

# Car parking fringe benefits' burden may increase under ATO's new draft views

20 November 2019

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## In brief

On 13 November 2019, the Australian Tax Office (ATO) released Draft Taxation Ruling [TR 2019/D5](#) Fringe benefits tax: car parking benefits (TR 2019/D5). The ruling sets out the ATO's updated interpretation of what constitutes a car parking benefit for fringe benefits tax (FBT) purposes in recognition of relatively recent judicial decisions and also replaces the ATO's previous Taxation Ruling 96/26 Fringe benefits tax: car parking fringe benefits (TR96/26).

Of particular note is that the view expressed in TR 2019/D5 means that there is now potentially greater FBT exposure on employer provided car parking where there is a special purpose car park within a one kilometre radius, regardless of whether the rate structure discourages all day parking, such as parking commonly provided at certain airports, hotels, shopping centres, hospitals and universities.

The updated views raise a number of other key observations and implications as follows:

- TR 2019/D5 provides further guidance on what constitutes a 'commercial parking station'. Specifically, it must satisfy all of the following criteria - it must be permanent; a commercial car parking facility; provide all day parking available to the public on payment of a fee; it must not be on-street parking; and it must be provided in the ordinary course of business. Importantly, it includes car parking facilities advertised online or on a mobile-based device and is capable of including single car space offerings if it is intended to be repeated or offered as part of establishing a business.
- TR 2019/D5 is significantly reduced in size compared to TR96/26, with much of the guidance and examples moving from the Public Ruling itself to the non-binding ATO's [FBT Guide for Employers](#). For any contentious matters, employers should consider whether they should seek separate binding guidance in the form of a Private Ruling. Employers will also need to monitor when the ATO updates the guidance in the FBT Guide for Employers.
- The new ruling, if finalised, will broadly apply to FBT years both before and after its finalisation date. There is an exception for the changing interpretation of special purpose car parking, which will apply from 1 April 2020, providing employers with a period of time to review the FBT status of their car parking arrangements to understand how the above changes will impact them.

Employers have the opportunity to participate in the TR 2019/D5 consultation process up until 17 January 2020.

## In detail

TR 2019/D5 sets out the ATO's updated interpretation of what constitutes a car parking benefit for the purposes of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA), in recognition of the respective decisions in *Qantas Airways Limited and Commissioner of Taxation* [2014] AATA 316 and

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*Commissioner of Taxation v Qantas Airways Limited* [2014] FCAFC 168 (collectively referred to as the Qantas case). It also replaces Taxation Ruling 96/26.

Historically, the ATO's view on the application of FBT on car parking (as stated in TR 92/26) has, consistent with the original intent of Parliament, largely limited FBT to apply to areas where car parking is valuable, such as in central business districts (CBD) and similar areas. Taxpayers have been able to rely on TR 96/26, to exclude car parking benefits from FBT where the only car parking facilities within a 1 kilometre radius were special purpose car parks (that charged rates above a certain threshold) where the rate structure discouraged all day parking (for example, paid car parking at certain airports, hotels, shopping centres, hospitals and universities). This is despite the Full Federal Court in the Qantas case effectively ruling in 2014 to the contrary.

TR 2019/D5 brings an end to this relief and will cause many employers with business operations in many more suburban areas to be brought into the FBT net. Not only will this create an FBT burden for a number of employers, it will further enhance the administration cost of applying the FBT rules.

The key changes made in TR 2019/D5 that employers should be aware of are summarised below.

### ***Definition of 'commercial' parking facility***

TR 2019/D5 provides updated guidance as to the definition of what is considered a 'commercial' parking 'facility'. The ruling lists factors that include whether it is a purpose-built parking facility and offers parking to members of the public. In order to be deemed commercial, the facility must also operate with a view to make a profit. TR 2019/D5 does not provide any additional guidance on what factors will be determinative in this respect, so employers should review the FBT Guide for Employers once the ATO has updated its website accordingly.

The ruling touches on modern and emerging instances of car parking, with application and web-based technologies now having the ability to convert traditionally non-commercial facilities into FBT-relevant car parking operations. This raises questions over how employers are able to practically track relevant car parking facilities that may give rise to car parking FBT obligations. For example, parking at an office or residential building that a web-based provider "acquires" to then on-charge to customers on commercial terms from their web or mobile based device may now be an additional consideration for employers when reviewing the car parking profile within the vicinity of their business premises.

### ***Definition of 'ordinary course of business'***

In line with the decision in the Qantas case, the definition of 'ordinary course of business' has been updated by TR 2019/D5 and is stated to depend on '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.' According to TR 2019/D5, a car parking facility may still qualify under the FBT net even if the purpose is to provide short term free (or nominally costed) parking. This includes parking at a hospital, shopping centre, hotel, university or an airport.

Therefore, employers who provide car parking to employees in relatively *low value* areas can incur an FBT liability where special purpose car parking facilities operate within 1 km of the provided parking charge a rate that exceeds the relevant threshold, even if all day parking is not the dominant purpose.

Furthermore, TR 2019/D5 clarifies that the offering of a single space 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.

### ***The takeaway***

Although TR 2019/D5 is a necessary update to provide clarity to employers following the Qantas case, it would now seem clear that FBT can apply in a manner inconsistent with the original intent of Parliament,

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with certain employers in non-CBD locations now potentially incurring an FBT liability on employer provided car parking.

Employers are likely to need to rely on additional commentary and examples that are now published on the ATO's website, within the FBT Guide for Employers. This carries a potential risk for employers as the new ruling explicitly states that the FBT Guide for Employers is not a public ruling and is not binding on the Commissioner.

Furthermore, TR 2019/D5 is considerably abbreviated in comparison to TR 96/26. We encourage employers to monitor the ATO's website for additional guidance which, given the draft ruling, may reveal further material changes.

Employers should consider if TR 2019/D5 will have an impact on the FBT treatment of any car parking spaces provided to employees. Employers may need to research the type of car parking facilities which operate within 1km of the space, since from 1 April 2020, a broader range of car parking stations may now qualify under the commercial parking facility definition.

Comments can be made to the ATO on the draft ruling by 17 January 2020. PwC will be preparing a submission. If you have any comments on the draft ruling, your local employment tax team member would be happy to discuss.

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## ***Let's talk***

For a deeper discussion of how these issues might affect your business, please contact:

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