

CR 2006/131 - Income tax: Qantas Deferred Share Plan - 2005 Performance Shares



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Class Ruling

Income tax: Qantas Deferred Share Plan – 2005 Performance Shares

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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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are 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:

- section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139BA of the ITAA 1936;
- section 139C of the ITAA 1936;
- section 139CA of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CD of the ITAA 1936;
- section 139CE of the ITAA 1936;
- section 139E of the ITAA 1936;
- section 139FA of the ITAA 1936;

- section 139FB of the ITAA 1936;
- section 139G of the ITAA 1936;
- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 109-5 of the ITAA 1997;
- section 115-5 of the ITAA 1997;
- section 115-30 of the ITAA 1997;
- section 115-100 of the ITAA 1997;
- section 130-80 of the ITAA 1997; and
- section 130-83 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1936 unless stated otherwise.

Class of entities

3. The class of entities to which this Ruling applies is all persons who are Australian resident employees of the Qantas Group who participate in the Qantas Deferred Share Plan – 2005 Performance Shares. In this Ruling, a person belonging to this class of entities is referred to as a participating employee. The Qantas Group comprises:

- Qantas Airways Limited (Qantas);
- Eastern Australia Airlines Pty Limited;
- Jetstar Airways Pty Limited;
- Qantas Defence Services Pty Limited; and
- Sunstate Airlines (Qld) Pty Limited.

Qualifications

4. The Commissioner makes this Ruling based upon 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 13 to 28 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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Robert Garran Offices
National Circuit
Barton ACT 2600

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Date of effect

8. This Ruling applies from the income year (as defined in subsection 995-1(1) of the ITAA 1997) ended 30 June 2006. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

9. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

10. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Related Rulings

12. Class Ruling CR 2005/100 Income tax: Qantas Deferred Share Plan – 2004 Performance Share Plan Rules.

Scheme

13. The scheme that is the subject of the Ruling is described below. This description is based on the following documents:

- the application for Class Ruling dated 21 April 2006;
- Qantas Deferred Share Plan Trust Deed dated 9 December 2002;
- Qantas Deferred Share Plan Terms and Conditions (DSP);
- Qantas Deferred Share Plan – 2005 Performance Share Plan Rules (2005 PSP Rules);
- correspondence from Qantas Airways Limited dated 9 June 2006;
- correspondence from Qantas Airways Limited dated 19 June 2006;
- Qantas Code of Conduct and Ethics;
- correspondence from Qantas Airways Ltd dated 28 August 2006; and
- correspondence from Qantas Airways Ltd dated 24 November 2006.

These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description.

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

14. The DSP was established as part of the employee share plan strategy of the Qantas Group and provides a platform for a broader based delivery of equity ownership to employees.

15. The DSP commenced on 17 October 2002.

16. Under the DSP the Qantas Board (the Board) may from time to time offer shares in Qantas or grant rights to an eligible employee subject to such conditions as it determines.

17. The 2005 PSP rules provide for fully paid ordinary shares in Qantas (performance shares), to be offered to participating employees upon the Board's approval of the satisfaction of certain performance hurdles. Such offers were made in August 2005.

18. The performance shares are acquired on-market and registered in the name of the trustee of the Qantas Deferred Share Plan Trust (the trustee) to be held for the benefit of the participating employees during a holding lock period.

19. The holding lock applies to all allocated performance shares held by the trustee such that the shares cannot be dealt with by participating employees until expiration of the holding lock period.

20. The holding lock period is ten years from the date of allocation but the participating employee may request that the Board exercise its discretion to remove the holding lock, provided the removal is not before:

- 1 July 2006 in respect of up to one-half of the performance shares acquired; and
- 1 July 2007 in respect of all remaining performance shares acquired.

21. Upon expiry of the holding lock or removal of the holding lock at the discretion of the Board, the performance shares will be transferred from the trustee and registered in the name of the participating employee.

22. The applicant has advised that various procedures introduced since 2002 have been implemented under the Qantas Code of Conduct and Ethics – Insider Trading Policy. The procedures are intended to restrict the sale of Qantas securities by participating employees who are in possession of material, non-public information. Material, non-public information is information that could or would be likely to influence persons in deciding to buy or sell Qantas securities.

