



CR 2008/19 - Income tax: Qantas Deferred Share Plan - Non-Executive Director Share Plan

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Class Ruling

Income tax: Qantas Deferred Share Plan – Non-Executive Director Share Plan

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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.

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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 21A of the *Income Tax Assessment Act 1936* (ITAA 1936);
- Division 13A of Part III (Division 13A) of the ITAA 1936;
- section 139B of the ITAA 1936;
- section 139BA of the ITAA 1936;
- section 139CA of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CD of the ITAA 1936;

- section 139DE of the ITAA 1936;
- section 139E of the ITAA 1936;
- Subdivision F of Division 13A (Subdivision F) of the ITAA 1936;
- section 15-2 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 104-10 of the ITAA 1997;
- section 109-5 of the ITAA 1997;
- Subdivision 115-A of the ITAA 1997;
- section 115-30 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 non-executive directors of Qantas Airways Limited (Qantas) who participate in the Qantas Deferred Share Plan – Non-Executive Director Share Plan. In this Ruling, a person belonging to this class of entities is referred to as a participant.

Qualifications

4. 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 12 to 29 of this Ruling.

5. 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

7. This Ruling applies from 1 July 2007.

8. 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 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 Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the 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).

Scheme

12. 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 of the scheme:

- the request for Class Ruling from Qantas Airways Limited dated 5 October 2007;
- Qantas Deferred Share Plan – Non-Executive Director Share Plan Rules;
- Qantas Deferred Share Plan Trust Deed dated 9 December 2002;
- Qantas Deferred Share Plan Terms and Conditions (DSP Terms and Conditions);

- Qantas' email dated 28 August 2006 regarding the former and revised insider trading and notification procedures;
- Qantas Code of Conduct and Ethics dated 19 July 2006; and
- correspondence from Qantas Airways Limited dated between 9 October 2007 and 5 December 2007.

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.

The Qantas Deferred Share Plan

13. The Qantas Deferred Share Plan (DSP), which commenced on 17 October 2002, was established as part of the employee share strategy of the Qantas group of companies and provides a platform for a broader based delivery of equity ownership to employees.

14. Under the DSP the Qantas board (the board) may from time to time offer shares or grant rights to an eligible employee subject to such terms and conditions as it determines.

Non-Executive Director Share Plan Rules

15. The Non-Executive Share Plan Rules (the Plan), which operate in conjunction with the DSP, provides for an offer of shares to be made to non-executive directors of Qantas under an arrangement whereby participants agree to a pre-tax sacrifice of director's fees, including committee fees, for each quarter (or other period as determined by the board) in exchange for Qantas shares.

16. The applicant has advised that the fee sacrifice arrangement is an effective salary sacrifice arrangement in accordance with paragraphs 19 to 23 inclusive of Taxation Ruling TR 2001/10.

17. The applicant has advised that the fee sacrifice arrangement is in respect of one year only and that a new fee sacrifice decision is required from participants each year.

18. The offer under the Plan was approved on 18 October 2006, and the applicant has advised that the Plan has been operational from 1 July 2007 and that participants have salary sacrificed since that date.

19. The shares allocated to participants under the Plan are fully paid ordinary shares in Qantas (shares) that are listed on the Australian Securities Exchange (ASX).

20. The number of shares allocated to each participant will be calculated by reference to the amount of fees to be sacrificed by each participant.

21. At the time of accepting an offer of shares, the participant must not be in possession of any material non-public information as explained in paragraphs 27 and 28 of this Ruling.

22. Under the Plan, shares are acquired on-market and registered in the name of the trustee of the Qantas DSP Trust (the trustee). Once the trustee has acquired the shares, they are allocated to participants each quarter (or other period as determined by the board) and held by the trustee for the benefit of the participants during a holding lock period.

Restrictions – holding lock

23. The holding lock applies to all shares held by the trustee, such that participants cannot deal with the shares until expiration of the holding lock period.

24. The expiration of the holding lock period is the earlier of:

- the cessation of the participant being a non-executive director of Qantas; or
- the tenth anniversary of the date the shares were allocated to the participant.

25. However, a participant may request that the board exercise its discretion to remove the holding lock at any time prior to the expiration of the holding lock period.

