2011;
- Third Supplementary Bidder's Statement dated 9 February 2011;
- Supplementary Target's Statement dated 14 February 2011;
- Fourth Supplementary Bidder's Statement dated 14 February 2011;
- Fifth Supplementary Bidder's Statement dated 7 March 2011;
- Crane 2010 Annual Report;
- Fletcher Building Limited News Release dated 1 April 2011; and
- Fletcher Building Limited News Release dated 6 May 2011.

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

## **Fletcher Building Limited & Fletcher Building (Australia) Pty Limited**

10. FBA, an Australian resident company, is a wholly-owned subsidiary of Fletcher Building Limited (FBL). FBL, a New Zealand resident company, is listed on both the Australian Securities Exchange (ASX) and the New Zealand Exchange (NZX).

11. As at 31 July 2010, FBL had 35,776 shareholders, with the largest 20 holding 78.72% of the issued shares. FBL had on issue:

- a single class of ordinary shares, with full voting and dividend rights, listed on both the ASX and the NZX; and
- 250 million capital notes listed on the NZX but not the ASX.

**Crane**

12. Crane is an Australian resident company listed on the ASX and was incorporated in 1959.
13. As at 30 June 2010, Crane had on issue 79,110,667 ordinary shares, held by 12,026 shareholders, and 400,000 cumulative preference shares, held by 3 shareholders. Each ordinary share had dividend entitlements and a single vote. The cumulative preference shares carried an entitlement to a 5% per annum dividend in priority to other dividends but no voting rights.
14. As at 11 August 2010, Crane's largest 20 shareholders held approximately 60.72% of its ordinary shares.
15. As at 30 June 2010, Crane had assets of approximately \$1,232 million, of which only approximately \$131 million comprised real property situated in Australia. As at the time of this scheme, the ratio of the market value of real property assets to the total assets of Crane was not relevantly different.

**The Offer**

16. FBA made an off-market offer (the FBA Offer) to Crane shareholders of \$3.50 cash and one ordinary FBL share for each Crane ordinary share that they owned. The FBA Offer expired on 31 March 2011.
17. The FBA Offer was subject to a condition precedent which required that approvals had to be received from the Foreign Investment Review Board (FIRB), New Zealand Commerce Commission (NZCC) and Australian Competition and Consumer Commission (ACCC). This condition was satisfied on 25 February 2011. The FBA Offer was declared unconditional on 17 March 2011.
18. A Crane shareholder's contract for the disposal of Crane shares to FBA was formed when the condition precedent was satisfied on 25 February 2011, or when the FBA Offer was accepted by a Crane shareholder, whichever was the later.

**The Interim Dividend and Special Dividend**

19. On 24 February 2011, Crane paid:
- ordinary shareholders, a fully franked Interim Dividend of \$0.22 per ordinary share, being \$17,404,346 in total; and
  - cumulative preference shareholders, a fully franked dividend of \$0.25 per preference share, being \$10,000 in total.
20. On 7 March 2011, Crane paid a fully franked Special Dividend of \$0.50 per Crane ordinary share. This amounted to \$39,555,333 in

total. Preference shares were excluded from the Special Dividend due to their terms of issue.

21. The Interim and Special Dividends were not funded directly or indirectly by FBA or FBL and were not conditional upon the acceptance by Crane shareholders of the FBA Offer. The Record Date for the Interim and Special Dividends was 14 February 2011.

## **Compulsory acquisition**

22. As at 1 April 2011, FBA had acquired 95.48% of Crane shares and it was announced that compulsory acquisition of all remaining Crane shares would take place, on the terms of the FBA Offer, under the *Corporations Act 2001*. The compulsory acquisition of the remaining Crane shares was completed on 5 May 2011 and announced by FBL on 6 May 2011.

## **Other matters**

23. In relation to the scheme:

- there are no 'significant stakeholders' or 'common stakeholders' (section 124-783 of the ITAA 1997);
- all entities are dealing at arm's length; and
- Crane shares are not 'indirect Australian real property interests' (subsection 855-25 of the ITAA 1997).

