

CR 2005/100 - Income tax: Qantas Deferred Share Plan - 2004 Performance Share Plan Rules

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⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *18 October 2006*



Class Ruling

Income tax: Qantas Deferred Share Plan – 2004 Performance Share Plan Rules

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Preamble

*The number, subject heading, **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

*[**Note:** This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]*

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax laws dealt with in this Ruling are:

- section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139BA of the ITAA 1936;
- section 139C of the ITAA 1936;
- section 139CA of the ITAA 1936;
- section 139CC of the ITAA 1936;
- section 139CD of the ITAA 1936;
- section 139CE of the ITAA 1936;
- section 139E of the ITAA 1936;
- section 139FA of the ITAA 1936;
- section 139FB of the ITAA 1936;
- section 139G of the ITAA 1936;
- section 104-10 of the *Income Tax Assessment Act 1997* (ITAA 1997);

- section 109-5 of the ITAA 1997;
- section 115-5 of the ITAA 1997;
- section 115-30 of the ITAA 1997;
- section 115-100 of the ITAA 1997;
- section 130-80 of the ITAA 1997; and
- section 130-83 of the ITAA 1997.

Class of persons

3. The class of persons to which this Ruling applies is all Australian resident employees of the Qantas Group (the Group) who participate in the Qantas Deferred Share Plan (DSP) as described in the arrangement part of this Ruling. In this Ruling, a person belonging to this class of persons is referred to as a participating employee. The Group comprises:

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

Qualifications

4. The Commissioner makes this Ruling based upon the precise arrangement identified in this Ruling.

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 9 to 22.

6. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20). Furthermore, this Ruling only applies to the extent that:

- it is not later withdrawn by notice in the *Gazette*;
- it is not taken to be withdrawn by an inconsistent later Public Ruling; or
- the relevant taxation laws are not amended.

Note: The Addendum to this Ruling that issued on 18 October 2006 applies from the income year ended 30 June 2006.

Arrangement

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

- the application for Class Ruling dated 21 April 2005;
- amended application for Class Ruling dated 10 May 2005;
- Qantas Deferred Share Plan Trust Deed dated 9 December 2002;
- Qantas Deferred Share Plan Terms and Conditions (DSP Terms and Conditions);
- Qantas Deferred Share Plan – 2004 Performance Share Plan Rules (DSP Rules);
- correspondence from Qantas Airways Limited dated 8 July 2005;
- Qantas Code of Conduct and Ethics; and

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- correspondence from Qantas Airways Limited dated 19 June 2006 and 28 August 2006.

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

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

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

11. The DSP commenced on 17 October 2002 and on 9 December 2002 the Board of Qantas (the Board) appointed a Trustee of the DSP.

12. Under the Terms and Conditions of the DSP the Board may from time to time offer shares (DSP shares) or grant rights to an eligible employee subject to such conditions as it determines.

13. The DSP Rules provide for DSP Shares, being fully paid ordinary shares in Qantas, to be offered to participating employees upon the Board's approval of the satisfaction of a performance hurdle, being a 'balanced scorecard'.

14. The DSP Shares are acquired on-market and registered in the name of the Trustee to be held for the benefit of the participating employees during a Holding Lock Period.

15. The applicant has advised that the DSP shares acquired by the participating employees under the DSP are qualifying shares for the purposes of section 139CD of the ITAA 1936.

16. The participating employees pay no consideration to acquire the DSP shares.

17. A disposal restriction applies to all DSP shares offered, such that the DSP shares cannot be dealt with by the participating employees until expiration of the Holding Lock Period.

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

- 1 July 2005 in respect of up to one-half of the DSP shares acquired; and
- 1 July 2006 in respect of up to one-half of the DSP shares acquired.

19. Upon expiry of the Holding Lock Period, the DSP shares will be transferred from the Trustee and registered in the name of the participating employee.

20. Unless the Board otherwise determines, any DSP shares offered under the DSP Rules which remain subject to a Holding Lock

Period will be forfeited if a participating employee ceases employment with the Group or commits an act of gross misconduct in relation to the Group.

20A. The applicant has advised that various procedures introduced since 2002 have been implemented under the Code of Conduct and Ethics – Insider Trading Policy. The procedures are intended to restrict the sale of Qantas securities by participating employees who are in possession of material, non-public information. Material, non-public information is information that could or would be likely to influence persons in deciding to buy or sell Qantas securities.

20B. Since 2002, a range of identified directors and executives (nominated employees) were required to provide written prior notice of intent to sell Qantas securities and make a statement that they were not at that time in possession of material, non-public information.

20C. From February 2006, a range of identified Qantas group finance staff (finance employees) are required to obtain approval to sell Qantas securities. Approval is subject to the non holding of material, non-public information.

