

CR 2022/72 - Qantas Airways Limited - Executive Recovery Retention Plan

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Status: **legally binding**

Class Ruling

Qantas Airways Limited – Executive Recovery Retention 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 participate in the Executive Recovery Retention Plan (Plan).
2. Full details of this scheme are set out in paragraphs 16 to 32 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

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

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 (Right), and
 - is a resident of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936*.
5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 16 to 32 of this Ruling.

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

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When this Ruling applies

6. This Ruling applies from 1 July 2021 to 30 June 2024.

Ruling

7. The Plan is an employee share scheme (ESS) as defined in subsection 83A-10(2).

8. The Right is an ESS interest as defined in paragraph 83A-10(1)(b).

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

10. Where the 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 day after Qantas announce their full-year results, expected in August 2023 (Vesting Date).

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 at that time (subsection 83A-110(1)).

12. If you dispose of the Qantas share on 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)).

13. 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).

14. Where you dispose of the Qantas share after the ESS deferred taxing point, CGT event A1 will happen (section 104-10) and you will make a capital gain if the capital proceeds from the disposal are more than the share's cost base. You will make a capital loss if those proceeds are less than the share's reduced cost base (subsection 104-10(4)).

15. 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 other requirements of Subdivision 115-A are satisfied (sections 115-25 and 83A-125).

Scheme

16. 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.

Executive Recovery Retention Plan

17. The objectives of the Plan are to recognise the important role employees play in Qantas' recovery following the challenges faced by the global pandemic and to reward employees for their commitment to Qantas.

18. The Plan is operated in accordance with the terms set out in the Recovery Retention Plan Terms and Conditions, together with the terms set out in the letter inviting you to participate in the Plan (Invitation).

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19. Under the Terms and Conditions, the Invitation provided to you at the time of the grant outlines:

- the number of Rights being granted
- details of any performance conditions which must be satisfied before a Right vests
- the time at which Rights may vest
- the circumstances in which Rights lapse, and
- any other relevant Terms and Conditions to be attached to the Rights or shares acquired on vesting.

20. If you receive an Invitation, you do not need to do anything to participate in the Plan; however, you may 'opt out' if you do not wish to participate.

Vesting of the Rights under the Executive Recovery Retention Plan

21. A Right is subject to satisfaction of vesting conditions (which are performance hurdles to be met by Qantas and service conditions to be met by you) during the performance period.

22. The performance hurdles are measured over the 2-year period from 1 July 2021 to 30 June 2023 (Performance Period).

23. The performance hurdles require Qantas to achieve various financial measures which will be tested at the end of the Performance Period. If they are not met, the Rights will lapse. There will be no re-testing of the performance hurdles.

24. The Qantas Board (Board) retains discretion to:

- adjust the performance hurdle measures to take into consideration significant initiatives or strategic proposals undertaken by Qantas that have impacted the ability to deliver the net debt target specified
- not approve any vested award where there is a material failure in the structure of or compliance with a safety policy or process that results in death or serious injury arising out of Qantas' business operations, and
- delay the Vesting Date; for example, to allow time for it to determine the appropriate outcome if there is an investigation under way by Qantas or an external party.

25. The service conditions require you to be employed by the Qantas Group on 1 July 2021 and at the Vesting Date for your Rights to be eligible for vesting. The Vesting Date is estimated to be in August 2023, after the performance hurdles have been assessed.

26. If you cease employment prior to the Vesting Date, the treatment of your unvested Rights will depend on the circumstances of your cessation. Unless the Board determines otherwise, all of your unvested Rights will automatically lapse on the date you cease employment, where you cease employment:

- on or prior to 30 June 2022 for any reason, or
- on or prior to the Vesting Date in circumstances where you resign, your employment is terminated for cause or in circumstances the Board has determined involves unacceptable performance or conduct.

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27. If you cease employment in any other circumstances, a pro-rata number of your unvested Rights will remain 'on-foot' and will be performance tested at the end of the Performance Period, unless the Board decides otherwise.

28. Any Rights that vest will be prorated if you:

- remain employed for less than the full Performance Period
- have leave without pay totalling 90 days or more (in total) during the Performance Period, and/or
- take parental leave (paid or unpaid) of more than 12 months (in total) during the Performance Period.

