


***CR 2021/26 - Qantas Airways Limited - 2020/22  
Qantas non-executive director fee sacrifice share  
acquisition plan***

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## Class Ruling

### Qantas Airways Limited – 2020/22 Qantas non-executive director fee sacrifice share acquisition plan

#### **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.

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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 participate in the 2020/22 Qantas Non-Executive Director Fee Sacrifice Share Acquisition Plan (the Plan).

2. Full details of the Plan are set out in paragraphs 19 to 42 of this Ruling.

**Note:** By issuing this Ruling, the ATO is not endorsing the 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 a non-executive director (NED) of the Qantas Group who:

- participates in the Plan, and
- is a resident of Australia as defined in 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 2022.

## Ruling

6. The Plan is an employee share scheme (ESS) as defined in subsection 83A-10(2).
7. The right to be granted a Qantas share under the Plan for each participation period (the Right) is an ESS interest as defined in paragraph 83A-10(1)(b).
8. Subdivision 83A-C will apply to the Right granted to you if it is not settled with a cash payment.
9. A Right settled with a cash payment will be included in your assessable income in the same income year you received that payment (section 6-5).
10. For the purposes of Division 83A, if you were not granted a Right in the preceding participation period, the time you acquired the Right for the upcoming participation period is the date you lodged the application form to participate in it (section 83A-340).
11. For the purposes of Division 83A, if you were granted a Right in the preceding participation period, the time you acquired the Right for the upcoming participation period is the date of the letter inviting you to participate in it (section 83A-340).
12. However, if you choose to completely withdraw your participation for the upcoming participation period, you do not acquire a Right for the upcoming participation period.
13. Where your Right converts into a Qantas share, the ESS deferred taxing point (as determined in section 83A-120) 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
  - end of the period during which you are prohibited from dealing with your Qantas shares (subsection 83A-120(7)).
14. Your assessable income for the income year in which the ESS deferred taxing point occurs includes the market value of the Qantas share at that time (subsection 83A-110(1)).
15. If you dispose of your Qantas share at 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 loss is disregarded (subsection 130-80(1)).
16. If you dispose of your Qantas share after the ESS deferred taxing point, you are taken to have acquired your share immediately after the ESS deferred taxing point at its market value (section 83A-125).
17. 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)).
18. 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**

19. 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**

20. The Plan was introduced in December 2019 and, among other things, designed to provide incentives to retain NEDs and align their interests with the interests of shareholders.

21. Qantas advises that the fee sacrifice arrangement is an effective salary sacrifice arrangement according to paragraphs 19 to 23 of Taxation Ruling TR 2001/10 *Income tax: fringe benefits tax and superannuation guarantee: salary sacrifice arrangements*.

### **The Plan terms and invitation letter**

22. The Plan is operated in accordance with the terms set out in the Plan rules together with the terms set out in the invitation letter Qantas issues to you before the start of each participation period. Each participation period is for a six-month duration commencing around 1 March and 1 September each year.

23. The invitation letter invites you to participate in the Plan being offered for the upcoming participation period only. To participate in an upcoming participation period, you will be required to contribute a percentage of your base or total fees of between 20% and 100% (Participant Contribution).

24. If you were not contributing a Participant Contribution in the preceding participation period, you are required to lodge an application form with the Qantas Board (Board) to elect to participate in the Plan.

25. If you were contributing a Participant Contribution in the preceding participation period and you wish to participate in the Plan for the upcoming participation period, you only need to lodge an application form if you elect to:

- vary your Participant Contribution for the upcoming participation period, or
- withdraw from the Plan.

26. You cannot vary your Participant Contribution within a participation period.

27. The final number of Rights you are eligible to receive is determined by dividing your Participant Contribution by the seven-calendar day volume-weighted average price (VWAP) of a Qantas share immediately following the announcement of Qantas' results for the half year or full year, as is relevant (Grant Date).

28. The number of Rights to be allocated is calculated based on your Participant Contribution and rounded down to the nearest whole number. Any excess Participant Contribution is forfeited.

29. You are not entitled to vote, receive dividends, or have any other rights of a shareholder in respect of Rights held during the participation period.

