Australian Government
Australian Taxation Office

Decision impact statement

SEPL Pty Ltd as trustee of the SFT Trust v Commissioner of Taxation [2026] FCAFC 36

Relying on this Decision impact statement

This publication provides our view on the implications of the court or tribunal decision discussed, including on related public advice or guidance.

Taxpayers can rely on this Decision impact statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty, nor will they have to pay interest on the underpayment provided they reasonably relied on this Decision impact statement in good faith. However, even if they do not have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

Table of Contents **Paragraph**

Venue: Full Federal Court

Venue reference no: SAD 127 of 2025

Judgment date: 27 March 2026

Summary of decision

1. This Decision impact statement outlines the ATO's response to this case, which considered:

- whether 3 brothers, who together comprised all of the directors of a corporate trustee of a discretionary trust, were each an 'employee' within the meaning of that term in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA), and
- if the brothers were each found to be an employee, whether car benefits provided to them by the corporate trustee of the discretionary trust were provided 'in respect of' their employment.

2. All legislative references in this Decision impact statement are to the FBTAA unless otherwise indicated.

3. All judgment references in this Decision impact statement are to the judgment of *SEPL Pty Ltd as trustee of the SFT Trust v Commissioner of Taxation* [2026] FCAFC 36, unless otherwise indicated.

Overview of facts

4. The taxpayer, SEPL Pty Ltd in its capacity as the corporate trustee of a discretionary trust (SFT Trust), was engaged in a business involving petrol stations, convenience stores, fast food and tobacco outlets, and gift shops that was initially established by the parents of the 3 brothers as a small operation.[1] The business grew over time.[2]

5. Following the death of the father and the retirement of the mother as director, the 3 brothers became the only shareholders and directors of SEPL Pty Ltd.[3] They collectively comprised the Trustee Board.[4] The Trustee Board allocated responsibility to each of the brothers for particular aspects of the taxpayer's business, and the brothers described the allocated roles they performed as that of 'Chief Executive Officer', 'Managing Director' and 'Executive Director'.[5]

6. The 3 brothers and the mother were also among a lengthy list of eligible beneficiaries of the SFT Trust, which included extended family members.[6]

7. The 3 brothers did not receive salaries and there were no written contracts of employment for any of them. There was also no record of any board resolution to enter into such an employment agreement, and managers were employed to oversee all relevant business functions.[7]

8. The 3 brothers 'worked in the business' and 'played an active "hands on" role in the management of the [taxpayer's] affairs'.[8] They were 'completely immersed' in the business, leaving 'little time for other pursuits'.[9]

9. The 3 brothers benefited from the taxpayer's business in 2 ways. Firstly, sharing the taxpayer's business profits through an informal arrangement reached between the brothers, with the profits being distributed to each of the brother's family trusts (also

[1] *BQKD and Commissioner of Taxation* [2024] AATA 1796 (*BQKD*) at [17–19].
[2] *BQKD* at [23].
[3] *BQKD* at [22].
[4] *BQKD* at [22].
[5] *BQKD* at [41], [54] and [61].
[6] *BQKD* at [20].
[7] At [7].
[8] *BQKD* at [3], [56] and [77].
[9] *BQKD* at [30–31].

eligible beneficiaries of the SFT Trust).[10] Secondly, each brother had the exclusive use of luxury and high-performance cars owned by the taxpayer in its capacity as trustee of the SFT Trust.[11]

10. The 3 brothers genuinely believed they were entitled to benefits (specifically, the private use of cars) as beneficiaries of the SFT Trust, not because they saw it as a reward for their work as directors or as employees.[12]

11. Each brother used the cars allocated to them for both business and private use over the 2016 to 2020 fringe benefits tax (FBT) years (the relevant FBT years).[13] The expenses associated with the private use of the cars were debited to the mother's beneficiary loan account with the SFT Trust, which was then cleared by trust distributions.[14] The taxpayer claimed tax deductions for the estimated business use of the cars by the 3 brothers.[15]

12. The taxpayer did not pay any FBT during the relevant FBT years in respect of the private use of the cars by the 3 brothers.

History of the dispute

13. At audit, the Commissioner was of the view that the taxpayer was liable to pay FBT on the value of the car benefits provided to the 3 brothers. As a result, the Commissioner included the taxable value of the private use of the cars in amended FBT assessments for the relevant FBT years.