# **Ruling**

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## **The Interim Dividend**

24. The Interim Dividend of \$0.22 cash per share paid to Crane shareholders will constitute a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

25. Crane shareholders who receive the fully franked Interim Dividend and are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Interim Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

26. Crane shareholders who receive the fully franked Interim Dividend and are non-residents (other than those carrying on a business in Australia at or through a permanent establishment in Australia) are not required to include the dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and will not be liable for Australian withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

27. Crane shareholders who receive the Interim Dividend and are non-residents carrying on business in Australia at or through a permanent establishment in Australia, where the Interim Dividend is

attributable to the permanent establishment, are required to include the Interim Dividend as assessable income under subparagraphs 44(1)(b)(i) and 44(1)(c)(i) of the ITAA 1936.

### **The Special Dividend**

28. The Special Dividend of \$0.50 cash per share paid to Crane shareholders will constitute a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

29. Crane shareholders who receive the fully franked Special Dividend and are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Special Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

30. Crane shareholders who receive the fully franked Special Dividend and are non-residents (other than those carrying on business in Australia at or through a permanent establishment in Australia) are not required to include the dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and will not be liable for Australian withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

31. Crane shareholders who receive the fully franked Special Dividend and are non-residents carrying on business in Australia at or through a permanent establishment in Australia, where the Special Dividend is attributable to the permanent establishment, are required to include the Special Dividend as assessable income under subparagraphs 44(1)(b)(i) and 44(1)(c)(i) of the ITAA 1936.

### **Gross up and tax offset**

32. Resident Crane shareholders who received the fully franked Interim and Special Dividends directly:

- must include the amount of the franking credit attached to the Interim Dividend and the Special Dividend in their assessable income; and
- will be entitled to a tax offset equal to the amount of the franking credit (tax offset);

under section 207-20 of the ITAA 1997, subject to being a qualified person.

### **Qualified persons**

33. The Interim Dividend and the Special Dividend will not constitute a 'related payment' within the meaning of former section 160APHN of the ITAA 1936.

34. Accordingly, each Crane shareholder will need to hold their Crane shares at risk for a continuous period of at least 45 days in the



primary qualification period in order to be a qualified person in respect to the Interim Dividend and Special Dividend.

35. Each Crane shareholder who has not previously satisfied the primary qualification period for the purpose of former Division 1A will be considered to have satisfied the holding period rule under former section 160APHO of the ITAA 1936 and therefore be a qualified person in relation to the Interim Dividend and Special Dividend as follows:

- (a) for a Crane shareholder who accepted the FBA Offer before 17 March 2011, if they acquired the Crane share, or interest in the share, on or before 30 January 2011;
- (b) for a Crane shareholder whose Crane shares were compulsorily acquired, if they acquired the Crane share, or interest in the share, before the ex-dividend date of 15 February 2011; and
- (c) for all Crane shareholders covered by paragraphs (a) or (b) above, during the period when the Crane Share or interest in the share was held, the shareholder did not have 'materially diminished risks of loss or opportunities for gain' (as defined under former section 160APHM of the ITAA 1936) for a continuous period of at least 45 days.

36. For those Crane shareholders who accepted the FBA offer after it was declared unconditional but before the compulsory acquisition process began on 1 April 2011 and thus were not subject to the compulsory acquisition process, the primary qualification period in which they would be required to hold the Crane shares at risk would also run from date of acquisition until date of acceptance or 1 April 2011, whichever occurs first.

## **Capital gains tax**

### ***CGT event A1***

37. CGT event A1 happened when a Crane shareholder disposed of their Crane share to FBA (subsections 104-10(1) and 104-10(2) of the ITAA 1997).

38. Where a Crane shareholder accepted the FBA Offer, CGT event A1 happened on the day that the Crane shareholder entered into the contract to dispose of their Crane shares to FBA (paragraph 104-10(3)(a) of the ITAA 1997).

39. Where a Crane shareholder did not accept the FBA Offer and had their shares compulsorily acquired by FBA, CGT event A1 happened when FBA became the owner of the relevant Crane shares (paragraph 104-10(6)(b) of the ITAA 1997).

***Capital gain or capital loss***

40. A Crane shareholder made a capital gain if the capital proceeds from the disposal of their Crane share exceeded its cost base. The capital gain is the amount of the excess (subsection 104-10(4) of the ITAA 1997).

