

# ***TR 2021/2 - Fringe benefits tax: car parking benefits***

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! There is a Compendium for this document: **TR 2021/2EC** .

! An updated version of this ruling has been issued as a draft for public comment until 2 December 2022.

! This document has changed over time. This is a consolidated version of the ruling which was published on *16 June 2021*



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Status: **legally binding**

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## Taxation Ruling

# Fringe benefits tax: car parking benefits

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### **📌 Relying on this Ruling**

This publication 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.

Note: This Ruling does not address the concept of 'primary place of employment', in light of the decision in *Virgin Australia Airlines Pty Ltd v Commissioner of Taxation* [2021] FCA 523. This Ruling will be amended to include further guidance on this point in due course.

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### What this Ruling is about

1. This Ruling sets out when the provision of car parking is a car parking benefit for the purposes of the *Fringe Benefits Tax Assessment Act 1986*.<sup>1</sup>

### Background

2. This Ruling replaces Taxation Ruling TR 96/26 *Fringe benefits tax: car parking fringe benefits* (withdrawn on 13 November 2019).

3. This Ruling should be read in conjunction with Chapter 16 of *Fringe benefits tax – a guide for employers*<sup>2</sup> (Employers' guide) which provides guidance to help employers calculate the taxable value of a 'car parking fringe benefit'<sup>3</sup> and provides practical examples.

### Definitions

4. The following terms are used in this Ruling and the Employers' guide:

- 'All-day parking' means parking of a car for a minimum of six continuous hours between 7.00am–7.00pm.<sup>4</sup>
- 'Car' means a motor-powered road vehicle (including a motor car, sports utility vehicle, van or utility, but not a motor cycle) designed to carry a load of less than one tonne and fewer than nine passengers.<sup>5</sup> The car must be
  - a car owned by, or leased to, an employee or their associate
  - a car made available to an employee or their associate, or
  - related to a car benefit<sup>6</sup> provided on that day.<sup>7</sup>
- 'Car space' refers to a space in which a car can reasonably be parked. It does not need to be on bitumen or a paved surface and does not need to be marked as a parking bay.
- 'Commercial parking station'<sup>8</sup> as referred to in paragraph 16 of this Ruling.
- 'Minimum parking period' is a combined parking period of more than four hours.<sup>9</sup>
- 'On-street parking' is parking on a street, road, lane, thoroughfare or footpath paid for by inserting money in a meter or by obtaining a voucher.

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<sup>1</sup> All legislative references in this Ruling are to the *Fringe Benefits Tax Assessment Act 1986* unless otherwise indicated.

<sup>2</sup> The Employers' guide is not a public ruling and is not binding on the Commissioner. Refer to Taxation Ruling TR 2006/10 *Public Rulings*.

<sup>3</sup> A car parking fringe benefit is defined in subsection 136(1) as a fringe benefit that is a car parking benefit.

<sup>4</sup> Subsection 136(1).

<sup>5</sup> Subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

<sup>6</sup> A car benefit is provided if subsection 7(1) is satisfied.

<sup>7</sup> Paragraph 39A(1)(c).

<sup>8</sup> 'Commercial parking station' is defined in subsection 136(1).

<sup>9</sup> It does not matter whether the parking is continuous, as long as the cumulative total is more than four hours.

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- ‘Place of residence’<sup>10</sup> refers to a place where a person resides or has sleeping accommodation. This could be a place at which the employee sleeps on a temporary basis, for example, at a hotel or serviced apartment.
- ‘Primary place of employment’ is the employee’s primary place of employment as defined in subsection 136(1).
- ‘Work car park’ is a business premises<sup>11</sup> or associated premises<sup>12</sup> of the provider<sup>13</sup>, where cars are parked in a car space on that day. A work car park does not need to be a commercial parking station and includes an area where pool cars or fleet cars available for employees to use are parked. A business may have multiple locations where car spaces are provided to employees – each is considered to be a work car park.

## Ruling

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5. Subsection 39A(1) prescribes the conditions which must be satisfied before a benefit is a car parking benefit.