26. Unless the board otherwise determines, upon expiration of the holding lock period, the shares will be transferred from the trustee and registered in the name of the participant.

Restrictions – Qantas code of conduct and ethics

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

28. Paragraph 14.8 of the Code provides that various nominated categories of employees (nominated employees), which includes directors, are considered to be routinely in possession of material, non-public information. As such, they are prohibited from dealing in Qantas securities without providing the CEO (or Nominee) a written request to deal in Qantas securities. The request must also state that at the time they do not believe they are in possession of material, non-public information.

29. The applicant has also advised that:

- no forfeiture conditions exist under the Plan or the DSP;

- the shares acquired by participants meet the conditions of section 139CD;
- participants pay no consideration to acquire the shares; and
- the Plan, operating in conjunction with the DSP, does not satisfy the exemption conditions in section 139CE.

Ruling

30. A share allocated by the trustee to a participant under the Plan will be a share acquired under an employee share scheme for the purposes of Division 13A, and will be a qualifying share for the purposes of section 139CD.

31. For the purposes of Division 13A, a participant will acquire the share at the time the trustee allocates the share to the participant and holds it on behalf of the participant.

32. A share allocated to a participant under the Plan:

- is precluded from being a non-cash business benefit for the purposes of section 21A of the ITAA 1936; and
- is not an item that is included in assessable income under section 15-2 of the ITAA 1997,

by the operation of section 139DE of the ITAA 1936.

Where a participant makes an election

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

34. The discount included in the participant's assessable income will be an amount equal to the market value of the share (worked out under Subdivision F) at the time of acquisition, pursuant to subsection 139CC(2).

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

Capital gains tax

36. A participant acquires a 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, under subsection 109-5(2) of the ITAA 1997.

37. Where the participant subsequently disposes of the share, the participant will make a capital gain if 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 share's reduced cost base, pursuant to section 104-10 of the ITAA 1997.

38. The first element of the cost base or reduced cost base of the share is the market value (worked out under Subdivision F) of the share at the time they are allocated it (that is, when they first acquire a beneficial interest in the share) in accordance with subsection 130-80(3) of the ITAA 1997.

39. For the purposes of determining whether a capital gain is a discount capital gain, a participant is treated as having acquired a share at the time they first acquired a beneficial interest in the share, pursuant to subsection 115-30(1) of the ITAA 1997.

40. Where the disposal of the share occurs 12 months or more after acquisition, any capital gain that results from the disposal will be a discount capital gain, pursuant to Subdivision 115-A of the ITAA 1997.

Where a participant does not make an election

41. Where a participant does not make an election under section 139E, the discount given in relation to a share will be included in the participant's assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

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

- when the participant disposes of a share;
- when the participant ceases to be employed by their employer, a holding company of their employer, or a subsidiary of their employer or of a holding company of their employer;
- the end of the 10 year period starting when the participant acquired the share; and
- the later of the following times:
 - when the holding lock on a share is removed by the board;
 - when any additional disposal restrictions imposed under the Code, cease to have effect, that are in effect or imposed on participants at the time the holding lock on any share is removed by the board.

Disposal within 30 days

43. Where the participant disposes of a 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.

Capital gains tax

44. 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

45. Where the participant does not dispose of a 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, determined in accordance with Subdivision F.

Capital gains tax

46. The participant acquires a share for CGT purposes when the share is transferred to them or when they become absolutely entitled to the share, whichever is the earlier, under subsection 109-5(2) of the ITAA 1997.

47. The first element of the cost base of reduced cost base of the share will be the market value (worked out under Subdivision F of the ITAA 1936) of the share at the cessation time, in accordance with subsection 130-83(3) of the ITAA 1997.

48. Where the share is subsequently disposed of by, or on behalf of the participant, the participant makes a capital gain if the capital proceeds from the disposal are more than the cost base of the share. Conversely, a capital loss will arise if the capital proceeds are less than the reduced cost base under section 104-10 of the ITAA 1997.

49. Where the disposal of a share occurs 12 months or more after the time a participant became absolutely entitled to the share, any capital gain that results from the disposal will be a discount capital gain, pursuant to Subdivision 115-A of the ITAA 1997.

