


# ***CR 2019/58 - DuluxGroup Limited - Employee Share Scheme - Employee Share Investment Plan shares disposed of under scheme of arrangement***

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## Class Ruling

### DuluxGroup Limited – Employee Share Scheme – Employee Share Investment Plan shares disposed of under scheme of arrangement

#### **❶ Relying on this Ruling**

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

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#### **What this Ruling is about**

1. This Ruling sets out the tax consequences for employees in respect of their shares in DuluxGroup Limited (Dulux) acquired under the DuluxGroup Employee Share Investment Plan (the ESIP) which were:
  - disposed of under the scheme of arrangement to Nippon Paint Holdings Co., Ltd. or one of its wholly-owned subsidiaries (Nippon), and
  - not held for three years.
2. Full details of the disposal of ESIP shares are set out in paragraphs 10 to 27 of this Ruling.
3. All legislative references are to provisions of the *Income Tax Assessment Act 1997* unless otherwise indicated.

**Who this Ruling applies to**

4. This Ruling applies to you if you:

- were an employee or director (collectively, employee) of Dulux or a wholly-owned subsidiary of Dulux (collectively, DuluxGroup)
- acquired fully paid ordinary shares in Dulux (Dulux shares) which were offered under the ESIP Rules (ESIP shares) in either or both December 2016 (the 2016 offer) and December 2017 (the 2017 offer)
- were entitled to reduce the amount included in your assessable income in the income year or income years in which you acquired your ESIP shares in accordance with section 83A-35, which includes:
  - in each year of income you were granted Dulux shares, your taxable income and certain other amounts was less than \$180,000, and
  - immediately after you were granted your Dulux shares under the 2016 offer and/or the 2017 offer, you did not hold a beneficial interest in more than 10% of Dulux shares.
- disposed of your ESIP shares in accordance with the scheme of arrangement under which Nippon acquired all of the Dulux shares on issue
- were employed by the DuluxGroup at all times from the time you were granted your Dulux shares under the ESIP until the date that all Dulux shares were transferred to Nippon under the scheme of arrangement (the Implementation Date), and
- held your ESIP shares at all times from the time you acquired your shares until 21 August 2019 (the Implementation Date).

5. This Ruling does not apply to you if you are subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 10 to 27 of this Ruling.

6. This Ruling also does not apply to you in respect of any Dulux shares you obtained as a Dulux employee, executive or participant under the *DuluxGroup Long Term Equity Incentive Plan* or similar share incentive plan as a result of the exercise of share rights on or after 17 April 2019.

**When this Ruling applies**

7. This Ruling applies from 1 July 2016 to 30 June 2020.

**Ruling**

8. The Commissioner will allow the minimum holding period to end at the earlier time of 21 August 2019 for Dulux shares acquired under the ESIP (paragraph 83A-45(5)(a)).

9. The first element of the cost base or reduced cost base of the Dulux shares, or of each parcel of relevant shares, is the market value of those shares when the shares were acquired (subsection 83A-30(1)).

## **Scheme**

10. The following description of the scheme is based on information provided by the applicant as well as the Scheme Implementation Deed (SID) executed by Dulux on 17 April 2019, the Scheme Booklet dated 17 June 2019 and the ESIP Rules, guides and invitations made to Dulux employees and executives under the ESIP. If the scheme is not carried out as described, this Ruling cannot be relied upon.

### **Relevant entities**

#### ***Dulux***

11. Dulux is an Australian resident company which listed on the Australian Securities Exchange on 12 July 2010 following the demerger from Orica Limited. Until Dulux was delisted on 22 August 2019 pursuant to the scheme of arrangement, Dulux remained a widely held, listed company.

12. As at 14 June 2019, Dulux had 389,250,252 ordinary shares on issue.

#### ***Nippon***

13. Nippon was established in 1881 and is listed on the Tokyo Stock Exchange. Nippon operates in 26 countries, and prior to its acquisition of Dulux, Nippon had no operations in Australia.

### **Employee Share Investment Plan**

14. Dulux established the ESIP in 2010 as a broad based employee share plan. The ESIP is operated in accordance with the ESIP Rules.

15. An employee or category of employees who is or are eligible to receive grants of Dulux shares under the ESIP are referred to as 'Participants' under the ESIP Rules.

16. Under the 2016 offer, eligible employees were invited by the Board of Dulux (the Board) to agree to forego either \$500 or \$1,000 of their total remuneration (by way of salary sacrifice) in return for Dulux granting them with shares of that value. Dulux did not match or grant them with any additional amount. The shares were allotted on 15 December 2016.

17. Under the 2017 offer, eligible employees were invited by the Board to agree to forego \$500 of their total remuneration (by way of salary sacrifice) in return for Dulux matching the amount and granting them with shares of \$1,000 in value. The shares were allotted on 22 December 2017.

18. When the 2016 offer and the 2017 offer were each made, the Board invited at least 75% of the eligible employees of DuluxGroup who:

- had completed at least 3 years of service (whether continuous or non-continuous)
- were non-probationary full-time or permanent part-time employees of DuluxGroup, and
- were Australian residents,

to acquire Dulux shares under the ESIP.

