

CR 2020/2 - Qantas Airways Limited - off-market share buy-back



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Class Ruling

Qantas Airways Limited – off-market share buy-back

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 income tax consequences of the off-market buy-back of Qantas Airways Limited (Qantas) ordinary shares (Qantas shares) undertaken by Qantas, which was announced by Qantas on 22 August 2019 and took place on 4 November 2019 (the Buy-back).
2. Full details of the Buy-back are set out in paragraphs 35 to 55 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1936* unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you held Qantas shares and you sold some or all of those Qantas shares under the Buy-back.
5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 of the *Income Tax Assessment Act 1997* (ITAA 1997) in relation to the scheme outlined in paragraphs 35 to 55 of this Ruling.

Note: Division 230 will not apply to individuals, unless they have made an election for it to apply to them.

When this Ruling applies

6. This Ruling applies from 1 July 2019 to 30 June 2020.

Ruling**The dividend component**

7. You are taken to have been paid a dividend of \$4.37 (the Dividend Component) by Qantas on 11 November 2019 for each Qantas share bought back under the Buy-back pursuant to section 159GZZP.
8. The Dividend Component is a frankable distribution under section 202-40 of the ITAA 1997, and has been franked by Qantas pursuant to section 202-5 of the ITAA 1997.
9. The difference between the Buy-back price of \$5.56 per Qantas share and the Dividend Component of \$4.37 per Qantas share is the Capital Component (\$1.19 per Qantas share). The Capital Component is not a dividend for income tax purposes (subsection 159GZZP(2)).

Inclusion of Dividend Component in assessable income and entitlement to franking credit tax offset***Resident shareholders – direct distributions***

10. If you are an Australian resident individual, corporate shareholder or the trustee of a complying superannuation fund who participated in the Buy-back, your assessable income in the income year in which the Buy-back occurred includes:

- the Dividend Component of \$4.37 per Qantas share, and
- subject to you being a 'qualified person' (see paragraphs 29 and 30 of this Ruling), the amount of the franking credit on the Dividend Component (subsection 44(1) and subsection 207-20(1) of the ITAA 1997).

11. You will be entitled to a tax offset under subsection 207-20(2) of the ITAA 1997 equal to the amount of the franking credit on the Dividend Component, subject to you being a 'qualified person'.

Resident shareholders – indirect distributions***Partnerships***

12. If you are a partnership, your assessable income in the income year in which the Buy-back occurred for the purposes of calculating the net income of the partnership under section 90 includes:

- the Dividend Component of \$4.37 per Qantas share, and
- subject to being a 'qualified person', the amount of the franking credit attached to the Dividend Component (subsection 44(1) and subsection 207-35(1) of the ITAA 1997).

Trusts

13. If you are the trustee of a trust, your assessable income in the income year in which the Buy-back occurred for the purposes of calculating the net income of the trust under subsection 95(1) includes:

- the Dividend Component of \$4.37 per Qantas share, and
- subject to you being a 'qualified person', the amount of the franking credit on the Dividend Component (subsection 44(1) and subsection 207-35(1) of the ITAA 1997).

Partners and beneficiaries

14. Subsections 207-35(3) to (6) of the ITAA 1997 set out the circumstances in which a partner or beneficiary to whom a franked distribution flows indirectly is required to gross up their assessable income for their share of the franking credit on the franked distribution. Where the franked distribution flows indirectly (within the meaning of Subdivision 207-B of the ITAA 1997) through a trust or partnership to a resident that is an individual, a corporate tax entity (at the time the distribution flows indirectly to it) or a trustee mentioned in paragraphs 207-45(c) or (d) of the ITAA 1997, the entity will, subject to the qualified person rule, be entitled to a tax offset equal to the entity's share of the franking credit on the franked distribution (section 207-45 of the ITAA 1997).

Refundable tax offset

15. The franking credit tax offset is subject to the refundable tax offset rules in Division 67 of the ITAA 1997. Certain trustees and corporate tax entities are excluded from the refundable tax offset rules by subsection 67-25(1A) to (1DA) of the ITAA 1997.

Non-resident shareholders

16. If you are a non-resident, as the Dividend Component is fully franked, you will not be liable to Australian withholding tax in respect of the Dividend Component (paragraph 128B(3)(ga)).

