CR 2020/76 - Qantas Airways Limited - 2020-22 Qantas long term incentive plan

Class Ruling

Qantas Airways Limited – 2020–22 Qantas long term incentive plan

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.

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What this Ruling is about

1. This Ruling sets out the income tax consequences for employees of Qantas Airways Limited (Qantas) and its subsidiaries (collectively, the Qantas Group) who are granted a right to be allocated a Qantas share under the 2020–22 Qantas Long Term Incentive Plan (the Plan).

2. Full details of this employee share scheme (ESS) are set out in paragraphs 20 to 41 of this Ruling.

Note: By issuing this Ruling, the ATO is not endorsing this plan. Potential participants must form their own view about the plan.

3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you are an employee of the Qantas Group who:

- is granted a right to be allocated a Qantas share under the Plan (LTIP Right), and
- is a resident of Australia within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936*.

When this Ruling applies

5. This Ruling applies from 1 July 2019 to 30 June 2023.

Ruling

6. The LTIP Right granted to you under the Plan will be an indeterminate right (section 83A-340).

7. Once the vesting conditions are met and the LTIP Right is settled with a Qantas share, the LTIP Right will be treated as a right to acquire a beneficial interest in a share (that is, it will be treated as an ESS interest under an ESS for the purposes of section 83A-10) from the time the LTIP Right was granted to you (subsection 83A-340(2)).

8. Division 83A will not apply if a LTIP Right granted to you is settled with cash.

9. Subdivision 83A-C will apply to the LTIP Right granted to you.

10. Where your LTIP Right vests and it is settled with a Qantas share, the ESS deferred taxing point will (subject to the 30-day period in subsection 83A-120(3)) be the earliest of:

- the time when you cease employment (subsection 83A-120(5)), and
- the end of the 12-month trading restriction period (Holding Lock Period) (subsection 83A-120(7)).

11. Your assessable income for the income year in which the ESS deferred taxing point occurs (as determined in section 83A-120) includes the market value of the Qantas share acquired upon vesting of the LTIP Right at the ESS deferred taxing point reduced by the cost base of the LTIP Right (subsection 83A-110(1)).

12. However, no amount will be included in your assessable income from forfeiting a LTIP Right, or a Qantas share acquired upon vesting of a LTIP Right, where the forfeiture occurs before the deferred taxing point (subsection 83A-110(1)).

13. Division 83A will not apply, and you will not include an amount in your assessable income, where the forfeiture occurs on or after the ESS deferred taxing point but before the end of the Holding Lock Period, and the forfeiture is not the result of your choice (other than a choice to cease employment) (section 83A-310).

14. You will not make a capital gain or a capital loss from forfeiting a LTIP Right or Qantas share (section 104-25 and section 130-80).

15. Where the ESS deferred taxing point occurs, you are deemed to have acquired the Qantas share immediately after the ESS deferred taxing point for its market value (section 83A-125).

16. For capital gains tax (CGT) purposes, the first element of the cost base and reduced cost base of the Qantas share is its market value immediately after the ESS deferred taxing point (section 112-15, subsection 110-25(2) and subsection 110-55(2)).

17. If you dispose of your Qantas share acquired upon vesting of the LTIP Right on or before the ESS deferred taxing point (including where the ESS deferred taxing point is extended under the 30-day rule in subsection 83A-120(3)), any capital gain or capital loss is disregarded (subsection 130-80(1)).

18. Where you dispose of a Qantas share after the ESS deferred taxing point, the disposal will constitute a CGT A1 event (section 104-10) and a capital gain will be made if the capital proceeds from the disposal are more than the share's cost base. A capital loss

is made if those capital proceeds are less than the share's reduced cost base (subsection 104-10(4)).

19. If you make a capital gain from CGT event A1 happening to your Qantas share you may be entitled to treat the gain as a discount capital gain in respect of the share if it has been held for at least 12 months from the date the ESS deferred taxing point occurred, provided the other requirements of Subdivision 115-A are satisfied (section 115-25 and section 83A-125).

Scheme

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

The Plan

21. The Plan provides a means for the delivery of equity ownership to Qantas Group employees. The objectives of the Plan are to, among other things, align the interests of employees who participate in the Plan with shareholders and provide incentives to retain those employees.

