

CR 2024/72 - Transport for New South Wales - free Opal card scheme

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Status: **legally binding**

Class Ruling

Transport for New South Wales – free Opal card scheme

📌 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 fringe benefits tax consequences of the provision of Opal cards by employers to their employees, that allow for free travel across the Opal network.
2. Details of this scheme are set out in paragraphs 8 to 15 of this Ruling.
3. All legislative references in this Ruling are to the *Fringe Benefits Tax Assessment Act 1986* (FBTAA), unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to you if you are an employer that is a private transport operator (PTO):
 - that is a non-government entity in the business of providing public transport services
 - that provides those services within the area of the NSW Opal network (Opal network), and
 - in circumstances where you enter into an agreement with Transport for NSW (TfNSW) to provide your employees with Opal cards that allow for free travel across the Opal network (free Opal card) (Scheme).

When this Ruling applies

5. This Ruling applies from 1 April 2024 to 31 March 2029.

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Ruling

6. The provision of Opal cards that allow free travel on the Opal network to employees of the PTOs under the Scheme is a benefit provided to employees in respect of their employment.

7. The benefit will be exempt under subsection 47(1) where the travel is:

- between the employee's home and place of employment, or other place from which or at which the employee performs duties of employment, or
- on a regular and scheduled service over a route wholly within a metropolitan area (being the Opal network).

Scheme

8. 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.

9. TfNSW is a state government entity that manages the provision of public transport services throughout New South Wales and manages the Opal network.

10. TfNSW is facilitating a Government initiative to address bus driver shortages and depot understaffing. The initiative will provide employees of PTOs free travel on the whole Opal network.

11. Under the Scheme, PTOs can elect to enter into an arrangement with TfNSW which would enable the PTOs to provide their employees with Opal Cards, which allow for free travel across the Opal network.

12. TfNSW will be responsible for the establishment of the free Opal card scheme and will determine the terms and conditions of use for the free Opal card.

13. The PTOs will have the following responsibilities in relation to the establishment and ongoing management of the free Opal card scheme:

- identify individual eligible employees that meet the eligibility criteria for a free Opal card and establish a process by which eligible employees can opt in or out of the Scheme
- provide details of eligible employees to TfNSW
- distribute free Opal cards to individual eligible employees
- promote the Scheme to current eligible employees and potential future employees
- reporting obligations to TfNSW
- return or destroy relinquished free travel Opal cards, and
- undertake audits to ensure employee compliance with concessions determination and terms and conditions of use.

14. The free public transport offered to the employees of the PTOs will be provided in the same, or substantially the same, circumstances as transport provided to members of the public in the ordinary course of carrying on a business of providing transport to members of the public.

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15. The free Opal cards will not be provided to the PTO's employees under a salary packaging arrangement.

Commissioner of Taxation

20 November 2024

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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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Is a benefit provided?

16. The term 'benefit' is defined in subsection 136(1) to include:

... any right (including a right in relation to, and an interest in, real or personal property), privilege, service or facility and, without limiting the generality of the foregoing, includes a right, benefit, privilege, service or facility that is, or is to be, provided under:

- (a) an arrangement for or in relation to:
 - (i) the performance of work (including work of a professional nature), whether with or without the provision of property
 - (ii) the provision of, or of the use of facilities for, entertainment, recreation or instruction; or
 - (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction ...

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17. The provision of Opal cards allowing free travel to employees of PTOs under the scheme is considered to be a benefit because it meets the definition outlined in paragraph 16 of this Ruling.

Will a fringe benefit arise from providing employees with free travel on the Opal network?

18. A 'fringe benefit' is defined in subsection 136(1) as:

... in relation to an employee, in relation to the employer of the employee, in relation to a year of tax, means a benefit:

- (a) provided at any time during the year of tax; or
- (b) provided in respect of the year of tax; being a benefit provided to the employee or to an associate of the employee by:
 - (c) the employer; or
 - (d) an associate of the employer; or
 - ...
- (ea) ... in respect of the employment of the employee, but does not include:
 - ...
- (g) a benefit that is an exempt benefit in relation to the year of tax

19. In general terms, a fringe benefit is a 'benefit' provided to an employee in respect of the employee's employment, that is not an exempt benefit.