### When do you provide a car parking benefit?

6. You provide a car parking benefit on a particular day when, between 7.00am–7.00pm<sup>14</sup>:

- a car is parked at a work car park for the minimum parking period
- an employee uses the car in connection with travel between their place of residence and primary place of employment at least once on that day
- the work car park is located at or ‘in the vicinity of’<sup>15</sup> the primary place of employment, on that day
- a commercial parking station<sup>16</sup> is located within a one kilometre radius of the work car park used by the employee
- the ‘lowest representative fee’<sup>17</sup> charged by any commercial parking station for all-day parking within a one kilometre radius of the work car park

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<sup>10</sup> ‘Place of residence’ is defined in subsection 136(1). The place of residence does not need to be the employee’s usual place of residence or, as defined in subsection 136(1), the employee’s ‘normal residence’.

<sup>11</sup> ‘Business premises’ is defined in subsection 136(1). Taxation Ruling TR 2000/4 *Fringe benefits tax: meaning of ‘business premises’* considers what constitutes business premises.

<sup>12</sup> ‘Associated premises’ is defined in subsection 136(1). This includes premises that are owned, leased or otherwise under the provider’s control or control of a third party where the provider has exclusive occupancy rights or ownership of a designated parking space at their premises. Refer to paragraph 7 of TR 2000/4 as to when a ‘premises is of a person’.

<sup>13</sup> ‘Provider’ is defined in subsection 136(1). Where the car park owner retains ownership or other exclusive occupancy rights in respect of the relevant car space, the car park owner is the provider. Where the employer obtains exclusive occupancy rights in respect of the relevant car space, the employer is the provider.

<sup>14</sup> Subsection 39A(1) specifies the conditions that are to be met during a ‘daylight period’ or periods. ‘Daylight period’ is defined in subsection 136(1) as being between 7.00am–7.00pm.

<sup>15</sup> See paragraphs 10 and 11 of this Ruling.

<sup>16</sup> See paragraph 16 of this Ruling.

<sup>17</sup> See paragraphs 49 to 54 of this Ruling.

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exceeds the car parking threshold<sup>18</sup> (the ‘car parking threshold requirement’)

- the parking is provided to the employee in respect of their employment, and
- the parking is not excluded by the regulations<sup>19</sup>. For example, a car space is excluded if it is provided to a disabled employee who holds and displays a valid disabled person’s parking permit and the permit allows the employee to park in spaces that are designated for the exclusive use of a disabled person.<sup>20</sup>

7. You do not have to be the employer to provide a car parking benefit as long as it is provided under an arrangement with the employer. Further, you can provide a car parking benefit in relation to a car where the use of that car is an exempt benefit.<sup>21</sup>

8. A car that is parked at one or more work car parks on the same day, between 7.00am–7.00pm, may also satisfy the minimum parking period.

9. Ordinarily, where there is no evidence that the employee and employer are dealing with each other in any other capacity, the parking is provided to the employee ‘in respect of’<sup>22</sup> their employment.

#### **Meaning of ‘in the vicinity of’**

10. The work car park must be located at or ‘in the vicinity of’ the employee’s primary place of employment. This means the two locations are near, proximate, or close to each other. When considering the distance between the places, it is the spatial<sup>23</sup> and geographical separation that is significant.<sup>24</sup>

11. Geographical includes<sup>25</sup>:

... geographical features such as rivers, railway lines, freeways and other physical obstacles which might render a car park and an employee’s primary place of employment near or close as the crow flies but not so in terms of the distance of the shortest practicable route between them.

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#### **Example 1 – work car park is not ‘in the vicinity of’ the employee’s primary place of employment**

12. *An employer leases premises (a work car park) to provide car parking to its employees.*

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<sup>18</sup> The car parking threshold is indexed annually in line with movements in the All Groups Consumer Price Index (subsections 39A(2), (2A), (3) and (4)). The car parking threshold for each year is published by the Commissioner.