Sale consideration

17. You are taken to have received \$1.40 per share (Sale Consideration) as the sale consideration in respect of each Qantas share bought back under the Buy-back on 4 November 2019 (in accordance with section 159GZZZQ, unless you are a corporate tax entity to which subsections 159GZZZQ(8) and 159GZZZQ(9) apply).

18. If the Buy-back price for each Qantas share bought back under the Buy-back was less than what would have been the market value of the Qantas share if the Buy-back did not occur and was never proposed to occur, then the market value rule in subsection 159GZZZQ(2) applies to the Buy-back. Taxation Determination TD 2004/22 *Income tax: for Off-Market Share Buy-Backs of listed shares, whether the buy-back price is set by tender process or not, what is the market value of the share for the purposes of subsection 159GZZZQ(2) of the Income Tax Assessment Act 1936?* outlines the Commissioner's approach for determining what would have been the market value of the Qantas share at the time of the Buy-back if the Buy-back did not occur and was never proposed to occur.

19. The effect of the rule is that as the Buy-back price is less than the market value determined in accordance with TD 2004/22, the difference is included in the consideration received for the disposal of the Qantas share, in addition to the amount of \$1.19 per Qantas share debited to the share capital account of Qantas. As the Buy-back price was less than the relevant market value, the Sale Consideration is \$1.40 per Qantas share.

20. The treatment of the Sale Consideration will depend on whether the Qantas shares are held on capital account or on revenue account.

Shares held on capital account

21. If you held Qantas shares on capital account, you are taken to have disposed of your Qantas shares for capital gains tax (CGT) purposes on 4 November 2019 (section 104-10 of the ITAA 1997).

22. The Sale Consideration of \$1.40 per Qantas share (which may be adjusted under subsection 159GZZZQ(8) if you are a corporate tax entity) represents the capital proceeds for CGT purposes (subsection 116-20(1) of the ITAA 1997). If you are not a partnership, you will make:

- a capital gain on each Qantas share sold under the Buy-back where the Sale Consideration is more than the Qantas share's cost base, and
- a capital loss on each Qantas share sold under the Buy-back where the Sale Consideration is less than the Qantas share's reduced cost base (subsection 104-10(4) of the ITAA 1997).

23. If you are a partnership, any capital gain or capital loss will be made by the partners individually (subsection 106-5(1) of the ITAA 1997). Each partner in a partnership has a separate cost base and reduced cost base for the partner's interest in each Qantas share sold under the Buy-back by the partnership (subsection 106-5(2) of the ITAA 1997). Each partner is allocated an appropriate share of the Sale Consideration received by the partnership for the disposal of Qantas shares under the Buy-back.

Shares held on revenue account

24. If you held your Qantas shares as trading stock (as defined in subsection 995-1(1) of the ITAA 1997) at the time of the Buy-back on 4 November 2019:

- you include the Sale Consideration in your assessable income (section 6-5 of the ITAA 1997), and
- you disregard any capital gain or capital loss you make (section 118-25 of the ITAA 1997).

25. If you held your Qantas shares as revenue assets (as defined in section 977-50 of the ITAA 1997), but not as trading stock, the amount by which:

- the Sale Consideration exceeds the cost of each Qantas share is included in your assessable income (section 6-5 of the ITAA 1997), or
- the cost of each Qantas share exceeds the Sale Consideration is an allowable deduction (section 8-1 of the ITAA 1997).

26. If you made a capital gain in respect of the Qantas shares you held on revenue account but not as trading stock, the capital gain is reduced by the amount that is otherwise included in your assessable income (section 118-20 of the ITAA 1997). If you made a capital loss in respect of the Qantas shares you held on revenue account but not

as trading stock, you reduce the reduced cost base by the amount of the allowable deduction (subsection 110-55(9) of the ITAA 1997).

Non-resident shareholders – CGT consequences

27. If you were a foreign resident shareholder when you sold your Qantas shares under the Buy-back, you disregard any capital gain or capital loss you made if the Qantas shares were not taxable Australian property (section 855-10 of the ITAA 1997).

28. If you are a foreign resident, a Qantas share that you sell in the Buy-back will be 'taxable Australian property' (from which you will make a capital gain or capital loss) if the share:

- was used by you (the foreign resident shareholder) in carrying on a business through a permanent establishment in Australia, or
- is a CGT asset that is covered by subsection 104-165(3) of the ITAA 1997 (choosing to disregard a gain or loss on ceasing to be an Australian resident).