19. No offers were made under the ESIP after the 2017 offer.

20. Under the ESIP, Dulux granted:

- 164,105 shares to eligible employees under the 2016 offer, and
- 192,906 shares to eligible employees under the 2017 offer,

which continued to be subject to the '3 years minimum holding period' at the Implementation Date.

21. At all times from when the 2016 offer and 2017 offer were each made, Dulux operated the ESIP such that all the shares acquired under the ESIP were not permitted to be disposed of during the minimum holding period in accordance with the requirements of subsections 83A-45(4) and (5).

22. The number of shares issued under the ESIP was:

- for the 2016 offer, calculated as the amount each eligible employee chose to salary sacrifice (either \$500 or \$1,000) divided by the 5-day trading volume weighted average price (VWAP) of the ordinary shares for the period up to and including 13 December 2016, rounded down to the nearest whole number
- for the 2017 offer, calculated as \$1,000 (\$500 salary sacrifice amount and \$500 matching amount) divided by the 5-day trading VWAP of the ordinary shares for the period up to and including 20 December 2017, rounded down to the nearest whole number.

23. For each offer, eligible employees may have acquired Dulux shares with an aggregate market value of slightly less than \$500 (under the 2017 offer) or \$1,000 (under the 2016 and 2017 offer).

24. Under the ESIP Rules, an eligible employee:

- was entitled to apply for shares in their name only and not on behalf of any other person or entity
- with the exception of ceasing their employment with Dulux, was subject to a restriction period of 3 years on the sale, transfer or disposal of their Dulux shares in any way under the ESIP Rules and the guide for each offer. The restriction period in the ESIP Rules applied where:

... the invitation consists of an offer which complies with the provisions in Subdivision 83A-B ... then ... a Share allocated to a Participant under the Plan will be a Restricted Share until the earlier of:

- (a) the end of 3 years after the date of allocation; and
- (b) the time when the Participant ceases to be employed by any Group ... Company.

- faced no risk of forfeiture of the shares, and
- was granted shares which ranked equally:
  - ... in all respects with other shares in the Company for the time being on issue except as regards any rights attaching to such Shares by reference to a record date prior to the date of allotment.

### **Scheme of arrangement**

25. On 17 April 2019, Dulux entered into a binding SID with Nippon under which Nippon would acquire all of the issued shares in Dulux by way of a court ordered scheme of arrangement pursuant to Part 5.1 of the *Corporations Act 2001*.

26. On 21 August 2019, Nippon acquired all ordinary shares in Dulux including all shares held by employees in the ESIP pursuant to the scheme of arrangement.

#### **Other matters**

27. Dulux did not enter into any formal discussions with another entity concerning a takeover or some other acquisition of all of Dulux shares from the start of 2015 until December 2017.

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**Commissioner of Taxation**

25 September 2019

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**Appendix – Explanation**

**❶** *This Explanation 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.*

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**When the minimum holding period ends**

28. Dulux shares you acquired under the ESIP were ESS interests subject to Division 83A.

29. By way of salary sacrifice, you agreed to forego part of your total remuneration in return for Dulux:

- granting you shares of a similar value (2016 offer), and/or
- granting shares by matching the remuneration foregone in the value of shares provided (2017 offer).

Therefore, you are considered not to have paid any consideration for the shares. Subdivision 83A-B applied to you as you acquired your ESIP shares at a discount equal to their market value on the date or dates of grant (sections 83A-20 and 83A-30).

30. Generally, you were required to include the discount in your assessable income for the income year in which you acquired the shares (subsection 83A-25(1)). While you were entitled to reduce the amount of the discount included in your assessable income under subsection 83A-25(1) (subsection 83A-35(1)), you were prevented from reducing the amount by more than \$1,000 (paragraph 83A-35(2)(a)). This reduction is only available where:

- your adjusted taxable income for the income year in which you acquired the shares under the ESIP did not exceed \$180,000 (paragraph 83A-35(2)(b)), and
- you acquired your Dulux shares in circumstances where subsection 83A-35(6), subsection 83A-35(7) and section 83A-45 apply (paragraphs 83A-35(1)(a) and (b)). These provisions are discussed in paragraphs 31 to 37 of this Ruling.

31. Subsection 83A-35(6) was satisfied as, when you acquired Dulux shares under the ESIP, the ESIP was operated on a non-discriminatory basis where offers to acquire ordinary shares in Dulux were made to at least 75% of the permanent employees of DuluxGroup who had completed at least 3 years of service with DuluxGroup (whether continuous or non-continuous) and who were Australian residents.

32. Subsection 83A-35(7) was satisfied as under the ESIP Rules, you and other employees who acquired Dulux shares under the ESIP were not at risk of forfeiting the shares other than by way of disposal.