<sup>19</sup> There may be exemptions that also apply in respect of car parking. For example, section 58GA exempts car parking provided by small businesses in certain circumstances. For benefits provided on or after 1 April 2021, the small business entity turnover increases to \$50 million for this exemption.

<sup>20</sup> Sections 5 and 12 of the *Fringe Benefits Tax Assessment Regulations 2018*. The exclusion will apply where a disabled employee is either the driver or passenger of the car.

<sup>21</sup> Certain cars may be exempt under subsection 8(2).

<sup>22</sup> The meaning of ‘in respect of’ is defined in subsection 136(1) to include in relation to the employment of an employee, by reason of, by virtue of, or for or in relation directly or indirectly to, that employment.

<sup>23</sup> ‘Spatial’ refers to the physical measured distance between the places.

<sup>24</sup> *Virgin Blue Airlines Pty Ltd v Commissioner of Taxation* [2010] FCAFC 137 (*Virgin Blue*) at [54].

<sup>25</sup> *Virgin Blue* at [54].

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13. As the crow flies, the distance between the work car park and office building, which is the employee's primary place of employment, is less than one kilometre.

14. However, the shortest walking route between the work car park and office building is approximately two kilometres, or 20 to 25 minutes, by foot. A shuttle bus also operates between the work car park and office building. The journey by shuttle bus takes approximately 15 to 20 minutes, one way.

15. The work car park is not 'in the vicinity' of the employee's primary place of employment.<sup>26</sup>

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### **What is a commercial parking station?**

16. A commercial parking station<sup>27</sup>, on a particular day, is a commercial car parking facility which:

- is permanent
- is not on-street parking
- has car spaces available in the ordinary course of business to the public for all-day parking on payment of a fee.

17. For a car parking benefit to arise, the commercial parking station must be located within a one-kilometre radius of the work car park. A commercial parking station is located within a one-kilometre radius if the closest car entrance to the commercial parking station is within one kilometre of the closest car entrance to the work car park.<sup>28</sup> You measure this distance by the 'shortest practicable route', which can be travelled by foot, car, train and boat. Illegal or impractical shortcuts will not be considered to be part of a practical route.

### **Commercial car parking facility**

18. Commercial car parking facility takes its ordinary meaning. In considering its ordinary meaning and the statutory context, there must first be a parking facility. Without limiting what might be a parking facility, it could be:

- a purpose-built complex designed for car parking (including parking provided as part of an office or apartment building), or
- an area of land dedicated or adapted to providing car parking (including on-street parking<sup>29</sup>).

19. 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'.<sup>30</sup> As such, a commercial car parking facility is a parking facility that displays certain characteristics that are hallmarks of such a facility.

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<sup>26</sup> This example contains facts which are similar to those in *Virgin Blue*.

<sup>27</sup> Subsection 136(1).

<sup>28</sup> Section 39B.

<sup>29</sup> The exclusion of 'a parking facility on a public street, road, lane, thoroughfare or footpath paid for by inserting money in a meter or by obtaining a voucher' from the definition of 'commercial parking station' in subsection 136(1) means such parking facilities would otherwise be within scope of the definition.

<sup>30</sup> *Owners of Ship Shin Kobe Maru v Empire Shipping Co Inc* [1994] HCA 54; *SZTVU v Minister for Home Affairs* [2019] FCAFC 30 at [66–71].

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20. A parking facility will be a commercial car parking facility if it is operated by a car parking operator. This includes a parking facility that exists within another complex (such as an office, shopping centre or hospital) where the owner or lessor of that complex outsources the management of the parking facility to a car parking operator.

21. Where a parking facility is not managed by a car parking operator, it may nevertheless be a commercial car parking facility if it displays other hallmark characteristics, namely, if the parking facility:

- has clear signage visible from the street advertising that paid parking is available
- has mechanisms to control who can enter and/or exit the parking facility, or park at the facility. This may include boom gates, or 'pay and display' ticketing machines
- charges more than a nominal fee (usually a significantly lower rate than the local market rate) for paid parking. This includes charging a user for parking which is not all-day parking (such as parking at an hourly rate).