Qualified persons

29. You will be a qualified person (for the purposes of paragraph 207-145(1)(a) of the ITAA 1997 which refers to Division 1A of former Part IIIAA) in relation to the Dividend Component of the Buy-back price if you satisfy the 'holding period rule' under former section 160APHO.

30. You will satisfy the 'holding period rule' if:

- the Qantas shares you sold under the Buy-back were acquired before the Buy-back Tender Ex entitlement Date (2 September 2019), and
- during the period when you held the Qantas shares, you had sufficient risks of loss or opportunities for gain in respect of the shares (as defined in former section 160APHM) for a continuous period of at least 45 days.

31. Neither the announcement of the Buy-back, the making of an invitation to you to offer to sell your Qantas shares nor the making of an offer by you to Qantas in respect of a Qantas share will affect whether you had sufficient risks of loss or opportunities for gain in respect of the shares bought back under the Buy-back.

32. The last-in first-out rule in former subsection 160APHI(4) has no effect for the Buy-back in respect of any additional Qantas shares you acquired on or after 2 September 2019, as the shares did not confer an entitlement to participate in the Buy-back.

The anti-avoidance provisions

33. The Commissioner will not make a determination under subsections 45A(2) or 45B(3) that section 45C applies to the whole, or any part, of the Capital Component of the Buy-back price you received.

34. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 or paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefits you received in relation to the Dividend Component of the Buy-back price.

Scheme

35. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

Qantas

36. Qantas is an Australian incorporated public company, the shares of which have been listed on the Australian Securities Exchange (ASX) since 1995.

37. Shareholders in Qantas who hold Qantas shares are a mixture of resident and non-resident members.

38. In 2015 Qantas launched its Financial Framework to ensure that Qantas delivers total shareholder returns in the top quartile of global airline peers and the ASX100.

39. The key objectives of the Financial Framework, which is to target an optimal capital structure for Qantas, are:

- minimise the Qantas Group's cost of capital by targeting a net debt range
- achieve return on invested capital (ROIC) above 10 per cent throughout the cycle, and
- grow invested capital with disciplined investment and return any surplus to shareholders.

40. The financial statements of Qantas as at 30 June 2019 show that it has issued share capital of \$1.871 billion and retained earnings of \$1.603 billion.

41. As at 30 June 2019 Qantas had on issue 1,570,505,939 Qantas shares.

The buy-back

42. On 22 August 2019 (Announcement Date) Qantas announced an off-market share buy-back of Qantas shares of up to 79.7 million shares through a tender process in line with its Financial Framework. The Buy-back announcement was made in conjunction with Qantas' full-year profit result. Qantas retained the right to buy back a lower amount or no Qantas shares at all, depending on tenders lodged by shareholders and market conditions.

43. Qantas shareholders entitled to participate in the Buy-back were those shareholders holding Qantas shares registered in their name on the Buy-back Record Date (eligible shareholders) and who were not ineligible shareholders being:

- 'excluded foreign persons', being persons who are located in any jurisdiction where Qantas is prohibited from making payments pursuant to any Act, rule or regulation (this includes residents of the United States, any US person and any resident of Canada)
- persons who held only American depository receipts
- persons who held only restricted employee shares or rights, or
- directors and certain employees involved in determining the Buy-back price.

44. Participation in the Buy-back was voluntary and therefore eligible shareholders who did not wish to participate were not required to do anything. Non-participating eligible shareholders and ineligible shareholders did not receive any property, dividends or distribution by way of compensation.

45. The Buy-back price was subject to two overriding limits:

- Qantas not purchasing Qantas shares at a discount greater than 14% to the volume weighted average price (VWAP) of the Qantas shares over the five trading days up to and including the closing date of the tender period of 1 November 2019 (Closing Date), and
- the Buy-back price per Qantas share would not exceed the market value of a Qantas share worked out in accordance with TD 2004/22.

46. Qantas paid a fully franked final ordinary dividend for the year ended 30 June 2019 of 13 cents per Qantas share (Final Ordinary Dividend) on 23 September 2019. The Announcement Date, Ex entitlement Date and Record Date for the Final Ordinary Dividend were the same as the respective dates for the Buy-back.

