TR 2021/2EC - Compendium

Australian Government
Australian Taxation Office

Public advice and guidance compendium – TR 2021/2

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Taxation Ruling TR 2019/D5 *Fringe benefits tax: car parking benefits*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	**Definition of 'work car park'** Based on a literal interpretation of the guidance that a car must be parked at a 'work car park' for the minimum parking period, uncertainty arises where an employee parks at one or more 'work car parks' on the same day, between 7.00am–7.00pm, as a car parking benefit (subject to the other conditions being satisfied) will arise where a car is parked for more than four hours. Such guidance is appropriate where there are multiple parking facilities proximous to an individual's only or primary place of employment, however, it may result in misapplication of the law where employees, given the nature of their work, are required to travel significantly to a number of varying business locations and where work car parks are available. We think this should be appropriately qualified in the final Ruling. The final Ruling should address the situation where, if there are multiple work car parks in and around the employee's primary place of employment, which of the multiple car parks on that day should be included from a taxable value perspective and at what value?	A business may have multiple locations where car spaces are provided to employees. Each is considered a work car park if it is a business premises or associated premises of the employer. The primary place of employment is the place from which, or at which, the employee performs their employment duties on any given day. It includes temporary or alternative places of employment and may not necessarily be the employee's regular place of employment. Where there are multiple places of employment on a particular day, the primary place of employment on that day is the place where, considering the nature of the employment, the time spent and the substance of the duties carried out, a reasonable person would conclude that particular place to be the employee's primary place of employment. We consider that the requirement that a car park must be 'in the vicinity' of the employee's primary place of employment on a given day (see paragraph 39A(1)(f) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)) provides an effective qualifier in situations where an employee is required to travel between business premises. The employee can only have one 'primary place of employment' on any given day. Subdivision B in Division 10A of the FBTAA provides guidance on how to calculate the taxable value of a car park fringe benefit where there is more than one commercial

Issue number	Issue raised	ATO response
		parking station near the employee's primary place of employment (see paragraph 39C(b) of the FBTAA). Also, an employer may elect to use a different taxable value calculation other than the default commercial parking station method.
2	**Meaning of 'in the vicinity of'** The draft Ruling does not provide practical guidance for when a work car park will be 'in the vicinity of' an employee's primary place of employment. Although the Full Federal Court was not prepared to fix a one-kilometre limit for this in *Virgin Blue Airlines Pty Limited ACN 090 670 965 v Commissioner of Taxation* [2010] FCA 631, the actual distance was only two kilometres. It would be valuable if the ATO provided illustrative examples to guide this consideration for the employers. The final Ruling should provide some clarity to taxpayers by saying the work car park should be within a reasonable walking distance of the place of employment. The ATO should explain where it intends to draw the line as to when car parks are in the vicinity of an employee's primary place of employment and where they are not.	In *Virgin Blue Airlines Pty Ltd v Commissioner of Taxation* [2010] FCAFC 137 (*Virgin Blue*), the Full Federal Court concluded the expression 'in the vicinity of' refers to places which are near, meaning in close spatial proximity, to each other. The decision also confirms the application of the vicinity test requires evaluative judgment. Therefore, we cannot fix a kilometre limit or reasonableness test to the meaning of 'in the vicinity of'. To exemplify the decision in *Virgin Blue*, Example 1 of the final Ruling has been included. We will also update the *Fringe benefits tax – a guide for employers* (the Guide). We will continue to evaluate each situation on its merits.
What is a 'commercial parking facility'?		
3	The draft Ruling's interpretation of the term 'commercial car parking station' represents a significant change from the ATO's previous interpretation, as expressed in Taxation Ruling TR 96/26 *Fringe benefits tax: car parking fringe benefits* (withdrawn).	We must administer the law as it applies to contemporary commercial car parking arrangements and in accordance with legal developments.
4	The definition is ambiguous and depends on the subjective interpretation of the reader. The ATO will be challenged to determine whether a parking station is considered 'commercial', both from an operator's and surrounding businesses' perspective. The ATO should refine its interpretation to limit the definition of commercial parking stations to car parking facilities where the purpose is to provide	The final Ruling has been updated to clarify that the phrase 'commercial car parking facility' takes its ordinary meaning. In particular, the final Ruling now explains that the ordinary meaning of 'commercial' is not to be viewed in isolation. 'Commercial' informs the ordinary meaning of the compound phrase 'commercial car parking facility'. Paragraphs 22 and 23 of the final Ruling provide a two-stage test to assist