33. The conditions of section 83A-45 were satisfied at the time when the shares were granted under the ESIP as:

- the shares were granted after 1 July 2015
- you were employed by Dulux or a subsidiary of Dulux (subsection 83A-45(1))
- all the shares provided under the ESIP Rules were fully paid ordinary shares (subsection 83A-45(2)), and
- the predominant business of Dulux was not the acquisition, sale or holding of shares, securities or other investments (whether directly or indirectly through one or more companies, partnerships or trusts) (subsection 83A-45(3)).

34. The ESIP must also satisfy the 'minimum holding period' requirements (subsections 83A-45(4) and (5)).

35. The 'minimum holding period' requires that at all times starting from when the shares were granted (15 December 2016 and 22 December 2017), the ESIP was operated in such a way that each employee who acquired shares under the ESIP was not permitted to dispose of the shares during the 'minimum holding period' (subsection 83A-45(4)).

36. Relevantly, the 'minimum holding period' commenced when the shares were acquired under the ESIP on either or both 15 December 2016 and 22 December 2017 (as the case may be) and ending at the earlier of:

- 3 years later, or such earlier time as the Commissioner allows if the Commissioner is satisfied that:
  - Dulux intended that the requirements as set out in subsection 83A-45(4) would apply to the shares acquired under the ESIP during the 3 years after that acquisition of those shares (subparagraph 83A-45(5)(a)(i)), and
  - at the earlier time that the Commissioner allows, all shares in Dulux were disposed of under a particular scheme (subparagraph 83A-45(5)(a)(ii)), or
- when the employee ceased employment with Dulux (paragraph 83A-45(5)(b)).

37. The terms of the scheme of arrangement required employees who acquired shares under the ESIP to dispose of the shares in the same manner as other ordinary shareholders in Dulux. This resulted in you and other employees disposing of the shares acquired under the ESIP before the three year 'minimum holding period' requirement. However, where the Commissioner is satisfied that the conditions in subsection 83A-45(5) are met, he may allow the 'minimum holding period' to end at an earlier time so that a disposal under the scheme of arrangement does not breach the 'minimum holding period' requirement (subsection 83A-45(5)).

38. Employees who acquired shares under the ESIP were prevented from disposing of them from the date they acquired them until the earlier of the date of three years after that date, or until the day after the date they ceased employment with Dulux (restriction period). The ESIP Rules did not provide for an exemption from, or for non-compliance with, the restriction period. Therefore, the Commissioner is satisfied that Dulux, as the scheme operator, intended that subsection 83A-45(4) would apply to the shares acquired under the ESIP during the three years after they were acquired for the purposes of subparagraph 83A-45(5)(a)(i).

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39. On 21 August 2019, being the earlier time the Commissioner considered allowing (for the purposes of subsection 83A-45(5) (see paragraph 36 of this Ruling)), the Commissioner is satisfied that all membership interests in Dulux, including shares acquired under the ESIP, were disposed of under the scheme of arrangement for the purposes of subparagraph 83A-45(5)(a)(ii).

40. The Commissioner is satisfied that the requirements of subparagraphs 83A-45(5)(a)(i) and (ii) are met and will allow a modified minimum holding period ending at the earlier time on 21 August 2019. In allowing the minimum holding period to end at the earlier time of 21 August 2019, the Commissioner specifically considered those issues described in paragraphs 24, 25, 26 and 38 of this Ruling.

41. Therefore, you will continue to be entitled to the reduction in your assessable income under section 83A-35 discussed in paragraph 30 of this Ruling.

## CR 2019/51

42. Class Ruling CR 2019/51 *DuluxGroup Limited – Scheme of Arrangement and payment of interim and special dividends* applies to you as individuals in respect of the scheme consideration amount of \$9.37, the interim dividend of \$0.15 and the special dividend of \$0.28.

**References***Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10; CR 2019/51

*Legislative references:*

- |                          |                              |
|--------------------------|------------------------------|
| - ITAA 1997              | - ITAA 1997 83A-35(2)        |
| - ITAA 1997 Div 83A      | - ITAA 1997 83A-35(2)(a)     |
| - ITAA 1997 83A-20       | - ITAA 1997 83A-35(2)(b)     |
| - ITAA 1997 83A-25       | - ITAA 1997 83A-35(6)        |
| - ITAA 1997 83A-25(1)    | - ITAA 1997 83A-35(7)        |
| - ITAA 1997 83A-30       | - ITAA 1997 83A-45           |
| - ITAA 1997 83A-30(1)    | - ITAA 1997 83A-45(1)        |
| - ITAA 1997 83A-35       | - ITAA 1997 83A-45(2)        |
| - ITAA 1997 83A-35(1)    | - ITAA 1997 83A-45(3)        |
| - ITAA 1997 83A-35(1)(a) | - ITAA 1997 83A-45(4)        |
| - ITAA 1997 83A-35(1)(b) | - ITAA 1997 83A-45(5)        |
|                          | - ITAA 1997 83A-45(5)(a)     |
|                          | - ITAA 1997 83A-45(5)(a)(i)  |
|                          | - ITAA 1997 83A-45(5)(a)(ii) |
|                          | - ITAA 1997 83A-45(5)(b)     |
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|                          | - Corporations Act 2001      |

## ATO references

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