47. The Buy-back timetable was as follows:

Date	Buy-back
22 August 2019	Announcement Date
2 September 2019	Ex entitlement Date
3 September 2019	Record Date
23 September 2019	Opening date for the Tender Period
25 October 2019	Annual General Meeting
28 October 2019 to 1 November 2019	The five trading days over which the VWAP is calculated (for the purposes of determining maximum level of discount)
1 November 2019	Closing date for the Tender Period
4 November 2019	Buy-back date
11 November 2019	Buy-back payment date

48. Under the Buy-back tender process, eligible shareholders were able to submit offers to sell their Qantas shares at specified discount percentages (Tender Discount) to the VWAP of Qantas shares over the five trading days up to and including the Closing Date (Tender Period).

49. The Tender Discount ranged from 10% to 14%, inclusive and at 1% intervals. Eligible shareholders were able to submit tenders to sell different parcels of Qantas shares at different Tender Discounts, or at the Final Price Tender – the price finally determined under the tender process (Buy-back price).

50. Where more Qantas shares were tendered at the Buy-back price than Qantas planned to purchase in the Buy-back, eligible shareholders with tenders equal to the accepted discount percentage would be scaled back on a pro rata basis.

51. For each Qantas share purchased under the Buy-back, Qantas debited \$1.19 of the Buy-back price to its untainted share capital account (Capital Component) and the balance of the Buy-back price to its retained earnings (Dividend Component). The Dividend Component was fully franked.

52. On 4 November 2019, Qantas announced that:
- it had successfully completed the purchase of 79.7 million Qantas shares under the Buy-back, representing 5.1% of the issued capital of Qantas
 - the Buy-back price was \$5.56 per Qantas share
 - the total value of Qantas shares purchased under the Buy-back was \$443.2 million, and
 - a scale-back mechanism was applied. Only Qantas shares tendered at a discount of 14% or at the Buy-back price were purchased in the Buy-back.
53. All Qantas shares bought back under the Buy-back were cancelled.

Other information

54. Qantas' share capital account (as defined in section 975-300 of the ITAA 1997), was not tainted within the meaning of Division 197 of the ITAA 1997.
55. Qantas shares bought back under the Buy-back are not 'indirect Australian real property interests' as defined in section 855-25 of the ITAA 1997.

Commissioner of Taxation

15 January 2020

Appendix – Explanation

ⓘ *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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Dividend and capital components

56. The Buy-back price you received consists of two components:

- a Capital Component, and
- a Dividend Component.

57. The amount of each of these components is determined in accordance with sections 159GZZZP and 159GZZZQ, and has regard to how Qantas accounted for the Buy-back.

The Dividend Component

58. Section 159GZZZP provides that where the buy-back of a share is an off-market purchase, the difference between the purchase price and the part (if any) of the purchase price which is debited against amounts standing to the credit of the company's share capital account is taken to be a dividend paid by the company to the seller as a shareholder in the company, out of profits derived by the company and on the day the buy-back occurs. This Buy-back occurred on 4 November 2019.

59. The Buy-back price was \$5.56 per Qantas share, of which \$1.19 (the Capital Component) was debited against the amounts standing to the credit of Qantas' untainted share capital account. As a result, the Dividend Component is taken to be \$4.37 per Qantas share.

60. The Dividend Component of \$4.37 per Qantas share is frankable, but only to the extent that the Buy-back price does not exceed the market value of a Qantas share at the time of the Buy-back if the Buy-back did not occur and was never proposed to occur (paragraph 202-45(c) of the ITAA 1997).

61. TD 2004/22 sets out the Commissioner's view as to how to determine what would have been the market value of a Qantas share at the time of the Buy-back if the Buy-back

did not occur and was never proposed to occur. In respect of the Buy-back, the Buy-back price per Qantas share did not exceed the market value determined in accordance with TD 2004/22. As a result, the entire Dividend Component is frankable.

The capital component

62. For the purposes of determining the amount of a gain or loss you made on Qantas shares you held on capital account or revenue account (whether or not you held the Qantas shares as trading stock), the consideration you are taken to have received in respect of the disposal of your Qantas share (the Sale Consideration) is determined in accordance with section 159GZZZQ. The effect of section 159GZZZQ is to adjust the Capital Component in order to determine the Sale Consideration for CGT or revenue account treatment.