20D. From July 2006, a revised process that applies to an expanded range of identified directors, executives and senior staff (expanded nominated employees) requires them to seek formal approval from the CEO (or his delegated nominee) to sell Qantas securities. The request for approval must state that at the time they do not believe they are in possession of material, non-public information.

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

22. The applicant states that the Rules do not satisfy the exemption conditions in section 139CE of the ITAA 1936 and therefore subsection 139BA(2) of the ITAA 1936 will not apply to reduce the discount included in assessable income.

Ruling

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

23. A DSP share will be a share acquired under an employee share scheme and will be a qualifying share for the purposes of section 139CD. For the purposes of Division 13A a DSP share is acquired by the participating employee on the date the participating employee acquires a beneficial interest in the DSP share. This occurs when the Trustee acquires the DSP share and holds it on behalf of the participating employee.

Where an employee makes an election

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

25. The discount included in the participating employee's assessable income will be an amount equivalent to the market value of the DSP share at the time of acquisition as no consideration is paid or given by the participating employee to acquire the DSP share pursuant to subsection 139CC(2).

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

Capital gains tax

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

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

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

30. Where the disposal of the DSP share is 12 months or more after the date of acquisition, any capital gain that results from the disposal will be a discount capital gain, subject to meeting the requirements of Subdivision 115-A of the ITAA 1997.

31. Under section 115-30 of the ITAA 1997 the DSP shares are acquired, for the purposes of determining whether the capital gain is a discount capital gain, at the time the participating employee first acquires a beneficial interest in the DSP share.

Forfeiture

32. Where a participating employee forfeits a DSP share, and has made an election under section 139E the discount given is included in the participating employee's assessable income under subsection 139B(2).

33. If the participating employee forfeits the DSP share before the DSP share is transferred to them or before they become absolutely

entitled to the DSP share, they will not make a capital gain or capital loss in relation to the forfeiture of the DSP share.

Where an employee does not make an election

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

35. The cessation time, under subsection 139CA(2) will be the earliest of the following times:

- the time when the participating employee disposes of the DSP share;
- the later of:
 - the time when the holding lock on any DSP share is removed by the Board;
 - the time when any additional disposal restrictions cease to have effect, that are in effect or imposed on participating employees who are nominated employees or finance employees, under the Qantas Code of Conduct and Ethics. This will only be the case where any additional disposal restrictions applied at the time the holding lock on any DSP share was removed by the Board:
 - from 1 July 2005 in respect of up to one-half of the DSP shares acquired;
 - in relation to participating employees who are nominated employees or finance employees; and
 - who, at that time, are in possession of material, non-public information;
 - the time when any additional disposal restrictions cease to have effect, that are in effect or imposed on participating employees who are finance employees or expanded nominated employees, under the Qantas Code of Conduct and Ethics. This will only be the case where any additional disposal restrictions applied at the time the holding lock on any DSP share was removed by the Board:
 - from 1 July 2006 in respect of up to one-half of the DSP shares acquired;
 - in relation to participating employees who are finance employees or expanded nominated employees; and

- who, at that time, are in possession of material, non-public information; and
- the time when any forfeiture conditions cease to have effect;
- the time when the participating employee ceases to be employed by the Qantas Group; or
- the end of the 10 year period starting when the participating employee acquired the DSP share.

Disposal within 30 days

36. Where the participating employee disposes of the DSP 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 DSP share as no consideration has been given for the acquisition of the DSP share.

37. 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

38. Where the participating employee does not dispose of the DSP 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 DSP share at the cessation time, in accordance with subsection 139CC(4).

39. Where a participating employee disposes of a DSP share, other than in an arm's length transaction at or within 30 days of cessation time, a capital gain or capital loss may arise (refer to paragraphs 27 and 28 of the Ruling). Please note that paragraph 31 will not apply in this instance.

Forfeiture of shares

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

41. Where the participating employee forfeits the DSP share before the DSP share is transferred to them or before they become absolutely entitled to it, they will not make a capital gain or capital loss in relation to the forfeiture of the DSP share.

Explanation

42. A share will be acquired under an employee share scheme, pursuant to Division 13A, if it is:

- acquired within the meaning of section 139G;
- acquired in respect of the employment of an employee, pursuant to subsection 139C(1); and
- acquired for less than market value, and therefore not excluded under subsection 139C(3).

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

44. A participating employee will acquire a beneficial interest in a DSP share when the Trustee acquires the DSP share and holds it on behalf of the participating employee. Thus the participating employee will acquire a share within the meaning of section 139G.

45. The DSP was established as part of the employee share scheme strategy of the Qantas group and provides a platform for a broader based delivery of equity ownership to employees. As such, any DSP share acquired is considered to be acquired by a participating employee in respect of their employment, pursuant to subsection 139C(1).

46. The participating employee pays no consideration for the acquisition of the DSP share. As no consideration is paid or given the participating employee will acquire the DSP share for less than market value.