23. Since 2002, a range of identified directors and executives (nominated employees) were required to provide prior written notice of intent to sell Qantas securities and make a statement that they were not at that time in possession of material, non-public information.

24. From February 2006, a range of identified Qantas group finance staff (finance employees) are required to obtain approval to sell Qantas securities. Approval is subject to the non holding of material, non-public information.

25. From July 2006, a revised process that applies to an expanded range of identified directors, executives and senior staff (expanded nominated employees) requires them to seek formal approval from the CEO (or his delegated nominee) to sell Qantas securities. The request must state that at the time they do not believe they are in possession of material, non-public information.

26. Unless the Board otherwise determines, any performance shares offered under the 2005 PSP Rules which remain subject to a holding lock will be forfeited if a participating employee:

- ceases employment with the Qantas Group; or
- commits an act of gross misconduct in relation to the Group.

27. When a performance share is forfeited all rights of a participating employee under the DSP in respect of the shares cease and no consideration or compensation will be payable for, or in relation to, that forfeiture.

28. The applicant has also advised that:

- the performance shares acquired by participating employees under the DSP meet the conditions of section 139CD;
- the participating employees pay no consideration to acquire the performance shares; and
- the 2005 PSP rules operating in conjunction with the DSP, do not satisfy the exemption conditions in section 139CE.

Ruling

29. A performance share will be a share acquired under an employee share scheme and will be a qualifying share for the purposes of section 139CD. For the purposes of Division 13A of Part III (Division 13A) a performance share is acquired by the participating employee on the date the participating employee acquires a beneficial interest in the share. This occurs when the trustee acquires the performance share and holds it on behalf of the participating employee.

Where an employee makes an election

30. Where a participating employee makes an election under section 139E, the discount given in relation to a performance share is included in the participating employee's assessable income in the year of income in which the share is acquired, pursuant to subsection 139B(2).

31. The discount included in the participating employee's assessable income will be an amount equivalent to the market value of the performance share at the time of acquisition pursuant to subsection 139CC(2).

32. Subsection 139BA(2) will not apply to reduce the discount included in the participating employee's assessable income.

Capital gains tax

33. A participating employee acquires a performance share for capital gains tax (CGT) purposes when the share is transferred to them or when they become absolutely entitled to the share whichever is the earlier pursuant to subsection 109-5(2) of the ITAA 1997.

34. Where the performance share is subsequently disposed of by, or on behalf of, the participating employee, the participating employee makes a capital gain where the capital proceeds from the disposal are more than the cost base of the share. Conversely, a capital loss will arise where the capital proceeds are less than the reduced cost base.

35. The first element of the cost base or reduced cost base of the performance share is the market value of the share worked out under sections 139FA to 139FF as at the date the participating employee first acquired a beneficial interest in the share pursuant to subsection 130-80(3) of the ITAA 1997.

36. Where the disposal of the performance share occurs 12 months or more after the date a beneficial interest in the share is acquired, any capital gain that results from the disposal will be a discount capital gain, subject to meeting the requirements of Subdivision 115-A of the ITAA 1997.

Forfeiture

37. Where a participating employee forfeits a performance share, and has made an election under section 139E in relation to the income year that the share is acquired, the discount given on that share is included in the participating employee's assessable income in that income year, pursuant to subsection 139B(2).

38. If the participating employee forfeits a performance share before they become absolutely entitled to the share, they will not make a capital gain or capital loss in relation to the forfeiture of the share.

Where an employee does not make an election

39. Where a participating employee has not made an election under section 139E, the discount given in relation to a performance share will be included in the participating employee's assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

40. Pursuant to subsection 139CA(2), the cessation time will be the earliest of the following:

- the time when the participating employee disposes (including by forfeiture) of a performance share;
- the later of:
 - the time when the holding lock on a performance share is removed by the Board;

- the time when any additional disposal restrictions cease to have effect, that are in effect or imposed on participating employees who are expanded nominated employees or finance employees, under the Qantas Code of Conduct and Ethics. This will only be the case where any additional disposal restrictions applied at the time the holding lock period on any performance share was removed by the Board:
 - from 1 July 2006 in respect of up to one-half of the performance shares acquired;
 - from 1 July 2007 in respect of all remaining performance shares;
 - in relation to participating employees who are expanded nominated employees or finance employees; and
 - who, at that time, are in possession of material, non-public information; and
- the time when any forfeiture conditions cease to have effect;
- the time when the participating employee ceases to be employed by the Qantas Group; or
- the end of the 10 year period starting when the participating employee acquired the performance share.