Is the benefit provided in respect of employment?

20. In considering whether a benefit is provided to an employee 'in respect of' their employment, subsection 136(1) defines 'in respect of', in relation to the employment of an employee, to include 'by reason of, by virtue of, or for or in relation directly or indirectly to, that employment.'

21. In *J & G Knowles v Commissioner of Taxation* [2000] FCA 196, the Full Federal Court, in examining the meaning of 'in respect of' an employee's employment, held that the phrase required a 'nexus, some discernible and rational link, between the benefit and employment', though noted that 'what must be established is whether there is a *sufficient* or *material*, rather than a, causal connection or relationship between the benefit and the employment'.

22. Based on the facts, it is considered that the provision of Opal cards, allowing free travel to PTO employees, is sufficiently and materially connected to the employment of the PTO employees and as such, any benefit would be considered to have been provided 'in respect of' their employment.

Is the benefit provided to a current employee?

23. An employee is defined in subsection 136(1) to include a current, future and former employee. Subsection 136(1) defines a 'current employee' to mean 'a person who receives, or is entitled to receive, salary or wages'.

24. 'Salary or wages', as defined in subsection 136(1), means payments from which an amount must be withheld under section 12-35 of Schedule 1 to the *Taxation Administration Act 1953*.

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25. PTOs pay employees payments which are 'salary or wages'. Therefore, the employees are current employees of the PTOs.

Is the benefit provided by an employer or an associate?

26. The provider of the benefit is the PTOs (being the employer) through an arrangement with TfNSW.

27. As the provision of the Opal card allowing free travel is a benefit provided to an employee in respect of the employee's employment, the first limb of the definition of fringe benefit is met. The second limb (that is, whether the benefit is an exempt benefit) is considered in paragraphs 30 to 32 of this Ruling.

Is the benefit a residual benefit?

28. Section 45 provides that a benefit is a residual benefit for the purposes of the FBTAA if the benefit is not a benefit by virtue of a provision of Subdivision A of Divisions 2 to 11 (inclusive) of Part III.

29. The benefit of free travel provided on the Opal network does not fall under any other Division so, in these circumstances, a residual benefit is provided to the PTO employees.

Will the residual benefit be exempt?

30. The FBTAA specifies that certain benefits will be exempt benefits.

31. For the purpose of this Ruling, the relevant exempt residual benefit rules to be considered are contained in subsection 47(1).

Application of subsection 47(1)

32. In general terms, subsection 47(1) provides that a residual benefit consisting of transport otherwise than in an aircraft, provided to an employee in respect of their employment, is an exempt benefit. Subsection 47(1) states:

Where:

- (a) in respect of the employment of a current employee, the employer, or an associate of the employer, provides a residual benefit to the employee that consists of transport of the employee, otherwise than in an aircraft:
 - (i) between:
 - (A) the place of residence of the employee; and
 - (B) the place of employment of the employee or any other place from which or at which the employee performs duties of that employment; or
 - (ii) in a case where the place referred to in sub-subparagraph (i)(B) is in a metropolitan area – on a regular and scheduled service over a route wholly within that metropolitan area; and
- (b) where the provider is the employer – the employer carries on a business of providing transport to members of the public; and
- (c) where the provider is an associate of the employer – the employer and the associate each carries on a business of providing transport to

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- members of the public; and
- (d) the transport referred to in paragraph (a) is provided in the same, or substantially the same, circumstances as transport provided to members of the public in the ordinary course of carrying on a business of providing transport to members of the public; and
 - (e) the employee is employed in the business of providing transport to members of the public; and
 - (f) the benefit is not provided under a salary packaging arrangement;
- the benefit is an exempt benefit.

Does the residual benefit provided to the employee consist of transport between the place of residence and place of employment, or wholly within the metropolitan area?

33. The travel provided is not in an aircraft and therefore providing the travel between the place of residence of the employee, and the place of employment of the employee or any other place from which the employee performs duties of that employment, will be an exempt benefit.

34. Alternatively, where the place of employment is in a metropolitan area and the transport is provided wholly within the metropolitan area and all other requirements of subsection 47(1) have been met, the benefit will be an exempt benefit.