22. Generally, if a parking facility displays two or more of these characteristics, it is a commercial car parking facility. However, the characteristics of a particular parking facility must be objectively considered.

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**Example 2 – parking facility is a commercial car parking facility**

23. *An inner-suburban shopping centre provides dedicated car spaces in a multi-level concrete structure attached to the shopping complex. The car park is operated by the landlord of the shopping centre.*

24. *There is licence plate recognition functionality at each entrance and boom gates at each exit to the parking facility. A car can be parked for free for the first two hours, after which parking costs \$5 per hour. There is signage visible from the street and at each entrance advertising that car parking is available.*

25. *This parking facility is a commercial car parking facility. While the parking facility is not managed by a car parking operator, it satisfies all three hallmark characteristics in paragraph 21 of this Ruling. The parking facility is a commercial parking station if it meets the other requirements in paragraph 16 of this Ruling.*

**Example 3 – parking facility is not a commercial car parking facility – no paid parking available**

26. *A hotel has a number of car spaces on its basement levels (a parking facility).*

27. *There is clear directional signage visible from the street indicating the location of the hotel's parking facility. Entry and exit to the facility is controlled by boom gates. All of the car spaces are clearly marked. None of the car spaces are available for paid parking but are exclusively available to hotel guests during their stay at the hotel (being a feature of their nightly hotel room charge).*

28. *While the hotel's parking facility displays some of the hallmarks of a commercial car parking facility, it is not a commercial car parking facility because paid parking is not available at the facility. Therefore, it is not a commercial parking station.*

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**Example 4 – parking facility is not a commercial car parking facility**

29. A local business has several car spaces on its premises that are not regularly used. The business decides to make the unused spaces available to the public as an additional source of income. The car spaces are advertised on a mobile app and website. There is no affiliation with any car parking operator.

30. The car spaces are located at the rear of the business premises, which is freely accessible from the street. There is no signage advertising paid parking is available at the premises, and entry or exit to the premises is not controlled. A person books a car space via the mobile app or website using their car's licence plate. The business monitors who is parking at their premises throughout the day.

31. While the business may charge a fee for parking in its car spaces, the parking facility does not have any of the other hallmark characteristics of a commercial car parking facility. Therefore, the parking facility is not a commercial parking station.

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**Permanent**

32. The term 'permanent' is not defined. Considering its ordinary meaning<sup>31</sup> and the statutory context, a permanent commercial car parking facility is enduring or lasting as such and not temporary or transient in nature. For example, a parking facility set up for a special event (like a sporting event) would not be permanent. A vacant lot, operated as a commercial car parking facility, could be considered to be a permanent commercial car parking facility even where it is intended that a building will be erected on the site in due course.

33. Many of the hallmarks of a commercial car parking facility would also support a conclusion that the parking facility is permanent, such as it has:

- signage, advertising and/or online booking facilities
- infrastructure which controls the entry and exit of cars or payments for parking.

**All-day parking available in the ordinary course of business to the public on payment of a fee**

34. Only one car space within a commercial car parking facility needs to be available in the ordinary course of business to members of the public for all-day parking for the facility to meet this part of the definition of a commercial parking station.

35. Whether a car space is available in the ordinary course of business for all-day parking depends on the business being carried on by the operator of the parking facility. That is, whether the offer of all-day parking is a usual or regular part of business activities, even if it is not the sole business activity. A parking facility may still qualify as a commercial parking station even if some of its car spaces are available for other purposes. Such purposes include:

- short-term parking, such as hourly parking at a hospital, shopping centre, hotel, university or an airport, or

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<sup>31</sup> Macmillan Publishers Australia, *The Macquarie Dictionary* online, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au), viewed 25 February 2021.

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- long-term parking, that is, parking over a period exceeding one day.