Disposal within 30 days

41. Where the participating employee disposes of a performance share in an arm's length transaction at, or within 30 days of, the cessation time, the discount calculated under subsection 139CC(3) will be the amount or value of any consideration received on the disposal of the share.

42. Any capital gain or capital loss made as a consequence of such a disposal will be disregarded, pursuant to subsection 130-83(2) of the ITAA 1997.

Disposal after 30 days

43. Where the participating employee does not dispose of a performance share in an arm's length transaction at or within 30 days of the cessation time, the discount assessable will be the market value of the share at the cessation time, in accordance with subsection 139CC(4).

44. For CGT purposes, where a participating employee does not dispose of a performance share in an arm's length transaction at or within 30 days of cessation time, a capital gain or capital loss may arise (refer to paragraphs 33 and 34 of the Ruling).

Forfeiture of shares

45. Where a participating employee forfeits a performance share in respect of which no section 139E election has been made, and the forfeiture triggers the cessation time (or the forfeiture happens within 30 days of the cessation time) no amount is included in the assessable income of the participating employee for the purposes of subsection 139B(3).

46. Where the participating employee forfeits a performance share before they become absolutely entitled to the share, they will not make a capital gain or capital loss in relation to the forfeiture of that share.

Commissioner of Taxation

20 December 2006

Appendix 1 – Explanation

① *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.*

47. An employee will acquire a share under an employee share scheme, for the purposes of Division 13A, if the share:

- is acquired within the meaning of section 139G; and

in accordance with section 139C, the share:

- is acquired in respect of the employment of the employee; and
- is acquired for less than market value.

48. Section 139G provides that a person will acquire a share in several circumstances, including by acquiring a beneficial interest in the share.

49. A participating employee will acquire a beneficial interest in a performance share when the trustee acquires the share and holds it on behalf of the participating employee. Thus, at that time, the participating employee will acquire a share within the meaning of section 139G.

50. The DSP was established as part of the employee share scheme strategy of the Qantas Group and provides a platform for a broader based delivery of equity ownership to employees. As such, where a participating employee acquires a beneficial interest in a performance share, that share is considered to be acquired in respect of their employment, pursuant to subsection 139C(1).

51. As no consideration is paid or given by a participating employee, they will acquire a performance share for less than market value for the purposes of subsection 139C(3).

52. The Commissioner accepts the applicant's statement that the conditions specified in section 139CD are satisfied. Thus, a performance share will be a qualifying share for the purposes of Division 13A.

53. Where a participating employee acquires a performance share under the DSP, the discount given in relation to the share is included in the assessable income of the participating employee, pursuant to subsection 139B(1).

54. The year of income in which the discount is included in assessable income and the amount of the discount depend on whether the participating employee has made a section 139E election in relation to the year of income in which the performance share was acquired.

Where an employee makes an election

55. A participating employee can elect under section 139E that subsection 139B(2) applies in respect of all performance shares acquired by the participating employee in a year of income. Subsection 139B(2) provides that the discount in relation to a share is included in the participating employee's assessable income in the year of income in which the share is acquired.

56. The amount of the discount to be included in the participating employee's assessable income is calculated in accordance with subsection 139CC(2). The discount is the market value of the performance share at the time it was acquired by the participating employee as no consideration is paid or given by the participating employee for the acquisition of the share.

57. Subdivision F of Division 13A contains special provisions to determine the market value of a share on a particular day. As ordinary Qantas shares are quoted on an approved stock exchange (ASX), section 139FA provides that its market value will be:

- if there is at least one transaction on the ASX in those shares of that class during the week up to and including that day – the weighted average of the prices at which those shares were traded on the ASX during that week;
- if there was no such transaction in the week up to and including the date of acquisition – the last price at which an offer was made on the ASX in that period to buy a share; or
- if there was no transaction in, or offer made to buy shares on the ASX in the specified period – the value as determined under section 139FB.