The Plan terms and invitation letter

22. Qantas sends out letters to eligible employees of the Qantas Group outlining the following information:

- the number of LTIP Rights being offered
- details of any performance measures that Qantas will need to achieve (Performance Measures) during the period between 1 July 2019 and 30 June 2022 (Performance Period)
- service-related conditions which must be satisfied before the LTIP Right becomes an enforceable right to receive Qantas share or some other consideration (Service Conditions)
- the time at which a LTIP Right may vest
- the circumstances in which the LTIP Right may lapse
- details of any disposal restrictions which attach to a Qantas share acquired after vesting, and
- any other relevant terms and conditions attaching to the LTIP Right or any Qantas shares acquired upon vesting.

23. The LTIP Right is subject to satisfaction of the vesting conditions (which are Performance Measures to be met by Qantas and Service Conditions to be met by you) during the Performance Period.

24. No consideration is payable by you upon the grant or vesting of the LTIP Right.

25. You may 'opt-out' of the LTIP Right if you do not want to participate.

26. A LTIP Right is not transferable and may not be dealt with (except with Board approval or by force of law upon death or bankruptcy).

27. If bonus shares are issued or there is a capital reorganisation, the Board will determine any adjustments to the number of LTIP Rights you may be entitled to. If a new

LTIP Right is granted, it will be subject to the same terms and conditions as the original LTIP Right.

28. The Board may exercise its discretion to cash settle a LTIP Right following testing at the end of the Performance Period.

29. If the Board determines to cash-settle a LTIP Right, then you will be paid the cash-equivalent value, being the gross value of the Qantas shares that would have been allocated to you, net of applicable taxes and other withholdings. This amount will be paid by a member of the Qantas Group, not by the Trustee of the Qantas Employee Share Plan Trust (the Trust).

30. To the extent the Performance Measures and Service Conditions have been achieved, a LTIP Right will generally vest, provided you remain employed by the Qantas Group at the date of vesting and do not commit an act of misconduct in relation to the Qantas Group.

31. Once the LTIP Right vests, Qantas must deliver one share in Qantas for each LTIP Right unless the Board decides to cash-settle the LTIP Right. Upon vesting, the share acquired from the LTIP Right is subject to a 12-month Holding Lock Period (during which time clawback provisions apply).

32. Qantas shares are acquired on market or issued to the Trustee of the Trust prior to the allocation of the shares to you upon vesting of the LTIP Right.

33. Unless the Board otherwise determines, a LTIP Right that does not vest will lapse if:

- you resign in circumstances not approved by the Board
- your employment is terminated for cause, or
- your employment is terminated in other circumstances determined by the Board to involve unacceptable performance or conduct.

34. Where your employment ceases before the LTIP Right vests, the Board has the discretion to determine that instead of lapsing, some or all of the LTIP Rights will not lapse at the date of cessation of employment in limited circumstances such as death, disability, redundancy or retirement, and may vest to the extent the relevant Performance Measures and Service Conditions have been satisfied.

35. Where, in the opinion of the Board, you act fraudulently or dishonestly, or are in breach of your obligations to the Group, the Board may:

- deem all or any your LTIP Rights to have lapsed
- deem all or any shares held by you following the vesting of the LTIP Right to be forfeited, and/or
- impose additional vesting conditions for all or any LTIP Rights, or shares acquired from vesting of the LTIP Rights, or for the release of any trading restriction.

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

37. In any case, any LTIP Rights for which the vesting conditions are not met for the Performance Period will lapse.

38. At the end of the Holding Lock Period, you may deal with any Qantas share acquired upon vesting (subject to applicable laws and the Qantas employee share trading policy contained in the Qantas Code of Conduct and Ethics).

39. In the event of a takeover or change of control, the Board will determine the vesting of the target number of LTIP Rights you are entitled to. If vesting has already occurred, the LTIP Right must be converted into a share within 30 days of the change of control event.

40. Immediately after the acquisition of any LTIP Rights under the Plan, no participant in the Plan will hold more than 10% of the shares in Qantas or be in a position to cast or control the casting of more than 10% of the maximum number of votes that might be cast at a general meeting of Qantas.