14. The taxpayer objected to the amended FBT assessments. The objection was disallowed. The taxpayer sought review of the objection decision by the Administrative Appeals Tribunal (Tribunal).

15. The Tribunal set aside the Commissioner's objection decision and substituted it with a decision that the objection be allowed.[16]

16. On appeal to the Federal Court, the Commissioner contended that the Tribunal had erred on both issues and the appeal was allowed.[17] The primary judge held that the 3 brothers were 'employees' within the meaning of the FBTAA and the car benefits were therefore provided 'in respect of' their employment.[18]

17. The primary judge in the Federal Court set aside the Tribunal's decision, affirming the Commissioner's objection decision and dismissing the taxpayer's application for review.[19]

18. The taxpayer then appealed this decision to the Full Federal Court. On 27 March 2026, the Full Federal Court (Perry, O'Callaghan and Thawley JJ) (Full Court) unanimously allowed the taxpayer's appeal on both issues.[20]

[10] *Commissioner of Taxation v SEPL Pty Ltd as trustee of the SFT Trust* [2025] FCA 581 (*SEPL FCA*) at [5].
[11] *SEPL FCA* at [5].
[12] *BQKD* at [92].
[13] At [4] and *SEPL FCA* at [5].
[14] At [4] and *SEPL FCA* at [6] and [127].
[15] *BQKD* at [67].
[16] *BQKD* at [93].
[17] *SEPL FCA* at [13].
[18] *SEPL FCA* at [88–89], [96–97] and [151].
[19] *SEPL FCA* at [154].
[20] At [1], per Perry J, at [2], per O'Callaghan J and at [81], per Thawley J.

Issues decided

Meaning of 'employee' in subsection 136(1)

Statutory scheme of the FBTAA

19. The Full Court explained that the question whether each of the 3 brothers were an employee of the taxpayer depended on the meaning of the term 'employee', as it appeared in the definition of 'fringe benefit' in subsection 136(1).[21]

20. 'Employee' is defined in subsection 136(1) as a 'current employee', which is further defined in subsection 136(1) as 'a person who receives, or is entitled to receive, salary or wages'.

21. The expression 'salary or wages' is defined in subsection 136(1) as a payment from which an amount must be withheld under a provision in Schedule 1 to the *Taxation Administration Act 1953* (TAA). Table item 1 of subparagraph (b)(ii) of the definition of 'salary or wages' in subsection 136(1) refers to a 'payment to employee' in section 12-35 of Schedule 1 to the TAA, which in turn refers to withholding an amount from salary, wages, commission, bonuses or allowances paid to an individual 'as an employee'.

22. The Full Court held that it was also relevant to consider section 137.[22] Section 137 operates on the concept of 'salary or wages' and, only through that mechanism, affects whether a person is an employee.[23]

23. The Full Court observed that the term 'employment' appeared in paragraph 137(1)(b) and then only for the limited purpose of ascertaining whether the person is an 'employee' under the FBTAA.[24]

Definition of 'employment'

24. The Full Court did not accept that the word 'employment' expanded the statutory meaning of employee and explained that the definition of employment depended upon a 'person being treated as an employee'.[25]

25. The Full Court held that the word 'employment' was descriptive of what a person has if they are an employee.[26] It did not lead the statutory inquiry into whether a person was an employee or whether they performed some kind of expanding function.[27]

[21] At [16].
[22] At [27].
[23] At [27]. At [29–30] the operation of section 137 was discussed, which depends upon satisfying each of following 3 statutory preconditions:
- first, that a benefit has been provided by one person to another (paragraph 137(1)(a)),
- second, that 'but for' section 137 the benefit would not be regarded as having been provided 'in respect of the employment' of the recipient (paragraph 137(1)(b)), and
- third, that if the benefit were instead provided by way of a cash payment, that cash payment would constitute 'salary or wages' under the definition in subsection 136(1) (subparagraph 137(1)(c)(i)).

If all 3 conditions are met, paragraph 137(1)(d) applies so that, for 'the purpose only of ascertaining whether a person is an employee or an employer', the benefit is treated 'as if' it were salary or wages paid to the second person when applying the definitions in subsection 136(1).

[24] At [31].
[25] At [33–34] and [38–40].
[26] At [40].
[27] At [40].