36. All-day parking may still be provided in the ordinary course of business, even if a parking facility's fee structure appears to encourage short-term parking and discourage all-day parking. The fact that all-day parking charges are expensive will not, on its own, mean all-day parking is outside the ordinary course of business.<sup>32</sup>

37. The offering of a single car space for all-day parking may be in the ordinary course of business if it is intended to be repeated, or it can be shown that the transaction was the first step in the carrying on of a business. Some entities have been held to carry on a business where ongoing activities are relatively limited and the key activity consists of letting the company's premises for rent on an ongoing basis.<sup>33</sup>

38. Where none of a parking facility's car spaces are available in the ordinary course of its business to the public for all-day parking, the parking facility would not be a commercial parking station.

39. The term 'public' takes its ordinary meaning. A car space is available to the public when any member of the public may park their car in that space.<sup>34</sup> Contractual terms and conditions may restrict who or how someone may use the parking facility, for instance, an airport car park may be restricted to passengers and those meeting and greeting passengers. Such restrictions do not prevent the car park from being available to the public, provided any member of the public who agrees to the terms and conditions can use the parking facility.<sup>35</sup>

40. However, if there are substantial limits on the availability of all of the car spaces at a parking facility, the facility's car spaces are not available to the public.<sup>36</sup>

41. A fee must be charged to access all-day parking.<sup>37</sup> A car park operator may charge this fee daily, or over a longer period of time. Where a car park operator offers periodic payment, a daily fee can be worked out from the periodic fee charged.<sup>38</sup>

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**Example 5 – car spaces are available to the public for all-day parking**

42. *A private hospital operates a permanent commercial car parking facility in a purpose-built structure on its campus.*

43. *The fee for car parking is calculated per hour for the first four hours, with a flat fee thereafter. Any member of the public who agrees to the parking rates and conditions advertised online and at each entrance to the facility can park their car at the facility.*

44. *The facility's car spaces are available in the ordinary course of business to members of the public for all-day parking.*

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<sup>32</sup> *Qantas Airways Limited and Commissioner of Taxation* [2014] AATA 316 (*Qantas AAT*) at [57–61].

<sup>33</sup> Refer to paragraphs 38 to 41 of Taxation Ruling TR 2019/1 *Income tax: when does a company carry on a business?*

<sup>34</sup> A car park may be a commercial parking station on a particular day even if employees used or could use the parking on that day, or the car park was intended to be used by employees commuting between their place of residence and their primary place of employment. Refer to *Commissioner of Taxation v Qantas Airways Limited* [2014] FCAFC 168 (*Qantas*) at [12].

<sup>35</sup> A car park may be a commercial parking station on a particular day even if conditions imposed on its use meant employees did not or could not use it. Refer to *Qantas* at [22].

<sup>36</sup> *Re Income Tax Acts (No 1)* [1930] VLR 211.

<sup>37</sup> *Qantas AAT* at [65].

<sup>38</sup> Section 39E.

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**Example 6 – car spaces are not available to the public for all-day parking**

45. A car parking operator runs a permanent commercial car parking facility where all of the car spaces are available for lease by businesses.
46. None of the facility's spaces are available for members of the public to drive up and park (for short-term, all-day or long-term parking).
47. Therefore, the facility is not a commercial parking station.
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**Not on-street parking**

48. The definition of commercial parking station excludes a parking facility on a public street, road, lane, thoroughfare or footpath paid for by inserting money in a meter or by obtaining a voucher.<sup>39</sup>

**Lowest representative fee charged**

49. A fee that is not representative<sup>40</sup> is disregarded when considering if the car parking threshold requirement is met.<sup>41</sup>
50. To work out if an all-day parking fee is the lowest representative fee, you identify the fee charged on the first business day of the fringe benefits tax (FBT) year.<sup>42</sup> You then compare that fee against the average fee charged for the same all-day parking by the same operator during:
- the four-week period beginning on that first day of the FBT year, or
  - the four-week period ending on that first day of the FBT year.<sup>43</sup>
51. To be considered representative, the fee being tested should not be substantially greater or less than the average fee on each day during the relevant four-week period.
52. The lowest representative fee charged may include fees charged on 'early bird' parking rates or car-pooling arrangements, where a reasonable number of parking spaces are set aside for those purposes.
53. The lowest representative fee charged cannot be:
- nil<sup>44</sup>
  - worked out from fees for longer-term parking if users are prevented from entering and exiting the car park on a daily basis during that period<sup>45</sup>, or
  - a fee that is not available to the public on the day that the work car park is provided.