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

Commissioner of Taxation
16 December 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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Where a long-term incentive plan right is settled with a share

42. An employee share scheme is defined in subsection 83A-10(2) as:

> … a scheme under which ESS interests in a company are provided to employees, or associates of employees, (including past or prospective employees) of:
>
> (a) the company; or
>
> (b) subsidiaries of the company;
>
> in relation to the employees' employment.

Indeterminate right

43. An indeterminate right is a beneficial interest in a right that may later become a right to acquire a beneficial interest in a share (subsection 83A-340(1)).

44. A person will acquire an indeterminate right when they can enforce against their employer under the terms of contract rights that will later become a beneficial interest in a share (Taxation Determination TD 2016/17 *Income tax: in what circumstances does a contractual right, which is subject to the satisfaction of a condition, become a right to acquire a beneficial interest in a share for the purposes of subsection 83A-340(1) of the Income Tax Assessment Act 1997?*).

45. When a LTIP Right is granted, it is a beneficial interest in a right, but not a right to acquire a beneficial interest in a share.

46. When a LTIP Right vests and the Board determines not to cash settle the LTIP Right, the LTIP Right becomes a right to acquire a beneficial interest in a share in Qantas. Therefore, the LTIP Right is an indeterminate right under subsection 83A-340(1).

47. Subsection 83A-340(2) provides that where an employee acquires a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share, Division 83A will apply as if the right had always been a right to acquire the beneficial interest in the share.

48. Division 83A will apply so that the LTIP Right is taken to have always been a right to acquire a beneficial interest in a share from the time the LTIP Right is granted to you.

Employee share scheme interest

49. An ESS interest in a company is a beneficial interest in a share in the company or a right to acquire a beneficial interest in a share in the company (subsection 83A-10(1)).

50. A LTIP Right that vests and is settled with a Qantas share is a right to acquire beneficial interest in an ordinary share in Qantas and is an ESS interest (subsection 83A-10(1)). The Plan is an ESS as the Plan provides ESS interests to employees of the Qantas Group who may participate in the Plan (subsection 83A-10(2)).

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

52. As the LTIP Right is granted to you for nil consideration under the Plan, you acquired the LTIP Right at a discount pursuant to subsection 83A-20(1). Subdivision 83A-B will apply to the LTIP Right acquired by you under the Plan, unless Subdivision 83A-C applies.

Assessability of a long-term incentive plan right under Subdivision 83A-C

53. Subdivision 83A-C allows the discount in relation to the ESS interest to be included in assessable income at a later time if the following conditions are satisfied:

- Subdivision 83A-B would, apart from section 83A-105, apply to the interest
- paragraph 83A-105(1)(aa) results in a participant continuing to receive a discount in relation to the interest
- subsections 83A-45(1), (2), (3) and (6) apply to the interest, and
- there is a real risk that the participant will forfeit or lose the interest (other than by disposing of it, exercising the right or letting it lapse) pursuant to subsection 83A-105(3).

54. In relation to the first condition listed at paragraph 53 of this Ruling, Subdivision 83A-B would, apart from subsection 83A-105(1), apply to the LTIP Right because it is:

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

55. In relation to the second condition listed at paragraph 53 of this Ruling, paragraph 83A-105(1)(aa) requires that after applying section 83A-315 (which refers to the regulations for calculating the market value of an ESS interest where it is an unlisted right), there is still a discount given in relation to the interest.

56. Regulation 83A-315.03 of the *Income Tax Assessment Regulations 1997* states:

> If the lowest amount that must be paid to exercise a right to acquire a beneficial interest in a share is nil or can not be determined, the value of the right on a particular day is the same as the market value of the share on that day.

As the LTIP Right is provided for nil consideration, that is a discount to the market value of an ordinary share in Qantas. As such, you will receive a discount in relation to the LTIP Right.