Operation and scope of section 137

26. The Full Court approached section 137 on the same basis as the Tribunal, holding that:

- Section 137 did not itself supply the meaning of 'employee'.[28]
- The answer to the hypothetical question posed by paragraph 137(1)(c) depended upon whether a cash payment would have been made to a person 'as an employee', and that this permitted consideration of the ordinary (common law) meaning of the word 'employee'.[29]
- Any hypothetical cash payment would have been made to the relevant brother not 'as an employee' but in his capacity as a proprietor, controller, and discretionary beneficiary of the trust.[30]
- This meant that the condition in subparagraph 137(1)(c)(i), that the hypothetical cash payment 'would constitute salary or wages' under section 12-35 of Schedule 1 to the TAA, was not satisfied.[31]

Ordinary meaning of 'employee'

27. The word 'employee' in section 12-35 of Schedule 1 to the TAA bears its ordinary meaning, which is its common law meaning.[32]

Reliance on section 12-40 of Schedule 1 to the TAA

28. Table item 2 of the definition of 'salary or wages' in subsection 136(1) concerns section 12-40 of Schedule 1 to the TAA, and addresses payments to company directors. The Full Court considered that the Commissioner's reliance on section 12-40 of Schedule 1 to the TAA did not assist their case and that the primary judge erred in relying on that provision.[33]

Whether benefits are provided 'in respect of' employment

29. The Full Court considered the issue of whether, on the hypothetical basis that each of 3 brothers were an employee under subsection 136(1), the car benefits were provided to them 'in respect of' their employment.[34]

30. The definition of 'fringe benefit' in subsection 136(1) requires that the benefit be provided 'in respect of the employment of the employee'.[35]

31. While the definition of 'in respect of' in subsection 136(1) is broad, the Full Court held that the breadth of the definition did not displace the need for a meaningful connection between the benefit and the employment.[36] That is consistent with the reasoning of the Full Federal Court in *J & G Knowles v Commissioner of Taxation* [2000] FCA 196 (*J & G*

[28] At [46].
[29] At [46] and *BQKD* at [14–15].
[30] At [47] and *BQKD* at [21], [62–66], [90–92].
[31] At [47].
[32] At [15]. The Full Court at [49–50] referred to the High Court decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 to explain how to determine whether a person is an employee within the common law meaning of the term.
[33] At [53–61].
[34] At [64].
[35] At [66].
[36] At [68].

Knowles), the existence of some causal relationship is not of itself determinative and the connection must be sufficient or material having regard to the object and structure of the FBT regime.[37]

32. *J & G Knowles* recognised that the capacity in which the benefit was received is relevant.[38] The Full Court held that the 'Tribunal did not err in considering the basis on which the benefits were received, including – in addition to the objective circumstances – how the brothers themselves understood the arrangements'.[39]

33. The Full Court considered that '*J & G Knowles* makes clear that, even if employment is a cause, the benefit may still properly be characterised as arising from a different relationship, with the employment relationship not being sufficiently material to satisfy the statutory test'.[40]

34. The Full Court held that it was open for the Tribunal to conclude that the arrangement, taken as a whole, was one operating by reason of the brothers' relationship to the trust and family structure rather than by reason of any employment relationship.[41]

ATO view of this decision

Meaning of the term 'employee' within the statutory scheme of the FBTAA

35. We accept that whether an individual is an employee depends upon the relevant definitions in subsection 136(1), including the meaning of the terms:

- 'employee' as it appears in the definition of 'fringe benefit'[42]
- 'current employee' within the meaning of the definition of 'employee'[43]
- 'salary or wages'[44], and
- the operation of section 12-35 of Schedule 1 to the TAA, through the definition of 'salary or wages'.[45]

36. In noting that the meaning of employee in section 12-35 of Schedule 1 to the TAA is an undefined legislative term, the Full Court concluded that, in the absence of any countervailing indications in the context or purpose, the term bears it ordinary meaning.[46]

37. The High Court in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) held that the 'ordinary meaning' of 'employee' was its common law meaning.[47] Further, the High Court in *Personnel Contracting* and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 explained how to determine whether a person is an employee within the common law meaning of the term.[48] Subject to its modifications, the FBTAA used the word 'employee' in a similar way.[49] We accept the Full Court's adoption of the High Court's explanation of how