Issue number	Issue raised	ATO response
	parking to the public. This will not only ease the administrative and compliance burdens on the ATO and businesses, but also ensure that the basis of the lowest representative fee is reflective of a purposeful commercial market for car parking spaces rather than incorporate opportunistic offerings to the public which are based on excess parking capacity. The ATO view expressed in the draft Ruling is that '[a] facility is 'commercial' if it is run to make a profit …'. While this approach seems conceptually sound, in certain circumstances it may be difficult to determine whether the amount being charged by the owner of a car parking facility has been set with a view to making a profit. It is unreasonable to expect an employer within the one-kilometre radius to ascertain whether a car parking station is run to make a profit. It is similarly unreasonable to expect the relevant car parking facility to make such details available to surrounding employers for the purposes of determining whether a fringe benefits tax (FBT) obligation arises. It is submitted that an operator of a parking facility would not be willing to provide information to surrounding businesses whether the parking facility is run at a profit or loss. As such, it is unclear how surrounding businesses are meant to determine whether parking constitutes a commercial parking facility. The final Ruling should indicate all-day parking fees at or below a certain amount means the car park is not being run to make a profit and is therefore not a commercial parking station, and include specific guidance as to the factors that you consider would be relevant in determining whether a car parking facility is 'commercial'.	employers to objectively evaluate a particular car parking facility and reasonably conclude whether it is or is not a commercial car parking facility. Firstly, if an employer observes a particular car parking facility is run by a car parking operator, that facility is a commercial car parking facility. Secondly, if the parking facility is not run by a car parking operator, the final Ruling outlines three hallmark characteristics of commercial car parking facilities against which an employer can objectively evaluate a particular car parking facility. Employers do not need to make enquiries with a particular parking facility as to whether it is run to make a profit or otherwise make subjective determinations about a particular facility.
5	The final Ruling should include examples of where the parking facility operated by a not-for-profit entity or a hospital or shopping centre qualifies as a commercial parking facility and where it does not. It should also include an example of where the parking facility	Refer to our response to Issue 4 of this Compendium. Additionally, Examples 2 to 4 of the final Ruling explain car parking facilities which would and would not be considered a commercial car parking facility.

Issue number	Issue raised	ATO response
	of the not-for-profit entity, hospital or shopping centre was operated by a commercial parking station operator for profit to compare to the other examples.	
6	It would be good to understand the ATO view of the impact of the staff-only car park facility that is associated with a 'commercial parking station' (for example, a shopping centre), and whether this facility would qualify as a separate commercial parking station in its own right under the fringe benefits tax law.	As explained in paragraph 24 of the final Ruling, the characteristics of a particular parking facility must be objectively considered.
7	**What is a nominal parking fee?** Draft Chapter 16 of the Guide notes the all-day fee for parking must be more than nominal. As this may be a contentious issue in audits and rulings, the final Ruling should clearly state what amount the ATO considers to be nominal.	Paragraph 23 of the final Ruling reflects the principle contained in TR 96/26. That is, a nominal amount is 'usually a significantly lower rate than the local market 'rate'. This amount will vary depending on the local market rates.
8	**Meaning of 'permanent'** Do all of the criteria listed as features of a permanent commercial parking station have to be satisfied? Is one factor more significant, are the factors exhaustive, etc?	Each case needs to be considered on its merits, therefore, no one factor is more significant than the others. The factors listed in paragraph 34 of the final Ruling are not exhaustive.
Meaning of 'all-day parking'		
9	The draft Ruling notes '**[a]ll-day parking** means parking of a **car** for a minimum of six continuous hours between 7.00am-7.00pm', however, the legislation states that: ***all-day parking*****,** in relation to a particular day, means parking of a single car for a continuous period of 6 hours or more during a daylight period on that day. The times of sunrise and sunset occur at different times throughout the year and are clearly different for geographic locations. The definition in the draft Ruling is deceptive. A shift worker could commence work at 2.00pm and finish at 10.00pm and park for over six hours during daylight hours. The draft Ruling would suggest this does not qualify for all-day parking when	All-day parking is defined in subsection 136(1) of the FBTAA to mean 'parking of a single car for a continuous period of 6 hours or more during a daylight period on that day'. 'Daylight period' is also defined in subsection 136(1) of the FBTAA as being between 7.00am–7.00pm. The scenario presented misunderstands the Ruling's discussion of all-day parking and what constitutes the provision of a car parking benefit in section 39A of the FBTAA. All-day parking is relevant to determining whether the 'lowest representative fee' (see paragraphs 51 to 56 of the final Ruling) charged by any commercial parking station for all-day parking within a one-kilometre radius of the work car park exceeds the car parking threshold (the car parking threshold requirement) (see paragraph 6 of the final Ruling). An employee's work pattern is not relevant to this.