57. In relation to the third condition listed at paragraph 53 of this Ruling, subsections 83A-45(1), (2), (3) and (6) apply to the LTIP Right granted because:

- when the LTIP Right is acquired, you were employed by a company in the Qantas Group (subsection 83A-45(1))
- all of the ESS interests available for acquisition under the Plan relate to ordinary shares of Qantas (subsection 83A-45(2))
- the predominant business of the Qantas Group is not the acquisition, sale or holding of shares, securities or other investments (subsection 83A-45(3)), and
- immediately after the acquisition of the LTIP Right, you will not hold a beneficial interest in more than 10% of the shares in Qantas nor be in a position to cast, or control the casting of, more than 10% of the maximum number of votes that might be cast at a general meeting of Qantas (subsection 83A-45(6)).

58. In relation to the fourth condition listed at paragraph 53 of this Ruling, Subdivision 83A-C applies if, under the conditions of the Plan when the LTIP Right is granted, there is a real risk that you will forfeit or lose the LTIP Right (other than by disposing of it, exercising the right or letting it lapse).

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

60. As you can lose some (or all) of the LTIP Rights (or Qantas shares held on your behalf) during the three-year vesting period if you breach the LTIP terms and conditions, it is accepted that the real risk of forfeiture test is met.

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

Employee share scheme deferred taxing point

62. Section 83A-120 provides the rules for determining when the ESS deferred taxing point occurs for a right to acquire a share. This will be the earliest of the following times:

- when the right has not been exercised, there is no real risk of forfeiting the right, and the scheme no longer genuinely restricts immediate disposal of the right (subsection 83A-120(4))
- when you cease employment (within the meaning of section 83A-330) in respect of which you acquired the right (subsection 83A-120(5))
- 15 years after you acquired the right (subsection 83A-120(6), and
- after the right is exercised, when there is no real risk of forfeiting or losing the share, and the scheme no longer genuinely restricts disposal of the share (subsection 83A-120(7)).

63. However, if you dispose of the vested right or the share within 30 days of the earliest time outlined in paragraph 62 of this Ruling, the ESS deferred taxing point will instead be the time of disposal (paragraph 83A-120(3)(b)).

64. For the purposes of Division 83A, the concept of ‘exercising a right’ is not considered to necessarily require an action or activity by the beneficial owner of the right. It is enough that they become the beneficial owner of the share that is the subject of the LTIP Right, (this can happen automatically or at the instigation of the participant, the employer or another party). Therefore, you are taken to have exercised the LTIP Right when a Qantas share is allocated upon vesting of the LTIP Right.

65. Under the Plan, where your LTIP Right vests, the ESS deferred taxing point will (subject to the 30 day rule) be the earliest of:

- the time when you cease employment (subsection 83A-120(5)), and
- the end of the Holding Lock Period (subsection 83A-120(7)).

66. However, if you dispose of the Qantas share acquired from vesting of the LTIP Right within 30 days of the earliest time outlined in paragraph 62 of this Ruling, the ESS deferred taxing point will be the date of disposal (subsection 83A-120(3)).

Amount to be included in assessable income

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

68. Where the ESS interest is a right, the market value of the LTIP Right at the ESS deferred taxing point is the market value of the Qantas share acquired (regulation 83A-315.03 of *Income Tax Assessment Regulations 1997*).

69. Therefore, the amount included in your assessable income at the ESS deferred taxing point is the market value of the Qantas share acquired upon vesting of a LTIP Right at the ESS deferred taxing point, less the cost base of the LTIP Right. As the LTIP Right is granted for nil consideration and no amount is paid to exercise the LTIP Right, the first element of the cost base of the LTIP Right is nil (subsection 83A-110(1) and subsection 110-25(2)).

Forfeiture

70. No amount will be included in your assessable income if your LTIP Right, or a Qantas share acquired upon vesting of a LTIP Right, is forfeited before the deferred taxing point would have occurred (subsection 83A-110(1)).

71. Section 83A-310 provides that an amount is not included in assessable income in relation to an ESS interest if:

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

72. Where, in relation to a LTIP Right or Qantas share acquired upon vesting of a LTIP Right under the Plan:

- disregarding section 83A-310, an amount is included in your assessable income under Subdivision 83A-C
- you forfeit or lose the LTIP Right (without having disposed of it), and
- the forfeiture or loss is not the result of a choice by you, other than a choice to cease employment,

then an amount is not included in your assessable income as Division 83A is taken never to have applied (section 83A-310).