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.*

Share acquired under an employee share scheme

50. A participant 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
- acquired for less than market value.

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

52. Under the Plan, a participant will acquire a beneficial interest in a share when the trustee allocates the share to the participant and holds it on their behalf. Thus, at that time, the participant will acquire a share within the meaning of section 139G.

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

54. As no consideration is paid or given by a participant, they will acquire the share for less than market value, pursuant to subsection 139C(3). Consideration for the purposes of subsection 139C(3) does not include an amount sacrificed under an effective salary sacrifice arrangement as described in paragraphs 19 to 23 inclusive of TR 2001/10.

55. Thus, at the time that a participant is allocated a share under the Plan, they will acquire a share under an employee share scheme for the purposes of Division 13A.

56. The Commissioner accepts the applicant's statement that the conditions set out in section 139CD are satisfied. Thus, a share acquired under the Plan will be a qualifying share for the purposes of Division 13A.

Section 21A of the ITAA 1936 and section 15-2 of the ITAA 1997 do not apply

57. Where a share is acquired under an employee share scheme, section 139DE of the ITAA 1936 specifically provides that section 21A of the ITAA 1936 and section 15-2 of the ITAA 1997 do not apply to such a share. Thus, a share acquired under the Plan is not income derived as a non-cash business benefit for the purposes of section 21A of the ITAA 1936 and is not an item that is included in assessable income under section 15-2 of the ITAA 1997.

58. Where a participant acquires a share under the Plan, the discount given in relation to the share is included in the assessable income of the participant, pursuant to subsection 139B(1).

59. Where a share is a qualifying share, the year of income in which the discount is included in assessable income and the amount of the discount (for the purposes of Division 13A) depend on whether the participant has made a section 139E election in relation to the year of income in which the share is acquired.

Where a participant makes an election

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

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

62. As Qantas shares are listed on the ASX, section 139FA provides that their market value will be:

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

63. As the applicant has advised that the exemption conditions in section 139CE are not satisfied in relation to a share acquired under the Plan, subsection 139BA(2) does not apply to reduce the discount included in the assessable income (by up to \$1,000) of a participant.

Capital gains tax

64. Where a share is acquired under an employee share scheme from an employee share trust, the share will be acquired for CGT purposes (in accordance with subsection 109-5(2) of the ITAA 1997) at the time:

- when the share is transferred from the trustee to the participant (CGT event A1); or
- when the participant becomes absolutely entitled to the share (CGT event E5) if this occurs before the share is transferred.

65. Where a participant makes a section 139E election, the cost base or reduced cost base of the share 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 share at the time the participant first acquires a beneficial interest in the share. The market value is determined under Subdivision F of the ITAA 1936.

66. Where the 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.

67. Section 115-30 of the ITAA 1997 contains 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:

- where an employee acquires a share under an employee share scheme from an employee share trust; and
- where the share is a qualifying share and the employee has made a section 139E election covering the share,

then, for the purposes of determining whether a capital gain is a discount capital gain, a participant is treated as having acquired a share at the time they first acquired a beneficial interest in the share.

68. Thus, for the purposes of determining whether any capital gain they make in respect of the share is a discount capital gain, the participant will be treated as having acquired the share at the time it was first allocated by the trustee and they acquired a beneficial interest in the share.

69. Where the disposal of the share is 12 months or more after the date of acquisition (of a beneficial interest), any capital gain that results from the disposal will be a discount capital gain and the discount percentage for a participant will be 50%, pursuant to Subdivision 115-A of the ITAA 1997.

Where a participant does not make an election

70. Where a participant acquires a share under the Plan 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).

71. As shares acquired under the Plan are subject to disposal restrictions, the cessation time will be determined pursuant to subsection 139CA(2) and will be the earliest of the following times:

- when the participant disposes of the share;
- when the participant ceases to be employed by either their employer (being their employer at the time they acquired the share), a holding company of their employer, or a subsidiary of their employer or of a holding company of their employer;
- the end of the 10 year period starting when the participant acquired the share;
- the later of the following times:
 - when the holding lock on any share is removed, where the board on request by a participant, exercises its discretion in accordance with paragraphs 25 and 26 of this Ruling;
 - when any additional disposal restrictions under the Code cease to have effect, that are in effect or imposed on participants who are nominated employees at the time the holding lock on any share is removed by the board.