63. Subsection 159GZZZQ(1) provides that you are taken to have received an amount equal to the purchase price (in this case the Buy-back price of \$5.56) as consideration in respect of the sale of your Qantas shares to Qantas. However, this amount is subject to certain adjustments in order to arrive at the Sale Consideration.

64. Subsection 159GZZZQ(2) is one of the adjusting provisions. The subsection provides that if the buy-back price was less than what would have been the market value of the Qantas share (calculated as if the buy-back did not occur and was never proposed to occur), then the consideration is increased to the market value.

65. For the purposes of determining the application of subsection 159GZZZQ(2), the following methodology has been proposed by Qantas and accepted by the Commissioner as outlined in TD 2004/22 – the market value of a Qantas share on 4 November 2019 is the VWAP of a Qantas share on the ASX over the last five trading days before the Announcement Date (22 August 2019), adjusted for the percentage change in the S&P/ASX 200 Index from the commencement of trading on 22 August 2019 to the close of trading on the Closing Date of 1 November 2019.

66. Under this methodology, the market value of a Qantas share bought back was calculated as \$5.77. As a result, you are taken to have instead received consideration of \$5.77 for the sale of each Qantas share.

67. This deemed consideration of \$5.77 is reduced by a 'reduction amount' (subsections 159GZZZQ(3) and (4)). In the circumstances of the Buy-back, the reduction amount is equivalent to the Dividend Component of \$4.37, unless you are a corporate tax entity to whom subsection 159GZZZQ(8) applies.

68. As a result, the Sale Consideration for each Qantas share disposed of under the buy-back is \$1.40 (being \$5.77 less \$4.37).

69. However, if you are a corporate tax entity which is entitled to a franking credit tax offset under Division 207 of the ITAA 1997 in respect of the Dividend Component, a further adjustment may be made to the Sale Consideration. Under subsection 159GZZZQ(8), if you would also make either a capital loss or a deductible loss (or any increase in such a loss) in respect of the sale of a Qantas share bought back under the Buy-back, the Sale Consideration is increased by an off-settable amount determined under subsection 159GZZZQ(9). The reduction amount (being the Dividend Component) is itself reduced by so much of the off-settable amount that does not exceed the capital loss or the deductible loss.

70. You are taken to have disposed of your Qantas shares accepted under the Buy-back on 4 November 2019 (section 104-10 of the ITAA 1997). The disposal may have

different taxation implications depending on how your Qantas shares were held, for instance:

- if you are an investor who held your Qantas shares on capital account, you will be subject to the CGT provisions (see paragraphs 21 to 23 of this Ruling), or
- if you are a share trader who held your Qantas shares on revenue account, you will be subject to the ordinary income provisions and the CGT provisions (see paragraphs 24 to 26 of this Ruling).

Non-resident shareholders – CGT consequences

71. Under subsection 855-10(1) of the ITAA 1997, an entity disregards a capital gain or capital loss made from a CGT event if:

- just before the CGT event happened, the entity is a foreign resident, or the trustee of a foreign trust for CGT purposes, and
- the CGT event happens in relation to a CGT asset that is not 'taxable Australian property'.

72. The term 'taxable Australian property' is defined in the table in section 855-15 of the ITAA 1997. The table sets out five categories of CGT assets:

Item 1	taxable Australian real property
Item 2	an indirect Australian real property interest not covered by item 5
Item 3	a CGT asset used at any time in carrying on a business through a permanent establishment in Australia and which is not covered by items 1, 2 or 5
Item 4	an option or right to acquire a CGT asset covered by items 1, 2 or 3
Item 5	a CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident)

73. The Qantas shares bought back under the Buy-back do not come within table items 1, 2 or 4 of section 855-15 of the ITAA 1997. However, if you are a foreign resident, or the trustee of a foreign resident trust for CGT purposes, you cannot disregard a capital gain or capital loss made when you sold your Qantas share under subsection 855-10(1) of the ITAA 1997 if:

- your Qantas share had been used at any time by you in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15 of the ITAA 1997), or
- your Qantas share was covered by subsection 104-165(3) (table item 5 of section 855-15 of the ITAA 1997).