Capital gains tax consequences of forfeiture

73. Where a LTIP Right or Qantas share is forfeited, CGT event C2 happens in accordance with subsection 104-25(1).

74. Where CGT event C2 happens, you make a capital gain if the capital proceeds are more than the asset's cost base. You make a capital loss if those capital proceeds are less than the asset's reduced cost base (subsection 104-25(3)). Where CGT event C2 happens because a LTIP Right or Qantas share is forfeited on or before the ESS deferred taxing point, subsection 130-80(1) does not apply to disregard any capital gain or capital loss (subsection 130-80(2)).

75. As you pay no consideration for the LTIP Right or Qantas share, the cost base and reduced cost base will remain nil as the market value substitution rule in section 112-20 does not apply to the LTIP Right or Qantas share forfeited or lost (subsection 130-80(4)).

76. As you receive no capital proceeds from the forfeiture of a LTIP Right or a Qantas share, the capital proceeds will remain nil as the market value substitution rule in section 116-30 also does not apply (subsection 130-80(4)).

77. Therefore, you will not make a capital gain or a capital loss from forfeiting a LTIP Right or Qantas share.

Capital gains tax consequences after employee share scheme deferred taxing point

Time of acquisition

78. Where you dispose of your Qantas share acquired by you pursuant to a LTIP Right after the ESS deferred taxing point, for CGT purposes you are deemed to have acquired that share immediately after the ESS deferred taxing point for its market value (section 83A-125). This resets the acquisition time of the share and its cost base to the market value immediately after the ESS deferred taxing point.

First element of the cost base of a share

79. The first element of the cost base and reduced cost base of a Qantas share acquired by you pursuant to a LTIP Right is the market value of the share immediately after the ESS deferred taxing point of the LTIP Right (section 83A-125, section 112-15, subsection 110-25(2) and subsection 110-55(2)).

Disposal within 30 days

80. Where you dispose of the Qantas share acquired by you pursuant to a LTIP Right within 30 days after what would otherwise be the ESS deferred taxing point, the ESS deferred taxing point will instead be the time of the disposal (paragraph 83A-120(3)(b)). The amount included in your assessable income will be the market value of the Qantas share at the time of disposal (section 83A-110).

81. Notwithstanding CGT event A1 happens as a result of the disposal (section 104-10), any capital gain or capital loss made from that disposal is disregarded (subsection 130-80(1)).

Disposal after 30 days

82. CGT event A1 happens when you dispose of a Qantas share (subsection 104-10(1)). A capital gain is made if the capital proceeds from the disposal are more than the share's cost base. A capital loss is made if those capital proceeds are less than the share's reduced cost base (subsection 104-10(4)).

Discount capital gain

83. If you make a capital gain from the disposal of a Qantas share you may be entitled to treat the gain as a discount capital gain in respect of the share that has been held for at least 12 months from the date the ESS deferred taxing point occurred, provided the other requirements of Subdivision 115-A are satisfied (section 115-25).

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TD 2016/17

Legislative references:

- ITAA 1936 6(1)
- ITAA 1997 Div 83A
- ITAA 1997 83A-10
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(2)
- ITAA 1997 83A-B
- ITAA 1997 83A-20(1)
- ITAA 1997 83A-45(1)
- ITAA 1997 83A-45(2)
- ITAA 1997 83A-45(3)
- ITAA 1997 83A-45(6)
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-105
- ITAA 1997 83A-105(1)
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- ITAA 1997 83A-105(3)
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- ITAA 1997 83A-330
- ITAA 1997 83A-340
- ITAA 1997 83A-340(1)
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- ITAA 1997 104-25
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- ITAA 1997 104-25(3)
- ITAA 1997 110-25(2)
- ITAA 1997 110-55(2)
- ITAA 1997 112-15
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- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25
- ITAA 1997 116-30
- ITAA 1997 130-80
- ITAA 1997 130-80(1)
- ITAA 1997 130-80(2)
- ITAA 1997 130-80(4)
- TAA 1953
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