



Class Ruling

Income tax: 2012-14 Qantas Long Term Incentive Plan

Contents	Para
----------	------

LEGALLY BINDING SECTION:

What this Ruling is about	1
----------------------------------	----------

Date of effect	8
-----------------------	----------

Scheme	9
---------------	----------

Ruling	30
---------------	-----------

NOT LEGALLY BINDING SECTION:

Appendix 1:

Explanation	39
--------------------	-----------

Appendix 2:

Detailed contents list	76
-------------------------------	-----------

ⓘ 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:

- Division 83A of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Subdivision 83A-C of the ITAA 1997;
- section 83A-120(3) of the ITAA 1997;
- subsection 83A-120(6) of the ITAA 1997;
- section 83A-330 of the ITAA 1997; and
- subsection 130-80(1) 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 is employees of Qantas Airways Limited (Qantas) and its subsidiary, Jetstar Airways Pty Limited (the Qantas Group) who:

- are granted a right under the Long Term Incentive Plan (the Plan) to an award; and
- are residents of Australia within the meaning of that expression in subsection 6(1) of the *Income Tax Assessment Act 1936*.

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

Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement 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 29 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.

7. This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration
Copyright and Classification Policy Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

or posted at: <http://www.ag.gov.au/cca>

Date of effect

8. This Ruling applies from 1 July 2011 to 30 June 2015. The Ruling continues to apply after 30 June 2015 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

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

- the request for Class Ruling dated 24 April 2012;
- Qantas Employee Share Plan Trust Deed dated 12 August 2010;
- Qantas Long Term Incentive Plan Terms and Conditions – approved by Qantas Remuneration Committee Chairman (under Board delegation) on 12 August 2010 (the Plan Terms);
- 2012-14 Long Term Incentive Plan Invitation Letter (the Invitation Letter);
- Qantas Code of Conduct and Ethics (the Code);
- Qantas Employee Share Trading Procedure; and
- correspondence from Qantas providing further particulars.

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

The Plan

10. The Plan provides a means for the delivery of equity ownership to Qantas Group employees. The objectives of the Plan are to, amongst other things, align the interests of executives and shareholders and provide an incentive for the retention of key executives.

The Plan Terms and Invitation Letter

11. The Chief Executive Officer of Qantas sends out Invitation Letters to selected employees of the Qantas Group outlining the following information:

- the number of rights being granted or the subject of the invitation (Rights);
- details of any performance or service related conditions which must be satisfied before Rights vest (Conditions);
- the time at which Rights may vest;
- the circumstances in which Rights lapse; and
- any other relevant terms and conditions to be attached to the Rights or Shares acquired on vesting of Rights.

12. Employees are deemed to have accepted the Rights if contrary action is not taken within 10 business days from issue of the invitation.

13. Vesting of the Rights is subject to Qantas achieving various Performance Hurdles during the period between 1 July 2011 and 30 June 2014 (Performance Period).

14. No consideration is payable upon the grant or vesting of the Rights.

15. The Rights are not transferable and may not be dealt with (except with Board approval or by force of law upon death or bankruptcy).

16. To the extent the Performance Hurdles have been achieved, the Rights will generally vest, provided the participant remains employed by the Qantas Group at the date of vesting and does not commit an act of gross misconduct in relation to the Qantas Group. 'Gross misconduct' means an act or omission justifying summary dismissal.

17. Once the Rights vest, Qantas must deliver one Qantas Share (Share) for each Right, at no cost to the participants.

18. The Shares are acquired on market by the Trustee of the Qantas Employee Share Plan Trust prior to the allocation to participants on the vesting of Rights.

19. Unless the Board otherwise determines, Rights not vested will lapse if a participant:

- ceases employment with the Qantas Group;
- resigns in circumstances not approved by the Board;
- is terminated for cause; or
- is terminated in other circumstances determined by the Board to involve unacceptable performance or conduct.

20. Where a participant's employment ceases before vesting of the Rights, the Board has the discretion to determine that instead of lapsing their Rights:

- some or all of the Rights that have not vested at the date of cessation of employment will not lapse; or
- some or all of the Rights that have not vested will vest at the date of cessation of employment.