Qualified persons

74. Paragraph 207-145(1)(a) of the ITAA 1997 provides that in relation to a franked dividend made by an entity, only a 'qualified person' in relation to the distribution for the purposes of Division 1A of former Part IIIA is:

- required to include the franking credit in its assessable income, and

- entitled to claim the franking credit as a tax offset.

75. Broadly speaking, to be a 'qualified person' in relation to the Dividend Component paid under the Buy-back, you must satisfy the 'holding period rule'.

76. There are two versions of the holding period rule. The version that applies depends on whether or not there is a 'related payment'. Broadly, there will be a related payment if you, or your associate, have done, are under an obligation to do, or may reasonably be expected to do, anything having the effect of passing the benefit of the dividend to one or more other persons.

77. The 'holding period rule' requires a shareholder to hold the shares on which the dividend is paid 'at risk' for a continuous period of at least 45 days during the relevant qualification period. In the absence of a related payment, the relevant qualification period is the primary qualification period, which commences on the day after the shares are acquired and ends on the 45th day after the day on which the shares became ex dividend. In determining whether a shareholder has satisfied the holding period rule, any days during which there is a materially diminished risk of loss or opportunity for gain in respect of the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

78. Under former subsection 160APHM(2), a shareholder is taken to have materially diminished risks of loss and opportunities for gain with respect to shares if the 'net position' in respect of the risks of loss and opportunity for gain of the shareholder results in the shareholder having less than 30% of the risks and opportunities relating to the shares.

79. The Commissioner does not regard the announcement of the Buy-back as affecting whether Qantas shares were held at risk or not.

80. There are at least 45 clear days between 1 September 2019 (the last day Qantas shares could be acquired with the right to participate in the Buy-back) and 4 November 2019 (the date tender offers were accepted). As a result if you acquired shares on or before 1 September 2019 that were bought back under the Buy-back the 'holding period rule' is satisfied as long as those shares were held 'at risk' for at least 45 days.

81. Generally, under the 'holding period rule' a shareholder will be deemed to have disposed of their most recently acquired shares first (former subsection 160API(4)). The 45 day rule operates on a 'last-in first-out' basis, so that shareholders will be deemed to have disposed of their most recently acquired shares for the purposes of applying the 45 day rule.

82. Where you acquired ex entitlement Qantas shares (on or after 2 September 2019) and participated in the Buy-back with cum entitlement shares (which conferred an entitlement to participate in the buy-back), you will not be considered for the purposes of the 45 day rule to be subject to the last-in first-out rule in former subsection 160API(4), and so will not be taken to have participated with the 'ex entitlement' shares. Ex entitlement shares do not constitute 'related securities' for the purposes of former subsection 160API(2) in relation to any cum entitlement shares. Qantas shares commenced trading on an ex entitlement basis on 2 September 2019. The final ordinary dividend shared a common timetable to the Buy-back in respect of Announcement, Ex entitlement and Record Dates.

83. Accordingly, for any additional Qantas shares that you acquired on or after 2 September 2019 on an ex entitlement basis, the 'last-in first-out' rule in former subsection 160API(4) will not apply in relation to those shares, regarding both the final ordinary dividend and the Dividend Component of the Buy-back.

The anti-avoidance provisions**Sections 45A and 45B**

84. Sections 45A and 45B are two anti-avoidance provisions, which if they apply, allow the Commissioner to make a determination that section 45C applies. The effect of such a determination is that all or part of the Capital Component you received under the Buy-back is treated as an unfranked dividend.

85. Section 45A is an anti-avoidance provision that applies in circumstances where capital benefits are streamed to certain shareholders (the advantaged shareholders) who derive a greater benefit from the receipt of the capital benefits than other shareholders, and it is reasonable to assume that the other shareholders (the disadvantaged shareholders) have received or will receive dividends.

86. Although a 'capital benefit' of \$1.19 (as defined in paragraph 45A(3)(b)) is provided to you under the Buy-back, the circumstances of the Buy-back indicate that there is no streaming of capital benefits to some shareholders and dividends to other shareholders. All shareholders who participated in the Buy-back received both the Capital Component and the Dividend Component in equal proportion based on the number of shares they sold into the Buy-back. Accordingly, section 45A has no application to the Buy-back.