29. Your Rights will vest upon notification to you from Qantas, at which time Qantas must deliver one Qantas share for each Right, at no cost to you.

30. If a takeover or change of control occurs prior to the Vesting Date, the unvested Rights will vest on a date determined by the Board. If it occurs after the Vesting Date, the vested Rights must, if not converted into shares, be so converted within 30 days of the change of control event or other such date determined by the Board.

Disposal restrictions

31. There are no disposal restrictions after Rights convert to shares. Any shares awarded to participants on vesting of Rights under the Plan may be sold, transferred or otherwise dealt with.

Other matters

32. Immediately after the acquisition of any Rights under the Plan, you will not hold a beneficial interest in 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.

Commissioner of Taxation

10 August 2022

 Status: **not legally binding**

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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ESS interest

33. 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)).

34. Under the Plan, the Right acquired upon Invitation is a right to acquire a beneficial interest in an ordinary share in Qantas from the time that you acquired the Right. Therefore, the Right is an ESS interest (subsection 83A-10(1)).

35. 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)).

36. The Plan provides that the Right is issued for no consideration. This means the Right was issued 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.

Assessability of a Right under Subdivision 83A-C

37. 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
- there is a real risk that you 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).

38. In relation to the first condition listed in paragraph 37 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 share in 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).

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39. In relation to the second condition listed in paragraph 37 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.

40. Section 83A-315.03 of the *Income Tax Assessment (1997 Act) Regulations 2021* states:

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

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

42. In relation to the third condition listed in paragraph 37 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 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 Qantas 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)).

43. In relation to the fourth condition listed in paragraph 37 of this Ruling, Subdivision 83A-C applies if, under the conditions of the Plan when the Right is granted, there is a real risk that you will forfeit or lose the Right (other than by disposing of it, exercising the right or letting it lapse).

44. A 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.

45. As the Rights will lapse if Qantas does not meet the performance hurdles during the Performance Period, it is accepted that the real risk of forfeiture test is met.

46. 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.

ESS deferred taxing point

47. Section 83A-120 provides the rules for determining when the ESS deferred taxing point occurs for a right to acquire a share:

- 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))

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- 15 years after you acquired the right (subsection 83A-120(6)), or
- 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)).

48. However, if you dispose of the vested right or the share within 30 days of the earliest time outlined in paragraph 47 of this Ruling, the ESS deferred taxing point will instead be the time of disposal (paragraph 83A-120(3)(b)).

49. 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 upon vesting of the Right.

50. Under the Plan, there is no real risk of forfeiture after the Rights have vested, nor are there any disposal restrictions. Accordingly, the ESS deferred taxing point will be the Vesting Date, subject to the 30-day rule.

51. That is, if you dispose of the Qantas share acquired from vesting of the Right within 30 days of the Vesting Date, the ESS deferred taxing point will be the date of disposal (subsection 83A-120(3)).

Amount to be included in assessable income

52. In accordance with section 83A-110, the amount to be included as assessable income in the income year in which the ESS deferred taxing point occurs is the market value of the ESS interest at the ESS deferred taxing point reduced by the cost base of that interest (if any).

53. 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 (section 83A-315.03 of the *Income Tax Assessment (1997 Act) Regulations 2021*).

54. 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 (subsections 83A-110(1) and 110-25(2)).

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References

Related Rulings/Determinations:

TR 2006/10

Legislative references:

- ITAA 1936 6(1)
- 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)
- ITAA 1997 83A-105(1)(aa)
- ITAA 1997 83A-105(3)
- ITAA 1997 83A-110
- ITAA 1997 83A-110(1)
- ITAA 1997 Subdiv 115-A
- ITAA 1997 83A-120
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-120(3)(b)
- ITAA 1997 83A-120(4)
- ITAA 1997 83A-120(6)
- ITAA 1997 83A-120(7)
- ITAA 1997 83A-125
- ITAA 1997 83A-315
- ITAA 1997 104-10
- ITAA 1997 104-10(4)
- ITAA 1997 110-25(2)
- ITAA 1997 115-25
- ITAA 1997 130-80(1)
- ITAA 1997 Div 230
- ITAR(1997) 2021 83A-315.03

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