When restrictions under the Code are not applicable for Division 13A purposes

72. Participants who are nominated employees for the purposes of the Code:

- who are not in possession of material, non-public information at the time of the removal of the holding lock on a 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).

73. When a cessation time occurs, the amount of the discount to be included in a participant'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

74. Where a participant disposes of a 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 participant's assessable income is calculated in accordance with subsection 139CC(3). The discount is the amount or value of any consideration received by the participant for the disposal as no consideration is paid or given by the participant for the acquisition of the share.

Capital gains tax

75. Subsection 130-83(2) of the ITAA 1997 has the effect that where CGT event A1 (disposal of a CGT asset), C2, E1, E2, E5 or I1 happens in relation to a share in an arm's length transaction at, or within 30 days of the cessation time, any capital gain or capital loss the participant makes from the CGT event is disregarded.

Disposal after 30 days

76. Where an employee does not dispose of a share in an arm's length transaction at, or within 30 days of, the cessation time, the discount to be included in a participant'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 participant for the acquisition of the share.

Capital gains tax

77. Where a share is acquired under an employee share scheme from an employee share trust, the share will be acquired for CGT purposes, in accordance with subsection 109-5(2) of the ITAA 1997, at the time:

- the share is transferred from the trustee to the participant (CGT event A1); or

- when the participant becomes absolutely entitled to the share (CGT even E5) if this occurs before the share is transferred.

78. Subsection 130-83(3) of the ITAA 1997 has the effect that where CGT event A1 (disposal of a CGT asset), C2, E1, E2, E5 or I1 does not happen in relation to a 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 (as calculated under Subdivision F) at the cessation time.

79. Where the share is subsequently disposed of, a capital gain will arise if the capital proceeds 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.

80. Where the disposal of the share occurs 12 months or more after the date a participant became absolutely entitled to a share, any capital gain that results from the disposal will be a discount capital gain and the discount percentage for a participant will be 50%, pursuant to Subdivision 115-A of the ITAA 1997.

81. **Note:** where a share is acquired under an employee share scheme from an employee share trust and the share is a qualifying share and no election under section 139E is made, for the purposes of determining whether any capital gain is a discount capital gain, subsection 115-30(1) of the ITAA 1997 will not operate to treat the share as being acquired when the employee became beneficially entitled to the share.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2001/10

Subject references:

- 139E election
- capital gains tax
- deferral
- employee share schemes

Legislative references:

- | | |
|----------------------------|-------------------------------------|
| - ITAA 1936 | - ITAA 1936 139CC(2) |
| - ITAA 1936 21A | - ITAA 1936 139CC(3) |
| - ITAA 1936 Pt III Div 13A | - ITAA 1936 139CC(4) |
| - ITAA 1936 139B | - ITAA 1936 139CD |
| - ITAA 1936 139B(1) | - ITAA 1936 139CE |
| - ITAA 1936 139B(2) | - ITAA 1936 139DE |
| - ITAA 1936 139B(3) | - ITAA 1936 139E |
| - ITAA 1936 139BA | - ITAA 1936 Pt III Div 13A Subdiv F |
| - ITAA 1936 139BA(2) | - ITAA 1936 139FA |
| - ITAA 1936 139C | - ITAA 1936 139FB |
| - ITAA 1936 139C(1) | - ITAA 1936 139G |
| - ITAA 1936 139C(3) | - ITAA 1997 15-2 |
| - ITAA 1936 139CA(2) | - ITAA 1997 104-10 |
| - ITAA 1936 139CA | - ITAA 1997 104-10(4) |
| - ITAA 1936 139CC | - ITAA 1997 109-5 |
| | - ITAA 1997 109-5(2) |
| | - ITAA 1997 Subdiv 115-A |
| | - ITAA 1997 115-30 |
| | - ITAA 1997 115-30(1) |
| | - ITAA 1997 130-80 |
| | - ITAA 1997 130-80(3) |
| | - ITAA 1997 130-83 |
| | - ITAA 1997 130-83(2) |
| | - ITAA 1997 130-83(3) |
| | - TAA 1953 |
| | - TAA 1953 Sch 1 357-75(1) |
| | - Copyright Act 1968 |
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ATO references

NO: 2008/2996

ISSN: 1445-2014

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