58. Where an employee makes an election under section 139E and the exemption conditions in section 139CE are satisfied in relation to the share, subsection 139BA(2) will apply to reduce the discount included in assessable income by up to \$1,000.

59. The applicant has advised that the exemption conditions in section 139CE are not satisfied in relation to a performance share and as such subsection 139BA(2) does not apply.

Capital gains tax

60. Where a participating employee has a beneficial interest in a performance share, they will acquire that share for CGT purposes at the earlier of the time:

- when they become absolutely entitled to the share, pursuant to event E5 of the table in subsection 109-5(2) of the ITAA 1997; or

- when the share is transferred from the Trustee to the participating employee and they acquire the legal interest in the share, pursuant to event A1 (case 1) of the table in subsection 109-5(2) of the ITAA 1997.

61. Where the performance share is subsequently disposed of, a capital gain will arise if the capital proceeds from the disposal exceed the cost base of the share. Conversely, a capital loss will arise if the reduced cost base exceeds the capital proceeds, pursuant to subsection 104-10(4) of the ITAA 1997.

62. Where a participating employee makes a section 139E election, the first element of the cost base or reduced cost base of the performance share for CGT purposes is determined in accordance with subsection 130-80(3) of the ITAA 1997. That subsection provides that the first element of the cost base or reduced cost base is the market value of the performance share at the time the participating employee first acquires a beneficial interest in the share. The market value of the share is determined under Subdivision F of Division 13A.

63. Where the disposal of the performance share is 12 months or more after the date of acquisition, any capital gain that results from the disposal will be a discount capital gain subject to the requirements contained in Subdivision 115-A of the ITAA 1997. The discount percentage for participating employees will be 50% pursuant to section 115-100 of the ITAA 1997.

64. Section 115-30 of the ITAA 1997 provides special rules about the time of acquisition of some CGT assets for the purposes of determining whether a capital gain is a discount capital gain. Item 8 of the table in subsection 115-30(1) of the ITAA 1997 provides that for the purposes of determining whether a capital gain is a discount capital gain, a participating employee is treated as having acquired a performance share at the time they first acquired a beneficial interest in the share.

Forfeiture

65. Where a performance share is forfeited and the participating employee has made a section 139E election in relation to the income year that the share is acquired, the amount of the discount on that share is included in a participating employee's assessable income, pursuant to subsection 139B(2). Division 13A does not provide for the discount to be excluded or excised from the participating employee's assessable income.

66. For CGT purposes, no capital gain or capital loss will arise in relation to a forfeited performance share where the participating employee has not become absolutely entitled to that share. This is because the share will not have yet been acquired by the participating employee for CGT purposes.

Where an employee does not make an election

67. Where an employee acquires a qualifying share and does not make an election under section 139E, the discount given in relation to the share is included in assessable income in the year of income in which the cessation time occurs, in accordance with subsection 139B(3).

68. As performance shares are subject to disposal restrictions and may be forfeited, the cessation time will be determined pursuant to subsection 139CA(2) and will be the earliest of:

- the time when the participating employee disposes of the share (that is, where the holding lock period has not expired and the participating employee forfeits their interest in the share);
- the later of:
 - the time when the holding lock period on any performance share is removed, where the Board on request by a participating employee, exercises its discretion in accordance with paragraph 20 of this Ruling;
 - the time when any additional disposal restrictions cease to have effect, that are in effect or imposed on participating employees who are expanded nominated employees or finance employees, under the Qantas Code of Conduct and Ethics – Insider Trading Policy. This will only apply to additional disposal restrictions imposed or in place at the time the 10 year holding lock period on any DSP share is removed by the Board:
 - from 1 July 2006 in respect of up to one-half of the performance shares acquired;
 - from 1 July 2007 in respect of all remaining performance shares;
 - in relation to participating employees who are expanded nominated employees or finance employees; and
 - who, at that time, are in possession of material, non-public information; and
- the time when any forfeiture conditions cease to have effect;
- the time when the participating employee ceases to be employed by either their employer (being their employer at the time they acquired the share) or a Qantas Group company, pursuant to subsection 139CA(3); or

- the end of the 10 year period starting when the participating employee acquired the performance share.