21. Where, in the opinion of the Board, a participant:

- acts fraudulently or dishonestly; or
- is in breach of his or her obligations to the Group,

the Board may:

- deem all or any unvested Rights of the participant to have lapsed; and/or
- deem all or any Shares held by the participant following the vesting of the Rights to be forfeited; and/or
- where Shares that have been allocated to the participant upon vesting or exercise of the Rights are subsequently sold, require the participant to repay the net proceeds of such a sale to Qantas.

22. Where, in the opinion of the Board, a Right vests, or may vest as a result of the fraud, dishonesty or breach of obligations of an employee of the Qantas Group other than the participant, and in the opinion of the Board, the Right would not otherwise have vested, the Board may determine any treatment in relation to the Right (including resetting conditions, deeming Shares to be forfeited and/or new Rights be allocated) to ensure that no unfair benefit is obtained by a participant as a result of the actions of another person.

23. In any case, any Rights for which the Performance Hurdle is not met after the testing will lapse.

24. The Qantas Employee Share Trading Policy as contained in the Code restricts certain employees (Nominated Qantas Employees) from disposing of their shares and may restrict employees from dealing in shares at certain times.

25. If bonus shares are issued or there is a capital reorganisation, the Board will determine any adjustments to the number of Rights to which each participant is entitled. If new Rights are granted, such Rights will be subject to the same (or no less favourable) terms and conditions as the original Rights.

26. In the event of a takeover or change of control, the Board may bring forward the time of vesting and alter the Conditions of vesting. If vesting has already occurred, all vested Rights must be converted into Shares within 30 days of the change of control event.

27. The Shares, acquired under the Plan upon the Rights vesting, will be fully paid ordinary shares in Qantas and, subject to compliance with the insider trading provisions of the *Corporations Act 2001*, will be acquired on-market.

28. Immediately after the acquisition of the Rights through the Plan, no participant holds more than 5% of the shares in Qantas or is in a position to cast, or control the casting of more than 5% of the maximum number of votes that might be cast at a general meeting of Qantas.

29. The predominant business of Qantas is not the acquisition, sale or holding of shares, securities or other investments, whether directly or indirectly through one or more companies, partnerships or trusts.

Ruling

30. Where a participant acquires a Right under the Plan, the Right will be an ESS interest acquired under an employee share scheme and Division 83A will apply to the interest.

31. The Rights acquired by participants under the Plan are at real risk of forfeiture and consequently, Subdivision 83A-C will apply to the ESS interests.

32. No amount will be included in a participant's assessable income in relation to the Right until the ESS deferred taxing point occurs under Subdivision 83A-C.

33. The ESS deferred taxing point for Rights acquired by a participant under the Plan will be the earlier of the following times:

- the time when the participant's Rights can no longer be forfeited and the participant is first able to dispose of the Rights, or the Shares acquired on exercise of the Rights;
- the time when the participant ceases the employment in respect of the which they acquired the Rights, within the meaning of section 83A-330; and
- seven years after the participant acquired the Rights (subsection 83A-120(6)).

However, if a participant disposes of the Rights or Shares acquired on vesting of the Rights within 30 days after the first occurrence of one of the above times, the ESS deferred taxing point will instead be the time of the disposal.

34. The amount to be included in assessable income will be the market value of the Shares at the ESS deferred taxing point reduced by the cost base of the interest.

35. Where, in relation to a Right acquired under the Plan:

- an amount is included in a participant's assessable income under Subdivision 83A-C;
- the participant forfeits or loses the Right under the rules of the Plan; and
- the forfeiture or loss is not the result of a choice by the participant, other than a choice to cease employment,

then the inclusion of the amount in assessable income is taken to have never have happened.

36. Where the ESS deferred taxing point occurs before disposal of the ESS interest, then for capital gains tax (CGT) purposes:

- a participant is deemed to have acquired, at its market value, the Rights (or the Shares acquired as a result of the vesting of the Rights) immediately after the ESS deferred taxing point; and
- the first element of the cost base and reduced cost base of the Rights (or the Shares acquired as a result of the vesting of the Rights) is their market value immediately after the ESS deferred taxing point.

37. If the ESS interest was disposed of at the ESS deferred taxing point (including an ESS deferred taxing point under the 30 day rule in subsection 83A-120(3)), any capital gain or loss is disregarded by subsection 130-80(1).