41. A Crane shareholder made a capital loss if the capital proceeds from the disposal of their Crane share were less than its reduced cost base. The capital loss was the amount of the difference (subsection 104-10(4) of the ITAA 1997).

***Capital proceeds***

42. The capital proceeds for the disposal of each Crane share were the sum of the market value (as at the time that CGT event A1 happened) of the FBL share received and the cash component of \$3.50 (subsection 116-20(1) of the ITAA 1997).

43. The Commissioner accepts that the market value of each FBL share acquired by a Crane shareholder may be determined by reference to the volume weighted average price (VWAP) of FBL shares traded on the ASX on the day of acquisition.

44. The Interim Dividend and the Special Dividend did not form part of the capital proceeds for the disposal of the Crane shares.

***Availability of scrip for scrip roll-over if a capital gain is made***

45. Subject to the qualification in paragraph 47 of this Ruling, a Crane shareholder who made a capital gain from the disposal of their Crane share to FBA is eligible to choose scrip for scrip roll-over for that part of the capital gain that is referable to the receipt of an FBL share as capital proceeds (sections 124-780 and 124-790 of the ITAA 1997). Scrip for scrip roll-over cannot be chosen for the cash component of the capital proceeds.

46. If scrip for scrip roll-over is chosen, that part of the capital gain referable to the receipt of an FBL share is disregarded (subsection 124-785(1) of the ITAA 1997).

47. Scrip for scrip roll-over cannot be chosen if any capital gain a Crane shareholder might make from the replacement FBL share would be disregarded for a reason other than the application of a roll-over (paragraph 124-795(2)(a) of the ITAA 1997).

***Pre-CGT Crane shares***

48. Scrip for scrip roll-over is not available for Crane shares acquired prior to 20 September 1985 (paragraph 124-780(3)(a) of the ITAA 1997) and a capital gain or capital loss on the disposal of such shares is disregarded (paragraph 104-10(5)(a) of the ITAA 1997).

49. For Crane shares acquired prior to 20 September 1985, the first element of the cost base and the reduced cost base of each FBL share acquired under this scheme is the market value of that share just after its acquisition (subsections 110-25(2), 110-55(2) and 124-800(1) of the ITAA 1997).

### ***Discount capital gain***

50. If a participating Crane shareholder made a capital gain and scrip for scrip roll-over is not chosen or cannot be chosen for all or part of the gain, they may be eligible to treat the gain as a discount capital gain provided that the participating Crane shareholder satisfies the requirements of Division 115 of the ITAA 1997.

### ***Acquisition date of FBL shares***

51. A Crane shareholder acquired their FBL shares:

- if they accepted the FBA Offer to dispose of their Crane shares, on the date when they entered into the contract for the disposal of their Crane shares in exchange for FBL shares (item 2 in the table in section 109-10 of the ITAA 1997); or
- if their Crane shares were acquired by FBA by way of compulsory acquisition, when the FBL shares were issued to them (item 2 in the table in section 109-10 of the ITAA 1997).

52. For the purposes of applying the CGT discount to any later disposal of their FBL shares, Crane shareholders who choose scrip for scrip roll-over under the FBA Offer, including where their Crane shares have been compulsorily acquired, are taken to have acquired their FBL shares on the date when they acquired the corresponding Crane shares (item 2 in the table in subsection 115-30(1) of the ITAA 1997).

### ***Cost base of FBL shares where roll-over is not chosen***

53. Where scrip for scrip roll-over is not chosen, the first element of the cost base and reduced cost base of each FBL share is the market value of the corresponding Crane share, not being a pre-CGT share, reduced by the amount of the cash consideration, which was exchanged for the FBL share (paragraph 110-25(2)(b) of the ITAA 1997 and subsections 110-55(2) and 112-30(1) of the ITAA 1997).

***Cost base of FBL shares where roll-over is chosen***

54. Where scrip for scrip roll-over is chosen, the cost base and reduced cost base of each Crane share, reduced by the amount of it that is reasonably attributable to the cash consideration, becomes the first element of the cost base and the reduced cost base respectively of the FBL shares for which each Crane share was exchanged (subsections 124-785(2), 124-785(3) and 124-785(4) of the ITAA 1997).