47. The Commissioner accepts that the conditions specified in section 139CD are satisfied. Thus a DSP share will be a qualifying share for the purposes of Division 13A.

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

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

Where an employee makes an election

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

participating employee's assessable income in the year of income in which the DSP share is acquired.

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

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

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

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

54. Qantas has stated that the exemption conditions in section 139CE are not satisfied in relation to a DSP share and as such subsection 139BA(2) does not apply.

Capital gains tax

55. As a participating employee has a beneficial interest in a DSP share they will acquire the DSP share for CGT purposes at the earlier of the time:

- when they become absolutely entitled to the DSP share, pursuant to event E5 of the table in subsection 109-5(2) of the ITAA 1997; or
- when the DSP share is transferred from the Trustee to the participating employee and they acquire the legal interest in the DSP share, pursuant to event number A1 (case 1) of the table in subsection 109-5(2) of the ITAA 1997.

56. Where the DSP share is subsequently disposed of, a capital gain will arise if the capital proceeds from the disposal exceed the

cost base of the DSP 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.

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

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

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

- the DSP share is acquired under an employee share scheme;
- the DSP share is acquired from an employee share trust; and
- the participating employee has made an election under section 139E.

Forfeiture

60. Where a DSP share is forfeited, and the participating employee has made an election, the amount of discount included in a participating employee's assessable income under section 139B cannot be excised.

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

Where an employee does not make an election

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

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

- the time when the participating employee disposes of the share (that is, where the holding lock period has not expired and the participating employee forfeits their interest in the share);
- the later of:
 - the time when the holding lock on any DSP share is removed, where the Board on request by a participating employee, exercises its discretion in accordance with paragraph 18 of this Ruling;
 - the time when any additional disposal restrictions cease to have effect, that are in effect or imposed on participating employees who are nominated employees or finance employees, under the Qantas Code of Conduct and Ethics – Insider Trading Policy. This will only apply to additional restrictions imposed or in place at the time the 10 year holding lock on any DSP share is removed by the Board:
 - from 1 July 2005 in respect of up to one-half of the DSP shares acquired;
 - in relation to participating employees who are nominated employees or finance employees; and
 - who, at that time, are in possession of material, non-public information;
 - the time when any additional disposal restrictions cease to have effect, that are in effect or imposed on participating employees who are finance employees or expanded nominated employees, under the Qantas Code of Conduct and Ethics – Insider Trading Policy. This will only apply to additional restrictions imposed or in place at the time the 10 year holding lock on any DSP share is removed by the Board:

- from 1 July 2006 in respect of up to one-half of the DSP shares acquired;
- in relation to participating employees who are finance employees or expanded nominated employees; and
- who, at that time, are in possession of material, non-public information; and
- the time when any forfeiture condition ceases to have effect on a DSP share;
- the time when the participating employee ceases to be employed by either their employer (being their employer at the time they acquired the share) or a Qantas Group company, pursuant to subsection 139CA(3); or
- the end of the 10 year period starting when the participating employee acquired the DSP share.

63A. Participating employees who are nominated employees, finance employees or expanded nominated employees, and who are not in possession of material, non-public information at the time of the removal of the holding lock on a DSP 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).

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

Disposal within 30 days

65. Where a participating employee disposes of a DSP share in an arm's length transaction at, or within 30 days of, the cessation time the amount of the discount to be included in the participating employee's assessable income is calculated in accordance with subsection 139CC(3). The discount is the amount or value of any consideration received by the participating employee for the disposal less the amount or value of any consideration paid or given by the participating employee for the acquisition of the DSP share.

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

Disposal after 30 days

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

68. Subsection 130-83(3) of the ITAA 1997 has the effect that where CGT event A1, C2, E1, E2 or E5 does not happen in relation to the DSP 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 DSP share is its market value at the cessation time.

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

70. Where a participating employee disposes of a DSP share, other than in an arm's length transaction at or within 30 days of the cessation time, a capital gain or capital loss may arise (refer to paragraph 28 of this Ruling). Note that paragraph 31 will not apply in this instance.

Forfeiture of shares

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

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

Detailed contents list

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Commissioner of Taxation

16 November 2005

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<i>Related Rulings/Determinations:</i>	- employees
CR 2001/1; TR 92/1; TR 92/20;	- forfeiture of rights & entitlements
TR 97/16	- income
	- resignation of employees
<i>Subject references:</i>	- share discounts on employee share schemes
- acquisition of shares	- shareholders
- capital gains tax	- shares
- CGT cost base	
- CGT discount	
- CGT events	<i>Legislative references:</i>
- cost base	- TAA 1953 Pt IVAAA

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- Copyright Act 1968
 - ITAA 1936 Pt III Div 13A
 - ITAA 1936 139B
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ATO references

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