38. A participant will not make a capital gain or a capital loss from forfeiture of a Right.

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.*

Application of Division 83A

39. Division 83A applies to shares, rights and stapled securities acquired under an employee share scheme on or after 1 July 2009.

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

41. An ESS interest in a company is defined in subsection 83A-10(1) as a beneficial interest in:

- (a) a share in the company; or
- (b) a right to acquire a beneficial interest in a share in the company.

42. The Rights issued under the Plan are rights to acquire a beneficial interest in a share in a company. The Plan is an employee share scheme as the Plan provides ESS interests to employees of the Qantas Group who are participants in the Plan.

43. Following satisfaction of the Performance Hurdles at the end of the Performance Period, the delivery of Shares to a participant results in the transfer of full ownership of the Shares to the participant.

44. Where an ESS interest is acquired under an employee share scheme at a discount on or after 1 July 2009, the discount in relation to the ESS interest is included in the assessable income of an employee, in accordance with Division 83A.

45. As participants acquired the Rights at a discount, pursuant to subsection 83A-20(1), Subdivision 83A-B will apply to the Rights acquired by participants under the Plan, unless Subdivision 83A-C applies.

Assessability of rights under Subdivision 83A-C

46. Subdivision 83A-C allows for the deferral of tax on the amount assessable in respect of an ESS interest if certain conditions are satisfied. Subdivision 83A-C applies if the following conditions are satisfied:

- (a) subdivision 83A-B would, apart from section 83A-105, apply to the interest; and
- (b) subsections 83A-35(3), (4), (5) and (9) apply to the interest; and
- (c) there is a real risk that an employee will forfeit or lose the interest (other than by disposing of it, exercising the right or letting it lapse) pursuant to subsection 83A-105(3).

47. In relation to the first condition, Subdivision 83A-B would, apart from subsection 83A-105(1), apply to the Right because the right:

- is a beneficial interest in a right to acquire a beneficial interest in an ordinary share of Qantas; and
- is provided to employees of the Qantas Group in relation to their employment, and will be provided for nil consideration (that is, at a discount).

48. In relation to the second condition, subsections 83A-35(3), (4), (5) and (9) apply to each Right granted to a participant because:

- when the Right is acquired, the participant is employed by a company in the Qantas Group (subsection 83A-35(3));
- all of the ESS interests available for acquisition under the Plan relate to ordinary shares in the capital of Qantas (subsection 83A-35(4));
- the predominant business of Qantas is not the acquisition, sale or holding of shares, securities or other investments, directly or indirectly (subsection 83A-35(5)); and
- after the acquisition of the Right, a participant will not hold a beneficial interest in more than five per cent of the shares in Qantas nor be in a position to cast, or control the casting of, more than five per cent of the maximum number of votes that might be cast at a general meeting of Qantas (subsection 83A-35(9)).

Real risk of forfeiture

49. In relation to the third condition, Subdivision 83A-C applies to a right if, under the conditions of the Plan when the right is granted, there is a real risk that a participant will forfeit or lose the right (other than by disposing of it, exercising the right or letting it lapse).

50. Real risk of forfeiture in a scheme may include conditions where retention of the ESS interests is subject to performance hurdles or a minimum term of employment. In cases where an employee share scheme has both employment and performance conditions to be met, and one of these conditions satisfies the 'real risk of forfeiture' test, it is not necessary to consider whether the other condition also satisfies the test.

51. As the Rights a participant acquires under the Plan are subject to forfeiture if the participant ceases employment before the vesting time, it is accepted that the real risk of forfeiture test is met.

52. As a result, Subdivision 83A-C applies to the Rights, and Subdivision 83A-B does not apply. The taxation of the Rights received under the Plan will be deferred until a deferred taxing point occurs.

ESS deferred taxing point

53. Section 83A-120 provides the rules for determining when the ESS deferred taxing point occurs for rights to acquire shares. This will be the earlier of the following times:

- when a participant ceases the employment (within the meaning of section 83A-330) in respect of which they acquired the rights;
- seven years after a participant acquired the rights;
- when the right has not been exercised, there is no real risk of forfeiting the right, and the scheme no longer genuinely restricts disposal of the right; and
- when there is no real risk of forfeiting the right or underlying share, and the scheme no longer genuinely restricts exercise of the right or disposal of the resulting share.