***Foreign resident shareholders***

55. A Crane shareholder who is a foreign resident, or the trustee of a foreign trust for CGT purposes, disregards any capital gain made when CGT event A1 happens to their Crane share if their Crane share is not 'taxable Australian property' (sections 855-10(1) and 855-15 of the ITAA 1997).

***Anti-avoidance provisions***

56. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefit received in relation to the Interim Dividend and Special Dividend paid in relation to a Crane share.

57. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the Interim Dividend and Special Dividend paid in relation to a Crane share.

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**Commissioner of Taxation**15 June 2011

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## Appendix 1 – Explanation

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**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.*

### **The Interim Dividend and the Special Dividend**

58. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 as a distribution made by a company to shareholders, whether in money or other property.

59. The payment of the Interim Dividend and the Special Dividend are each a distribution of money by Crane to its shareholders.

60. Paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 excludes from the definition of 'dividend' any:

moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph, by reason of subsection (4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company...

61. The payment of the Interim Dividend and the Special Dividend are from Crane's existing cash reserves and/or existing loan facilities. The payment amounts will be debited against Crane's retained earnings account and not the share capital account. Therefore, the exclusion in paragraph (d) will not apply. The Interim Dividend and the Special Dividend will each constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

### **Assessability of Dividends**

62. Subparagraph 44(1)(a)(i) of the ITAA 1936 includes in the assessable income of an Australian resident shareholder in a company:

dividends (other than non-share dividends) that are paid to the shareholder by the company out of profits derived by it from any source.

63. As the Interim Dividend and the Special Dividend are paid to Crane shareholders out of profits derived by Crane, Crane shareholders who are residents of Australia as defined in subsection 6(1) of the ITAA 1936 are required to include the Interim Dividend and the Special Dividend in their assessable income under paragraph 44(1)(a)(i) of the ITAA 1936.

64. Subparagraph 44(1)(b)(i) of the ITAA 1936 includes in the assessable income of a non-resident shareholder in a company:

dividends (other than non-share dividends) paid to the shareholder by the company to the extent to which they are paid out of profits derived by it from sources in Australia.

65. Broadly, subsection 128B(1) of the ITAA 1936 imposes Australian withholding tax on dividends paid by Australian resident companies to non-residents. However, subparagraph 128B(3)(ga)(i) of the ITAA 1936 excludes from subsection 128B(1) income derived by a non-resident that consists of the franked part of a dividend. As the Interim Dividend and the Special Dividend are fully franked, they will not be subject to Australian withholding tax when derived by non-resident Crane shareholders.

66. In addition section 128D of the ITAA 1936 states that:

Income other than income to which section 128B applies by virtue of subsection (2A), (2C) or (9C) of that section upon which withholding tax is payable, or upon which withholding tax would, but for paragraph 128B(3)(ga) or (jb), section 128F, section 128FA or section 128GB, be payable, is not assessable income and is not exempt income of a person.

67. As the payment of the Interim Dividend and the Special Dividend are income that is subject to withholding tax but for paragraph 128B(3)(ga) of the ITAA 1936, they will not be assessable income, and will not be exempt income of non-resident Crane shareholders pursuant to section 128D of the ITAA 1936.

68. Accordingly, Crane shareholders who receive the fully franked Interim Dividend and Special Dividend, and are non-residents (other than those carrying on business in Australia at or through a permanent establishment in Australia), are not required to include the dividend as assessable income under subparagraph 44(1)(b)(i) of the ITAA 1936 (section 128D of the ITAA 1936) and will not be liable for Australian withholding tax (paragraph 128B(3)(ga) of the ITAA 1936).

### **Gross up and tax offset**

69. Section 207-20 of the ITAA 1997 provides:

- (1) If an entity makes a \*franked distribution to another entity, the assessable income of the receiving entity, for the income year in which the distribution is made, includes the amount of the \*franking credit on the distribution. This is in addition to any other amount included in the receiving entity's assessable income in relation to the distribution under any other provision of this Act.
- (2) The receiving entity is entitled to a \*tax offset for the income year in which the distribution is made. The tax offset is equal to the \*franking credit on the distribution.