69. Participating employees who are nominated employees, finance employees or expanded nominated employees, and who are not in possession of material, non-public information at the time of the removal of the holding lock on a performance share by the Board and who subsequently acquire material, non-public information at any time after the removal of the holding lock, will not be considered to be subject to additional disposal restrictions for the purposes of determining when a cessation time occurs under subsection 139CA(2).

70. The amount of the discount to be included in a participating employee's assessable income is determined under section 139CC and will depend on whether the share is disposed of in an arm's length transaction at or within 30 days of the cessation time.

Disposal within 30 days

71. Where a participating employee disposes of a performance share in an arm's length transaction at, or within 30 days of, the cessation time the amount of the discount to be included in the participating employee's assessable income is calculated in accordance with subsection 139CC(3). The discount is the amount or value of any consideration received by the participating employee for the disposal as no consideration is paid or given by the participating employee for the acquisition of the share.

72. Subsection 130-83(2) of the ITAA 1997 has the effect that where CGT event A1 (disposal of a CGT asset), C2, E1, E2 or E5 happens in relation to a performance share in an arm's length transaction at, or within 30 days of, the cessation time, any capital gain or capital loss the participating employee makes from the CGT event is disregarded.

Disposal after 30 days

73. Where an employee does not dispose of a performance share in an arm's length transaction at, or within 30 days of, the cessation time the discount to be included in a participating employee's assessable income is calculated in accordance with subsection 139CC(4). The discount is the market value of the share at the cessation time as no consideration is paid or given by the participating employee for the acquisition of the share.

74. Subsection 130-83(3) of the ITAA 1997 has the effect that where CGT event A1 (disposal of a CGT asset), C2, E1, E2 or E5 does not happen in relation to a performance share in an arm's length transaction at, or within 30 days of, the cessation time, the first element of the cost base or reduced cost base of the share is its market value at the cessation time.

75. For the purposes of subsection 139CC(4) and subsection 130-83(3) of the ITAA 1997, the market value of a performance share is determined under section 139FA.

76. Where a participating employee disposes of a performance share, other than in an arm's length transaction at or within 30 days of the cessation time, a capital gain or capital loss may arise (refer to paragraph 34 of this Ruling).

Forfeiture of shares

77. Where a participating employee forfeits a performance share and the forfeiture triggers a cessation time (or the forfeiture happens within 30 days of the cessation time) the Commissioner accepts that the forfeiture will constitute an arm's length disposal. As such, the discount given in relation to the performance share will be determined under subsection 139CC(3). As no consideration will be received by the participating employee upon forfeiture of the share, no amount will be included in the participating employee's assessable income under subsection 139B(3).

78. If the participating employee forfeits the performance share before they become absolutely entitled to it, no capital gain or capital loss will arise in relation to that share as the share will not have yet been acquired for CGT purposes.

Appendix 2 – Detailed contents list

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

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References

<i>Previous draft:</i>	- ITAA 1936 139CC(2)
Not previously issued as a draft	- ITAA 1936 139CC(3)
	- ITAA 1936 139CC(4)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 139CD
CR 2005/100	- ITAA 1936 139CE
	- ITAA 1936 139E
<i>Subject references:</i>	- ITAA 1936 139FA
- employee share schemes	- ITAA 1936 139FAA
	- ITAA 1936 139FB
	- ITAA 1936 139FC
<i>Legislative references:</i>	- ITAA 1936 139FD
- TAA 1953	- ITAA 1936 139FE
- TAA 1953 Sch 1 357-75(1)	- ITAA 1936 139FF
- Copyright Act 1968	- ITAA 1936 139G
- ITAA 1936 Pt III Div 13A	- ITAA 1997 104-10
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- ITAA 1936 139B	- ITAA 1997 109-5(2)
- ITAA 1936 139B(1)	- ITAA 1997 Subdiv 115-A
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