54. However, if a participant disposes of the vested rights or disposes of the shares within 30 days of the time worked out above, the ESS deferred taxing point will instead be the time of disposal.

55. The word 'exercise' as used in Division 83A is not a defined word, thus it should take its ordinary meaning having regard to its legislative context and the purpose or object of the statute. For the purposes of Division 83A, the concept of 'exercising a right' is not considered to necessarily require an action or activity by the beneficial owner of the right. It is enough that they become the beneficial owner of the share that was the subject of the right, without having to do anything, that is, it happens automatically or is instigated by the employer or another party. Therefore, a participant is taken to have exercised the Rights when Shares are allocated on vesting of the Rights.

56. Where a participant's Rights vest, the ESS deferred taxing point in relation to these ESS interests will (subject to the 30 day rule) be the earlier of:

- the first time when the Shares acquired on vesting of those Rights are no longer subject to disposal restrictions (including any restrictions imposed by the Qantas Employee Share Trading Policy);
- the time when the participant ceases employment (where they do not forfeit the Rights, or Shares exercised from such Rights, on ceasing employment); and
- seven years from the date the participant was deemed to have accepted the Rights.

However, where a participant disposes of the Shares within 30 days of the earlier of the above times, the ESS deferred taxing point will be the date of disposal.

Amount to be included in assessable income

57. In accordance with section 83A-110, the amount to be included in assessable income at the ESS deferred taxing point will be the market value of the ESS interest reduced by the cost base of the interest.

58. Where an ESS interest is a right, and that right has been exercised at or before the ESS deferred taxing point, the ESS interest is the share acquired on exercise of the right.

59. As no consideration is paid by a participant to acquire or exercise the Right, the amount included in a participant's assessable income at the ESS deferred taxing point is the market value of the Share acquired from exercising the Right at the ESS deferred taxing point.

60. Where a participant disposes of the Right or Share acquired on exercise of the Right within 30 days after what would otherwise be the ESS deferred taxing point, the ESS deferred taxing point will instead be the time of the disposal (paragraph 83A-120(3)(b)). The amount included in a participant's assessable income will be the market value of the Share at the time of disposal.

Forfeiture

61. Section 83A-310 provides that an amount included in assessable income by Division 83A in relation to an ESS interest will be excluded if:

- either:
 - (i) the individual forfeits the interest; or
 - (ii) in the case of an ESS interest that is a beneficial interest in a right – the individual forfeits or loses the interest (without having disposed of the interest or exercised the right); and
- the forfeiture or loss is not the result of:
 - (i) a choice made by the individual (other than a choice by that individual to cease particular employment); or
 - (ii) a condition of a scheme that has the direct effect of protecting (wholly or partly) the individual against a fall in the market value of the interest.

62. Where, in relation to a Right acquired under the Plan:

- an amount is included in a participant's assessable income under Subdivision 83A-C;
- a participant forfeits or loses the Right (without having disposed of the interest or exercised that Right); and
- the forfeiture or loss is not the result of a choice by a participant, other than a choice to cease employment,

then, under section 83A-310, the inclusion of the amount in assessable income is taken never to have happened.

CGT consequences of forfeiture

63. Where the Rights are forfeited on or before the ESS deferred taxing point, CGT event C2 happens in accordance with subsection 104-25(1).

64. Where CGT event C2 happens, a capital gain is made if the capital proceeds from the event are more than the asset's cost base. A capital loss is made if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)). In accordance with subsection 130-80(2), where CGT event C2 happens because a Right is forfeited on or before the ESS deferred taxing point, subsection 130-80(1) does not apply to disregard any capital gain or capital loss.

65. Although a participant pays no consideration for a Right, the market value substitution rule for cost base and reduced cost base in section 112-20 does not apply, in accordance with subsection 130-80(4).

66. Although a participant receives no capital proceeds from the forfeiture of a Right, the market value substitution rule for capital proceeds in section 116-30 also does not apply, in accordance with subsection 130-80(4).

67. Therefore, as a result of subsection 130-80(4), a participant will not make a capital gain or a capital loss (if there are no amounts included in elements of the reduced cost base under section 110-55 other than the first element) from forfeiting a Right.