70. Therefore, subject to satisfying the qualified person rule, where the fully franked Interim Dividend and the fully franked Special Dividend are received directly by a Crane shareholder, the Crane shareholder will:

- include the amount of the franking credit attached to the Interim Dividend and Special Dividend in their assessable income; and
- be entitled to a tax offset equal to the amount of the franking credit.

71. Where the fully franked Interim Dividend and Special Dividend are received by a Crane shareholder (not being an entity taxed as a corporate tax entity) that is a trustee of a trust (not being a complying superannuation fund) or a partnership, subsection 207-35(1) of the ITAA 1997 applies, subject to the trustee or partnership being a qualified person. Subsection 207-35(1) provides: If:

- (a) a \*franked distribution is made in an income year to an entity that is a partnership or the trustee of a trust; and
- (b) the entity is not a \*corporate tax entity when the distribution is made; and
- (c) if the entity is the trustee of a trust – the trust is not a \*complying superannuation entity or \*FHSA trust when the distribution is made;

the assessable income of the partnership or trust for that income year includes the amount of the \*franking credit on the distribution.

72. Therefore, subject to satisfying the qualified person rule, a Crane shareholder that is a trust or a partnership will be required to include the amount of the franking credit attached to the Interim Dividend and the Special Dividend in their assessable income under subsection 207-35(1) of the ITAA 1997.

### **Qualified persons**

73. Former Division 1A contains the measures known as the holding period rule and the related payment rule. In broad terms, former Division 1A provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' with respect to a franked distribution they have received and thus be entitled to a tax offset for the franking credit attached to the distribution.

74. The test of what constitutes a 'qualified person' is provided in former subsection 160APHO(1) of the ITAA 1936 as follows:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a *qualified person* in relation to the dividend if:

- (a) where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or

- (b) where the taxpayer or an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification period in relation to the dividend.

75. Former subsection 160APHO(2) of the ITAA 1936 sets out the holding period requirement. Broadly, if a taxpayer is not under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the primary qualification period. If a taxpayer is under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the secondary qualification period.

### **Related payment rule**

76. In order to determine which is the relevant qualification period, it is necessary to determine whether, under the present arrangement, the Crane shareholders are considered to be under an obligation to make a related payment.

77. Former section 160APHN of the ITAA 1936 provides non-definitive examples of what constitutes the making of a related payment for the purposes of former Division 1A. Former subsection 160APHN(2) provides:

The taxpayer or associate is taken, for the purposes of this Division, to have made, to be under an obligation to make, or to be likely to make, a related payment in respect of the dividend or distribution if, under an arrangement, the taxpayer or associate has done, is under an obligation to do, or may reasonably be expected to do, as the case may be, anything having the effect of passing the benefit of the dividend or distribution to one or more other persons.

### ***Interim and Special Dividends***

78. Having regard to the relevant circumstances of the FBA Offer, it cannot be said that the FBA Offer documents indicate that a Crane shareholder, or an associate, does anything that has the effect of passing the benefit of the dividend to another person in respect of the Interim and Special Dividends. The Interim and Special Dividends were paid regardless of whether or not the FBA Offer proceeded. Further, the receipt by a Crane shareholder of the Dividends did not alter the consideration the shareholder was entitled to receive pursuant to the FBA Offer.

79. As the Crane shareholders are not taken, for the purposes of former Division 1A, to have made a related payment in respect of the Interim and Special Dividends as a result of the FBA Offer, the relevant holding period is the primary qualification period pursuant to former paragraph 160APHO(1)(a) of the ITAA 1936.



80. The primary qualification period is defined in former section 160APHD of the ITAA 1936 as follows:

In relation to a taxpayer in relation to shares or an interest in shares, means the period beginning on the day after the day on which the taxpayer acquired the shares or interest and ending:

- (a) if the shares are not preference shares – on the 45th day after the day on which the shares or interest became *ex dividend*; or

...