30. Some or all of your Rights will lapse upon the earliest of:
- the date specified in the applicable invitation letter
  - you ceasing to be an eligible person under the Plan prior to the Right being converted to a share, and
  - any other circumstance or event described under the Plan which results in the lapsing of Rights, whether automatically or as the Board determines.
31. Each Right granted to you will convert automatically to one fully-paid Qantas share (Conversion) immediately after the end of the relevant participation period, following the end of the 'blackout period' leading up to release of Qantas' financial results for the half year or full year, as relevant (Conversion Date).
32. You can withdraw from the Plan prior to the Conversion Date if you have approval from the Board or the withdrawal is made in accordance with the Terms.
33. If you withdraw from the Plan or cease to hold office with Qantas during the participation period, but before the Conversion Date, your Rights will lapse and you will be paid, in cash, the amount of fees (less applicable taxes withheld) that had been allocated as part of the Participation Contribution from the start of the relevant participation period up until the date that the withdrawal takes effect.
34. Rights will convert into Qantas shares on the relevant Conversion Date subject to you remaining to be a NED of Qantas and having made your Participant Contribution.
35. A Qantas share converted from a Right must, subject to any applicable restrictions imposed by Australian laws or the share trading policy, either be acquired on-market by or issued to the Qantas Employee Share Plan Trust.
36. You are prohibited from dealing in your Qantas share allocated to you for a period, as nominated by you in your application, starting from a minimum three years from the Conversion Date up to the maximum of 15 years from the Grant Date for the relevant Rights (Restriction Period).
37. At the end of the Restriction Period, you may deal with any Qantas share (subject to applicable laws and the Qantas employee share trading policy contained in the Qantas Code of Conduct and Ethics).
38. Unless the Board determines otherwise, you are entitled to vote, receive dividends and, subject to any applicable Restriction Period, have all rights of a shareholder in respect of Qantas shares allocated to you under the Plan.
39. Your Qantas shares may be sold or otherwise dealt with by you in accordance with the Plan once the relevant Restriction Period has been lifted.
40. The governing rules of the Plan expressly state that:
- the Plan is intended to operate in accordance with Subdivision 83A-C such that Rights granted under the Plan are subject to deferred taxation, and
  - a grant of Rights is personal to you and cannot be transferred to other person or entities and may only be registered in your name.

41. Immediately after the acquisition of any 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.

42. 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.

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**Commissioner of Taxation**

31 March 2021

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**Appendix – Explanation**

**❶** *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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**Employee share scheme interest**

43. 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)).

44. The Right is treated as a right to acquire a beneficial interest in an ordinary share in Qantas from the time that you acquired the Right. At this time, you will have an enforceable right arising upon contract formation that is subject to a condition precedent to performance under a contract that, upon satisfaction of the condition (the calculation of the VWAP) directly causes the enforceable right to become a right to acquire a Qantas share. Therefore, the Right is an ESS interest (subsection 83A-10(1)).

45. The Plan is an ESS as defined in subsection 83A-10(2) as it is a scheme under which ESS interests in a company are provided to employees, or associates of employees, of the company, or a subsidiary of the company, in relation to the employee's employment (subsection 83A-10(2)).

46. The Plan provides an effective salary sacrifice arrangement as described in paragraphs 19 to 23 of TR 2001/10, with the Right issued for no consideration under the Plan. This means you acquired the Right at a discount pursuant to subsection 83A-20(1). Subdivision 83A-B will apply to the Right acquired by you under the Plan, unless Subdivision 83A-C applies.

47. 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 your assessable income in accordance with Division 83A.

**Indeterminate right**

48. Subsection 83A-340(1) applies where you acquire a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share which is referred to as an indeterminate right.

49. A person will acquire an indeterminate right when they can enforce against their employer (under the terms of a contract) rights that will later become a beneficial interest in a share (refer to 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?*).

50. Receiving an invitation letter where you were not a participant in the preceding participation period does not provide you with a beneficial interest in a right pursuant to paragraph 83A-340(1)(a) as there is no contract formed under which an enforceable right arises that is subject to a condition precedent to performance that, upon satisfaction of the condition, directly becomes a right to acquire shares. When you elect to participate by lodging an application form, you then acquire a beneficial interest in a right because, at that time, you will have an enforceable right arising upon contract formation that is subject to a condition precedent to performance under a contract that, upon satisfaction of the condition (the calculation of the VWAP) directly causes the enforceable right to become a right to acquire a Qantas share.