Time of acquisition of shares

68. The time of acquisition of a Share acquired pursuant to a Right to which this ruling applies is immediately after the ESS deferred taxing point of the Right, unless the ESS deferred taxing point occurs at the time the interest is disposed of, in accordance with section 83A-125.

First element of the cost base of shares

69. The first element of the cost base and reduced cost base of a Share acquired by a participant pursuant to a Right to which this ruling applies is the market value of the Share immediately after the ESS deferred taxing point of the Right, in accordance with section 83A-125, section 112-15, subsection 110-25(2) and subsection 110-55(2).

Disposal within 30 days

70. Where the ESS deferred taxing point of a right happens at the time of disposal of the share acquired pursuant to the right, any capital gain or capital loss made by a participant from that disposal is disregarded in accordance with subsection 130-80(1). Therefore, where the Shares acquired on vesting of the Rights under the Plan are disposed of within 30 days of the ESS deferred taxing point, any capital gain or capital loss made by a participant is disregarded.

Disposal after 30 days

71. CGT event A1 happens if there is a change in ownership of a CGT asset from one entity to another. Where a participant disposes of a Share, the disposal will constitute a CGT event A1 (section 104-10).

72. A capital gain is made if the capital proceeds from the disposal are more than the Share's cost base. A capital loss is made if those capital proceeds are less than the Share's reduced cost base (subsection 104-10(4)).

73. Subsection 116-20(1) provides that the capital proceeds from a CGT event is the total of:

- the money received or entitled to be received; and
- the market value of any property received or entitled to be received (worked out as at the time of the event).

74. Consequently, the capital gain, with respect to a Share, will be equal to the money and the market value of any property the participant receives in respect of the disposal less the sum of the market value of the Share at the ESS deferred taxing point and the other elements of the cost base identified in accordance with section 110-25.

Discount capital gain

75. A participant who makes a capital gain from the disposal of Shares may be entitled to treat the gain as a discount capital gain in respect of those Shares that have been held for at least 12 months, provided the other requirements of Subdivision 115-A are satisfied (section 115-25).

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	4
Date of effect	8
Scheme	9
The Plan	10
The Plan Terms and Invitation Letter	11
Ruling	30
Appendix 1 – Explanation	39
Application of Division 83A	39
Assessability of rights under Subdivision 83A-C	46
<i>Real risk of forfeiture</i>	49
ESS deferred taxing point	53
Amount to be included in assessable income	57
Forfeiture	61
<i>CGT consequences of forfeiture</i>	63
<i>Time of acquisition of shares</i>	68
<i>First element of the cost base of shares</i>	69
<i>Disposal within 30 days</i>	70
<i>Disposal after 30 days</i>	71
<i>Discount capital gain</i>	75
Appendix 2 – Detailed contents list	76

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- acquisition of shares
- capital gains tax
- CGT event
- cost base
- disposal of shares
- employee share ownership
- employee share scheme
- ESS deferred taxing point
- ESS interest
- real risk of forfeiture

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997 Div 83A
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(2)
- ITAA 1997 83A-B
- ITAA 1997 83A-20(1)
- ITAA 1997 83A-25(1)
- ITAA 1997 83A-35(3)
- ITAA 1997 83A-35(4)
- ITAA 1997 83A-35(5)
- ITAA 1997 83A-35(9)
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-105
- ITAA 1997 83A-105(1)
- ITAA 1997 83A-105(3)
- ITAA 1997 83A-110
- ITAA 1997 83A-120
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-120(6)
- ITAA 1997 83A-125
- ITAA 1997 83A-310
- ITAA 1997 83A-330
- ITAA 1997 104-10
- ITAA 1997 104-10(4)
- ITAA 1997 104-25(1)
- ITAA 1997 104-25(3)
- ITAA 1997 110-25
- ITAA 1997 110-25(2)
- ITAA 1997 110-55
- ITAA 1997 110-55(2)
- ITAA 1997 112-15
- ITAA 1997 112-20
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25
- ITAA 1997 116-20(1)
- ITAA 1997 116-30
- ITAA 1997 130-80(1)
- ITAA 1997 130-80(2)
- ITAA 1997 130-80(4)
- TAA 1953
- Copyright Act 1968
- Corporations Act 2001

ATO references

NO: 1-3WE8C2K

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Assessable income ~~ employee share schemes