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<sup>39</sup> Subsection 136(1).

<sup>40</sup> Section 39AB.

<sup>41</sup> Section 39AA.

<sup>42</sup> Section 39AA. An FBT year is defined in subsection 136(1) as a year beginning on 1 April.

<sup>43</sup> Section 39AB.

<sup>44</sup> *WT94/87 and Commissioner of Taxation* [1995] AATA 97.

<sup>45</sup> *Qantas AAT* at [65].

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54. There are rules to prevent manipulation of the lowest representative fee. For example, the lowest representative fee must be set aside and replaced if the fee:

- is set for the sole or dominant purpose of reducing the taxable value of a car parking benefit, or
- arises because the operator and customer were not at arm's length.<sup>46</sup>

#### **Date of effect**

55. Except to the extent that this Ruling conflicts with views in TR 96/26, it applies before and after its date of issue. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 to 76 of TR 2006/10).

56. Paragraph 81 of TR 96/26 expressed the view that car parking facilities that have a primary purpose other than providing all-day parking (that is, one that usually charges penalty rates significantly higher than the rates chargeable for all-day parking at commercial all-day parking facilities) were not commercial parking stations. That view is not retained in this Ruling in recognition of the decisions of the Federal Court in *Qantas* and the Administrative Appeals Tribunal in *Qantas AAT*. In respect of this changed view, this Ruling applies in respect of car parking benefits provided on or after 1 April 2022.

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**Commissioner of Taxation**

16 June 2021

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<sup>46</sup> Subsection 39E(2).

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## References

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*Previous draft:*

Previously released in draft form as TR 2019/D5

*Related Rulings/Determinations:*

TR 2000/4; TR 2006/10; TR 2019/1

*Previous Rulings/Determinations:*

TR 96/26

*Legislative references:*

- FBTA 1986 7(1)
- FBTA 1986 8(2)
- FBTA 1986 39A(1)
- FBTA 1986 39A(1)(c)
- FBTA 1986 39A(2)
- FBTA 1986 39A(2A)
- FBTA 1986 39A(3)
- FBTA 1986 39A(4)
- FBTA 1986 39AA
- FBTA 1986 39AB
- FBTA 1986 39B
- FBTA 1986 39E
- FBTA 1986 39E(2)
- FBTA 1986 58GA
- FBTA 1986 136(1)
- FBTA Regulations 2018 5
- FBTA Regulations 2018 12
- ITAA 1997 995-1(1)
- TAA 1953

*Cases relied on:*

- Commissioner of Taxation v Qantas Airways Limited [2014] FCAFC 168; 227

FCR 554; 2014 ATC 20-477; 100 ATR 97; [2015] ALMD 1095

- Owners of Ship Shin Kobe Maru v Empire Shipping Co Inc [1994] HCA 54; 181 CLR 404; 68 ALJR 907; 125 ALR 1
- Qantas Airways Limited and Commissioner of Taxation [2014] AATA 316; 2014 ATC 10-360; 98 ATR 467; [2014] ALMD 5053
- Re Income Tax Acts (No 1) [1930] VLR 211; 36 ALR 192
- SZTVU v Minister for Home Affairs [2019] FCAFC 30; 268 FCR 497; [2020] ALMD 3010; [2020] ALMD 3016
- Virgin Blue Airlines Pty Ltd v Commissioner of Taxation [2010] FCAFC 137; 190 FCR 150; 2010 ATC 20-226; 81 ATR 85; [2011] ALMD 1559
- Virgin Australia Airlines Pty Ltd v Commissioner of Taxation [2021] FCA 523; 2021 ATC 20-793
- WT94/87 and Commissioner of Taxation [1995] AATA 97; 95 ATC 275; 30 ATR 1297

*Other references:*

- Fringe benefits tax – a guide for employers
- Macmillan Publishers Australia, *The Macquarie Dictionary* online, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au)

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ATO references

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