81. The concept of 'ex-dividend' is defined in former subsection 160APHE(1) of the ITAA 1936 as follows:

a share in respect of which a dividend is to be paid, or an interest (other than an interest as a beneficiary of a widely held trust) in such a share, becomes ex dividend on the day after the last day on which the acquisition by a person of the share will entitle the person to receive the dividend.

82. The record date for the Interim Dividend and the Special Dividend was 14 February 2011. This is the last day on which acquisition by a person of a Crane share will entitle the person to receive the Interim Dividend and the Special Dividend. Accordingly, the ex-dividend date for both dividends for the purposes of former subsection 160APHE(1) of the ITAA 1936 is 15 February 2011.

83. The primary qualification period runs from the day after acquisition until 45 days after the ex-dividend date of 15 February 2011. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the Crane shares are to be excluded.

84. Crane shareholders who accepted the takeover offer will no longer be considered to hold their Crane shares 'at risk' for the purposes of former Division 1A as of 17 March 2011, which is the date the takeover offer was declared unconditional. Accordingly, for those Crane shareholders who accepted the offer, the primary qualification period would run from the day after acquisition until 16 March 2011 (inclusive). In this context, there are 45 clear days in the period from 30 January 2011 until 16 March 2011.

85. Crane shareholders who do not accept the FBA Offer but have their shares compulsorily acquired pursuant to the *Corporations Act 2011* will no longer be considered to hold their shares 'at risk' when the shares are acquired by FBA. Accordingly, for those Crane shareholders who have their shares compulsorily acquired the primary qualification period would run from the day after acquisition until the earlier of 45 days after the ex-dividend date and the date (5 May 2011) FBA completed the compulsory acquisition procedures in accordance with the *Corporations Act*.

**Capital gains tax**

86. The Ruling section details the tax consequences and the relevant legislative provisions that relate to this scheme.

87. The significant tax consequence is the availability of scrip for scrip roll-over under Subdivision 124-M of the ITAA 1997. Scrip for scrip roll-over enables a shareholder to disregard a capital gain from a share that is disposed of as part of a corporate takeover or merger if the shareholder receives a replacement share in the exchange. It also provides special rules for calculating the cost base and reduced cost base of the replacement share.

88. Subdivision 124-M of the ITAA 1997 contains a number of conditions for, and exceptions to, a shareholder being eligible to choose scrip for scrip roll-over. The main conditions that are relevant to the scheme are:

- (a) shares in a company are exchanged for shares in another company;
- (b) the exchange occurs as part of a single arrangement;
- (c) conditions for roll-over are satisfied;
- (d) further conditions are not applicable or are satisfied; and
- (e) exceptions to obtaining scrip for scrip roll-over are not applicable.

89. Under the scheme, the conditions for roll-over under Subdivision 124-M of the ITAA 1997 are satisfied. Therefore, a Crane shareholder is able to choose partial scrip for scrip roll-over for the FBL shares they receive in exchange for their Crane shares but there is no roll-over available for the cash proceeds (section 124-790 of the ITAA 1997).

***Foreign resident shareholders***

90. A Crane share is not 'taxable Australian real property' under section 855-20 of the ITAA 1997 and is not considered to be an 'indirect Australian real property interest' under section 855-25 of the ITAA 1997. Whether items 3 or 5, in the table in section 855-15 of the ITAA 1997, relate to a Crane share depends on the shareholder's circumstances:

Item 1	*Taxable Australian real property (see section 855-20)
Item 2	A *CGT asset that: <ul style="list-style-type: none"> <li>(a) is an *indirect Australian real property interest (see section 855-25); and</li> <li>(b) is not covered by item 5 of this table.</li> </ul>

Item 3	A *CGT asset that: (a) you have used at any time in carrying on a *business through a permanent establishment (within the meaning of section 23AH of the <i>Income Tax Assessment Act 1936</i> ) in Australia; and (b) is not covered by item 1, 2 or 5 of this table
Item 4	An option or right to *acquire a *CGT asset covered by item 1, 2 or 3 of this table
Item 5	A *CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident)

91. In other respects, the Ruling section provides a detailed explanation of the Commissioner's decision. Therefore, no further explanation is warranted.