51. If you are a participant in the preceding participation period and you choose to participate in the upcoming participation period (whether or not you vary your Participant Contribution), you acquire a beneficial interest in a Right at the time you receive the invitation letter pursuant to paragraph 83A-340(1)(a).

52. However, if you choose to completely withdraw your participation for the upcoming participation period, you do not acquire a Right for the upcoming participation period.

53. At the Grant Date, you obtain a right to acquire a beneficial interest in a share because it is only at this time that the number of Rights can be ascertained.

54. Once the Rights are ascertained at the Grant Date, Division 83A will then apply as if the Right was acquired at that earlier time being when you acquire a beneficial interest in a right (subsection 83A-340(2)). That is, this date of acquisition will be either the date you:

- lodged your application form if you are not a participant in the preceding participation period, or
- received the invitation letter if you are a participant in the preceding participation period.

**Assessability of a Right under Subdivision 83A-C**

55. 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) to (3) and (6) apply to the interest, and
- pursuant to subsection 83A-105(6), at the time you acquired the interest the scheme genuinely restricted you immediately disposing of the Right and the



governing rules of the scheme expressly state that Subdivision 83A-C applies to the scheme.

56. In relation to the first condition listed in paragraph 55 of this Ruling, Subdivision 83A-B would, apart from subsection 83A-105(1), apply to the Right because it is:

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

57. In relation to the second condition listed in paragraph 55 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.

58. 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 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 Right.

59. In relation to the third condition listed in paragraph 55 of this Ruling, subsections 83A-45(1) to (3) and (6) apply to the Right granted because:

- when the 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 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)).

60. In relation to the fourth condition listed in paragraph 55 of this Ruling, Subdivision 83A-C applies if, under the conditions of the Plan at the time you acquired the interest the scheme genuinely restricted you immediately disposing of the Right, and the governing rules of the scheme expressly state that Subdivision 83A-C applies to the scheme. The governing rules of the Plan expressly state that the Plan is intended to operate in accordance with Subdivision 83A-C and that a grant of Rights is personal to you and cannot be transferred to other person or entities and may only be registered in your name.

61. As a result, Subdivision 83A-C applies to the Right, and Subdivision 83A-B does not apply. The taxation of the 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 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 Right when a Qantas share is allocated to you upon vesting of the Right.

65. As determined in section 83A-120, where your 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
- end of the period during which you are prohibited from dealing with your Qantas shares (subsection 83A-120(7)).

66. However, if you dispose of the Qantas share acquired from vesting of the 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 to acquire a beneficial interest in a share, the market value of the right at the ESS deferred taxing point is the market value of the share at that time (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 Right at the ESS deferred taxing point, less the cost base of the Right. As the Right is granted for nil consideration and no amount is paid to exercise the Right, the first element of the cost base of the Right is nil (subsection 83A-110(1) and subsection 110-25(2)).

## **Where Rights are settled in cash**

70. Where you cease to hold office with Qantas prior to the Conversion Date, you will be paid in cash the amount of your base or total fees, as relevant, less applicable taxes withheld. Division 83A will not apply to the Rights.

71. Subsection 6-5(2) provides that the assessable income of an Australian-resident taxpayer includes ordinary income derived directly or indirectly from all sources, whether in or out of Australia, during an income year. Ordinary income includes salary and wages.

72. Therefore, you will need to include the full amount of any pre-tax base or total fees or cash payments you receive in your assessable income for the year in which the cash is received.

## ***Disposal within 30 days***

73. Where you dispose of the Qantas share acquired by you pursuant to a 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).

74. 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***

75. 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***

76. 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:*

TR 2001/10; TD 2016/17

*Legislative references:*

- ITAA 1936 6(1)
- ITAA 1997 6-5
- ITAA 1997 6-5(2)
- ITAA 1997 Div 83A
- ITAA 1997 83A-10(1)
- ITAA 1997 83A-10(1)(b)
- ITAA 1997 83A-10(2)
- ITAA 1997 Subdiv 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-340
- ITAA 1997 83A-340(1)
- ITAA 1997 83A-340(1)(a)
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- ITAA 1997 104-10
- ITAA 1997 104-10(1)
- ITAA 1997 104-10(4)
- ITAA 1997 110-25(2)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 115-25
- ITAA 1997 130-80(1)
- TAA 1953
- Income Tax Assessment Regulations 1997 83A-315.03

## ATO references

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