87. Section 45B applies where certain capital payments are paid to shareholders in substitution for dividends. In broad terms, section 45B applies where under a scheme:

- a person is provided with a capital benefit by a company (paragraph 45B(2)(a))
- a taxpayer (the 'relevant taxpayer'), who may or may not be the person provided with the capital benefit, obtains a tax benefit (paragraph 45B(2)(b)), and
- having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose, but not including incidental purpose), of enabling the relevant taxpayer to obtain a tax benefit (paragraph 45B(2)(c)).

88. The conditions of paragraphs 45B(2)(a) and (b) were met in respect of the Buy-back. However, having regard to the 'relevant circumstances' of the Buy-back, the Commissioner considers that the scheme consisting of the Buy-back was not entered into or carried out for a more than incidental purpose of enabling the shareholders who participated in the Buy-back to obtain a tax benefit.

89. Some key factors are:

- the distribution of share capital of \$1.19 per Qantas share accords with the average capital per share methodology as outlined in Law Administration Practice Statement PS LA 2007/9 *Share buy-backs* and could not be said to be attributable to the profits of Qantas
- the pattern of distributions of Qantas does not indicate that the distribution of share capital of \$1.19 per Qantas share reflects amounts in substitution for a dividend
- the Buy-back is not expected to alter Qantas' dividend policy, and
- as a consequence of the Buy-back, the distribution of share capital resulted in the cancellation of Qantas shares held by shareholders who participated

in the Buy-back and a corresponding loss of dividend, voting and other rights.

90. Accordingly, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to treat all or part of the distribution of share capital of \$1.19 per Qantas share as an unfranked dividend paid by Qantas.

Section 177EA

91. Section 177EA is a general anti-avoidance provision that applies to a wide range of schemes designed to obtain imputation benefits. In essence, it applies to the schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares. This would include a buy-back with a franked dividend component.

92. Specifically, subsection 177EA(3) provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, the person (the relevant taxpayer) would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

93. The conditions in paragraph 177EA(3)(a) to (d) are satisfied in respect of the Buy-back.

94. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme, it would be concluded that, on the part of Qantas, its shareholders or any other relevant party, there is a more than incidental purpose of conferring an imputation benefit under the scheme. In respect of the Buy-back, the relevant taxpayer is each shareholder who participated in the Buy-back and the scheme consists of the Buy-back and the circumstances surrounding the Buy-back.

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

96. The Commissioner has come to the view that section 177EA applies to the Buy-back. In coming to this conclusion, the Commissioner has had regard to all the relevant circumstances of the scheme as outlined in subsection 177EA(17). Among the circumstances of the buy-back reflected in subsection 177EA(17) is the greater attraction of the buy-back to resident shareholders (because of the franking credits on the dividend component of the buy-back price) than to non-resident shareholders.

97. Where section 177EA applies, the Commissioner has a discretion pursuant to subsection 177EA(5) to make a determination to debit Qantas' franking account pursuant to paragraph 177EA(5)(a), or deny the imputation benefit to each participating shareholder pursuant to paragraph 177EA(5)(b). The Commissioner will exercise his discretion in such a way that he will not make a determination that the imputation benefit obtained by shareholders who participated in the Buy-back will be denied under paragraph 177EA(5)(b).

Section 204-30

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

- an imputation benefit is, or apart from the section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a))
- the member derives a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)), and
- the other member of the entity receives lesser or no imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c)).

99. If section 204-30 of the ITAA 1997 applies, the Commissioner may make a determination to debit Qantas' franking account pursuant to paragraph 204-30(3)(a), and/or to deny the imputation benefit to each shareholder who participated in the Buy-back pursuant to paragraph 204-30(3)(c).

100. For section 204-30 of the ITAA 1997 to apply, shareholders who participated in the Buy-back to whom distributions are streamed must derive a greater benefit from franking credits than ordinary shareholders of Qantas who did not participate in the Buy-back. Some of the cases in which a member of an entity 'derives a greater benefit from franking credits' are listed in subsection 204-30(8) by reference to the ability of a member to fully utilise franking credits.

101. A portion of Qantas' ordinary shares are held by non-resident shareholders who do not benefit from franking credits to the same extent as resident shareholders. As a result, the conditions in subsection 204-30(1) of the ITAA 1997 for section 204-30 to apply are met. However, the Commissioner will not make a determination under paragraph 204-30(3)(c).

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