### **The anti-avoidance provisions – imputation benefits**

#### **Section 204-30**

92. Section 204-30 of the ITAA 1997 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that (subsection 204-30(1)):

- (a) an \*imputation benefit is, or apart from this section would be, received by a \*member of the entity as a result of the distribution or distributions; and
- (b) the member would \*derive a \*greater benefit from franking credits than another member of the entity; and
- (c) the other member of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits.

93. Relevantly, if section 204-30 of the ITAA 1997 applies, the Commissioner is vested with discretion under subsection 204-30(3) of the ITAA 1997 to make a determination in writing either:

- (a) that a specified \*franking debit arises in the \*franking account of the entity, for a specified \*distribution or other benefit to a disadvantaged member;

or

- (c) that no \*imputation benefit is to arise in respect of a distribution that is made to a favoured member and specified in the determination.

94. For section 204-30 of the ITAA 1997 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than the members who consequently do not receive franking credits, or do not receive the same amount of franking credits as they would have had streaming not occurred.

95. Pursuant to the payment of the Interim Dividend and Special Dividend, all Crane shareholders will receive imputation benefits as a result of the dividends; the resident shareholders in the form of a tax offset (paragraph 204-30(6)(a) of the ITAA 1997) and the non-resident shareholders in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e) of the ITAA 1997). The resident shareholders will derive a greater benefit from franking credits than the non-resident shareholders (subsection 204-30(8) of the ITAA 1997).

96. However, the Interim Dividend and Special Dividend were paid to all Crane Shareholders and were fully franked with Australian franking credits.

97. Accordingly, it cannot be argued that Crane directed the flow of distributions in such a manner as to stream the imputation benefits such that one class of members derived a greater benefit from the franking credits attached to the Interim Dividend and Special Dividend, while the other members received lesser or no imputation benefits.

98. As the conditions in subsection 204-30(1) of the ITAA 1997 for the provision to apply will not be met, the Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefit received in relation to the Interim Dividend and Special Dividend.

### **Section 177EA**

99. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes seeking to obtain a tax advantage in relation to imputation benefits. Subsection 177EA(3) of the ITAA 1936 provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
  - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
  - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, a person (the *relevant taxpayer*) would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and

- (e) 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 (whether or not the dominant purpose, but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

100. If section 177EA of the ITAA 1936 applies, the Commissioner may make a determination under subsection 177EA(5) of the ITAA 1936 that either a franking debit arises to the company in respect of each distribution paid to the relevant taxpayer (paragraph 177EA(5)(a)) of the ITAA 1936 or, in the alternative, that no franking credit benefit arises in respect of a distribution paid to the relevant taxpayer (paragraph 177EA(5)(b)) of the ITAA 1936.

101. Crane is a corporate tax entity. The disposal of the ordinary shares in Crane pursuant to the proposal is a scheme for the disposition of membership interests. The fully franked Interim Dividend and Special Dividend are frankable distributions that were paid to Crane shareholders who could, therefore reasonably be expected to receive imputation benefits.

102. In the present case, the conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether having regard to the relevant circumstances of the scheme, it would be concluded that, on the part of Crane or its shareholders, there is a purpose, more than merely an incidental purpose, of conferring an imputation benefit under the proposal.

103. In arriving at a conclusion, the Commissioner must have regard to the relevant circumstances of the arrangement which include, but are not limited to, the circumstances set out in subsection 177EA(17) of the ITAA 1936. The relevant circumstances listed there encompass a range of circumstances which taken individually or collectively could indicate the requisite purpose. Due to the diverse nature of these circumstances, some may not be present at any one time in any one scheme.

104. The relevant circumstances of the arrangement indicate that there is no requisite purpose of conferring an imputation benefit under the arrangement. The Interim Dividend and Special Dividend were fully franked, which is a continuation of Crane's dividend policy to pay fully franked dividends. The Interim Dividend and Special Dividend were paid to all shareholders in proportion to their shareholding and calculated by reference to existing retained profits of Crane. The amount of the Interim Dividend and Special Dividend allows Crane shareholders to share in the accumulated profits of Crane.

105. Having regard to the relevant circumstances of the scheme, the Commissioner has come to the view that the requisite purpose is not present and accordingly the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the dividends.

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

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