Issue number	Issue raised	ATO response
	clearly under the legislation at least at certain times of the year it does.	
Meaning of 'in the ordinary course of business'		
10	The ATO view expressed in paragraph 21 of the draft Ruling is that '[a] commercial parking station offers parking in the ordinary course of its business'. Further guidance should be provided as to when the provision of parking by a business will be considered to be in the ordinary course of its business.	Paragraphs 36 and 37 of the final Ruling clarify that at least one car parking space at a permanent commercial parking facility must be available for all-day parking in the ordinary course of business to members of the public on payment of a fee. That is, while the facility may offer a range of paid car parking types or arrangements (for example, short-term, all-day and long-term), the relevant fact for an employer is whether paid all-day parking is ordinarily available to the public.
11	Given the broad range of business interests operated by some entities, which include paid parking, it is unclear how surrounding businesses are meant to determine whether the parking provided is in the ordinary course of that entity's business. If finalised in its current form, due to the unclear wording in the draft Ruling, employers will be required to make assumptions about unrelated businesses (over which they have no oversight or ability to request confidential information) in order to determine whether the parking is run at a profit or loss and also whether it is part of the ordinary course of business for the operator.	Refer to our response to Issue 10 of this Compendium. Employers need only observe whether paid all-day parking is ordinarily available at a particular permanent commercial car parking facility to meet this part of the definition of commercial parking station.
12	The terms 'usual' and 'regular' should be explained as we consider the current guidance could result in employers subjectively determining whether car spaces provided for all-day parking are in the ordinary course of business. In particular, this should be considered in terms of understanding permanency for sharing mobile applications, including when individuals place their car parks onto an application or website.	These words take their ordinary meaning and, therefore, do not need to be explained in the final Ruling. Further guidance regarding the utilisation of online platforms for car parking will be provided in the Guide.
13	**'Commercial parking stations' generally** The Ruling should clarify whether the following are commercial parking stations:	The explanation of the elements of the 'commercial parking station' definition have been updated at paragraph 18 of the final Ruling. Refer to our response to Issue 4 of this Compendium in which we explain that the determination of whether a particular car parking facility is a commercial

Issue number	Issue raised	ATO response
	• car park access is embedded in a membership price • subscription or time share-based access models, such as car parking clubs where car spaces are pooled and can be accessed for an annual fee • online platforms acting as agents for individuals offering car spaces for rent.	car parking facility depends on an evaluation of objectively-observed characteristics of the facilities rather than the internal operations or subjective motives of the facility operator. Paragraphs 41 and 42 of the final Ruling explains when it is determined that car spaces are available to members of the public. When there are substantial limits on the availability of all of the car spaces at a commercial parking facility, the facility's car spaces are not available to the public. In addition, guidance regarding the utilisation of online platforms for car parking will be provided in the Guide.
14	**Lowest representative fee charged** Now that the 'lowest representative fee' includes 'deterrent' fees, and a car parking operator can set whatever fee they like, employers are obligated to use this rate at a potentially huge detriment because there is no provision to test the reasonableness of this rate. Embedded in such prices are monopoly rents or penalty rates which are not necessarily 'representative' of a free-market premium. This means FBT is being imposed at a rate that is not an appropriate proxy for economic value, but rather includes penalty and other pricing distortions.	The location of a commercial car parking station within a one-kilometre radius of the work car park which charges 'a lowest representative fee' for all-day parking on the first business day of the FBT year which is more than the car parking threshold (currently $9.15) is only one condition in determining whether an employer provides a car parking benefit. Further, while the 'commercial parking station method' is the default method for determining the value of car parking benefits, an employer can elect to use one of the alternative methods. Therefore, employers are not required to use the lowest representative fee in instances where a qualified valuer has determined the market value to be lower.
15	**Unfairness, onerous complexity and compliance costs, and financial impacts** The draft Ruling does not reduce already onerous FBT compliance costs and may increase such costs. It is unfair to impose FBT on employers that provide private parking to employees, due to a lack of state government infrastructure (that is, public transport and associated car parks) or who made decisions to use certain locations based on the assumption that no FBT would be payable on car parking provided to their employees.	The ATO cannot comment on matters of policy. We must administer the law as it applies to contemporary commercial car parking arrangements and in accordance with legal developments. We will continue to consult with interested parties to further develop the Guide to assist employers apply the law in a practical way.
16	**Communication and compliance challenges for ATO** The ATO faces a significant communication challenge in ensuring that all previously unaffected businesses are made	We have and will continue to communicate the publication of the final Ruling to employers as appropriate.