Metropolitan area

35. In the absence of a legislative definition, it is relevant to refer to the ordinary meaning of the word 'metropolitan'. The Encyclopedia Britannica defines a 'metropolitan area' as¹:

... a major city together with its suburbs and nearby cities, towns, and environs over which the major city exercises a commanding economic and social influence. Literally construed, *metropolis* from the Greek means "mother city," and by implication there are progeny or dependents scattered about the core area.

36. Therefore, it is accepted that a metropolitan area extends beyond an urban area to include not just the city itself but also the surrounding communities that have a high degree of economic and social integration with the core urban area.

37. The Opal network broadly sits inside the NSW Government's 'Six Cities Region'.

38. The Six Cities Region is an evolution of the previous 'A Metropolis of Three Cities'² and specifically recognises the socio-economic integration and co-dependence across the region³:

Our three-cities strategy has grown to a six-cities vision. We're working to create good jobs where people live, attracting world-class industry and talent, and delivering the infrastructure to connect the cities together.

¹ Encyclopedia Britannica (September 2024) <https://www.britannica.com/>, accessed 15 November 2024.

² NSW Government (2018) *Greater Sydney Region Plan, A Metropolis of Three Cities – connecting people*, <https://www.planning.nsw.gov.au/sites/default/files/2024-04/greater-sydney-region-plan.pdf>

³ NSW Government (2022) *Building our way forward*, <https://www.nsw.gov.au/sites/default/files/2022-05/building-our-way-forward-infrastructure-update-jun-2022.pdf>

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39. The Opal network exhibits the attributes of a metropolitan area supporting the sharing of a labour market, along with social and economic integration, both in the current state and for achieving the NSW Government's future vision.

40. Therefore, we consider the entire Opal network to be within a single metropolitan area for the purposes of subsection 47(1).

Employer carries on a business of providing transport to members of the public

41. The PTOs are operators of public transport services, being bus transport, therefore they carry on a business of providing transport to members of the public.

The transport is provided in the same, or substantially the same, circumstances as transport provided to members of the public in the ordinary course of carrying on a business of providing transport to members of the public

42. The Scheme involves providing the employees with Opal cards that allow free transport across the Opal network in the same, or substantially the same, circumstances as the transport provided to members of the public, being public transport services across the Opal network.

The employee is employed in the business of providing transport to members of the public

43. Workers that are employed by the PTOs (which are operators of public transport) are employed in the business of providing transport to members of the public.

The benefit is not provided under a salary packaging arrangement

44. The benefit is not provided under a salary packaging arrangement.

Conclusion

45. Based on consideration of the factors discussed in paragraphs 32 to 44 of this Ruling, we consider that the requirements of subsection 47(1) have been met. Therefore the provision of Opal cards that allow free travel on the Opal network provided to employees of PTOs will be an exempt benefit.

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References

Legislative references:

- FBTA 1986 Pt III Div 2 Subdiv A
- FBTA 1986 Pt III Div 3 Subdiv A
- FBTA 1986 Pt III Div 4 Subdiv A
- FBTA 1986 Pt III Div 5 Subdiv A
- FBTA 1986 Pt III Div 6 Subdiv A
- FBTA 1986 Pt III Div 7 Subdiv A
- FBTA 1986 Pt III Div 8 Subdiv A
- FBTA 1986 Pt III Div 9 Subdiv A
- FBTA 1986 Pt III Div 10 Subdiv A
- FBTA 1986 Pt III Div 11 Subdiv A
- FBTA 1986 45
- FBTA 1986 47(1)
- FBTA 1986 136(1)
- TAA 1953 Sch 1 12-35

Cases relied on:

- J & G Knowles v Commissioner of Taxation [2000] FCA 196; 96 FCR 402; 2000 ATC 4151; 44 ATR 22

Other references:

- Encyclopedia Britannica (September 2024) <https://www.britannica.com/>
- NSW Government (2018) *Greater Sydney Region Plan, A Metropolis of Three Cities – connecting people*, <https://www.planning.nsw.gov.au/sites/default/files/2024-04/greater-sydney-region-plan.pdf>
- NSW Government (2022) *Building our way forward*, <https://www.nsw.gov.au/sites/default/files/2022-05/building-our-way-forward-infrastructure-update-jun-2022.pdf>

ATO references

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