Issue number	Issue raised	ATO response
	aware of their potential FBT obligations.	
17	**Contrary to the intent of the legislation** Employers operating in suburban and regional areas or in the vicinity of suburban landscapes, where shopping centres, universities and hospitals now provide paid parking, may now be captured by a law that was originally intended to address the provision of high-value parking in central business districts. The original intent of the FBT car parking legislation allowed for FBT free onsite parking for employees whose offices were located in areas not adequately serviced by public transport or that did not have commercial parking stations nearby facilitating appropriately priced all-day parking. Under changes proposed in the draft Ruling, the company will now be penalised for providing parking to these employees (and noting also the lack of all-day, on-street parking, public parking or reasonably-priced alternatives). Should a decision be made to pass all or some of the additional FBT cost on to employees, this would have an extremely detrimental impact on staff attraction and retention.	The ATO cannot comment on matters of policy. We must administer the law as it applies to contemporary commercial car parking arrangements and in accordance with legal developments, including the decisions in *Commissioner of Taxation v Qantas Airways Limited* [2014] FCAFC 168, *Qantas Airways Limited and Commissioner of Taxation* [2014] AATA 316, and *Virgin Blue*.
18	**Employers may be exposed to a potential risk of not complying with their FBT obligations** The draft Ruling focuses on the application of subsection 39A(1) of the FBTAA to establish when the provision of car parking will give rise to a car parking benefit for the purposes of the FBTAA. Much of the guidance and examples employers have relied on in TR 96/26, for example, regarding valuation methods and applicable record keeping, to determine their FBT liability in respect to car parking benefits, no longer exists in a binding public ruling and has been incorporated into draft Chapter 16 of the Guide.	The Guide reflects the precedential ATO view contained elsewhere and offers practical guidance for complying with FBT obligations. As such, employers should have confidence in the views expressed within it. Furthermore, we will consider the fact an employer relies on the Guide in complying with their FBT obligations when determining what action, if any, should be taken. The introduction to the Guide advises that we are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and your obligations. If you follow our information and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we will take that into account when determining what action, if any, we should take.
19	**No examples in draft Ruling** There are no examples in the draft Ruling.	The final Ruling has been updated to include examples.

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General issues		
20	All car parking facilities run by not-for-profit organisations should be excluded from the definition of a commercial parking station.	The meaning of commercial parking station is stated in subsection 136(1) of the FBTAA 1986. It does not include an exemption for not-for-profits.
21	The final Ruling should include an example similar to Example 7 in TR 96/26. This example was useful in noting it is appropriate for a valuer to consider the availability of free public parking spaces in determining the value of the parking spaces for FBT purposes.	Draft Chapter 16.2.5 of the Guide provides advice on using the market value method and outlines the details that are required for a valuation report. A valuation report should include a list of the car parks on which the valuation is based (with information on locality, grading, price and weighting) plus any information and assumptions used for the valuation. This would include the availability of free public parking spaces within the vicinity of the work car park. We will also be updating the Guide.
22	Does a charging station for electric vehicles fit within the definition of 'car space'? Some are located in convenient spots and are attractive locations to park.	We consider a charging station for an electric vehicle to be within the definition of a 'car space' because it is a space in which a car can reasonably be parked. Whether a charging facility is a 'work car park' or 'commercial car parking station' needs to be objectively considered against their respective definitions.
23	**Date of effect** The ATO should defer the commencement date until at least 1 April 2022.	In respect of the change in view from TR 96/26 concerning car parks charging penalty rates, we have determined the final Ruling will apply from 1 April 2022 in respect of car parking benefits provided on or after 1 April 2022.