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[37] At [68] and *J & G Knowles* at [26] and [29].
[38] At [71].
[39] At [78].
[40] At [80].
[41] At [79].
[42] At [16–17].
[43] At [18].
[44] At [19].
[45] At [20–21].
[46] At [25].
[47] *Personnel Contracting* at [93], per Gageler and Gleeson JJ, and at [161], per Gordon J.
[48] At [50].
[49] At [25] and [51].

to determine whether a person is an employee within the common law meaning of the term.[50]

38. We acknowledge that the Full Court held that the FBTAA extends or varies who might be an employee, but in applying the relevant provisions in this case, which involved section 12-35 of Schedule 1 to the TAA, we are required to determine whether any benefits (if they had been paid in cash) would have been paid to an individual 'as an employee' within the common law meaning of the term.[51]

Definition of 'employment' and operation and scope of section 137

39. We accept that the word 'employment' is descriptive of what a person has if they are an employee and does not lead an inquiry into whether a person is an employee or whether they perform some kind of expanding function.[52]

40. We also acknowledge that section 137 has a limited function and operates as a safeguarding measure to ensure that the FBT legislation could still operate where remuneration was provided only in non-cash form.[53]

Unique and unusual factual circumstances of this case

41. The Full Court's understanding of the statutory scheme of the FBTAA reflects the importance of correctly identifying an employee, particularly in circumstances where an individual is:

- a shareholder and a director of the corporate trustee (SEPL Pty Ltd), and
- an appointor (with the power to appoint to remove the trustee and to appoint discretionary objects) and an eligible beneficiary of the discretionary trust (SFT Trust).

42. We recognise that the finding that the 3 brothers were each not an employee was based on the unique and unusual factual circumstances in this case, including:

- a closely held family arrangement involving a discretionary trust
- no employment contracts and no payment of salary or wages to the 3 brothers who, as directors, played an active, hands on role in the management of the business, and
- the debit to the mother's beneficiary account, reflecting the private use of the vehicles by the 3 brothers, which was then cleared by trust distributions.

43. The particular facts and circumstances of a case will always need to be closely considered, and as a result, we consider:

- Directors of a corporate trustee of a discretionary trust may still fall within the definition of 'employee' for FBT purposes, even if the common law meaning of the term is applied.
- The capacity in which persons, including directors of a corporate trustee of a discretionary trust, receive benefits from the trust will need to be determined having regard to all of the facts and circumstances of a case. This includes, but is not limited to, the terms of the trust deed, the actions of the trustee in

[50] At [50].
[51] At [52].
[52] At [40].
[53] At [41–42].

exercising their duties under the trust, as well as the nature of the benefit provided.

44. Even though the provision of car benefits were not subject to FBT in this case, we note that different taxing provisions may apply to other arrangements involving the private use of car benefits and trusts (for example, Division 7A of the *Income Tax Assessment Act 1936* (ITAA 1936) may be considered where there are loans from private companies or unpaid present entitlements to private companies, including provisions that treat the use of company assets by shareholders or their associates as a payment (such as section 109CA of the ITAA 1936)).

Meaning of 'in respect of' their employment

45. We consider that the Full Court was correct in confirming that while the definition of 'in respect of' in subsection 136(1) is broad, the existence of some causal relationship is not, of itself, determinative.[54] The definition still requires a meaningful connection which is sufficient or material, having regard to the object and structure of the FBT regime.[55]

46. We accept that it was open for the Tribunal to regard the arrangement which the 3 brothers were participating in, taken as a whole, to be operating by reason of the brothers' relationship to the trust and family structure rather than by reason of any employment relationship.[56] We accept that the absence of a direct distribution by the taxpayer of the cars, or of their value, to the brothers did not necessarily result in a conclusion that the benefit was provided 'in respect of' their employment.[57]

47. In addition to the objective circumstances, we note that the subjective intention of the individual (that is, how they themselves understood the arrangement) may be a relevant factor in determining whether the benefits were provided 'in respect of' their employment.[58]

Implications for affected advice or guidance

48. We are reviewing the impact of this decision on related advice, including:

- Miscellaneous Taxation Ruling MT 2019 *Fringe benefits tax: shareholder employees of family private companies and directors of corporate trustees*
- Miscellaneous Taxation Ruling MT 2016 *Fringe benefits tax: benefits not taxable unless provided in respect of employment*
- Chapters 1, 7 and 22 of *Fringe benefits tax – a guide for employers*.

[54] At [68].
[55] At [68] and *J & G Knowles* at [26] and [29].
[56] At [79].
[57] At [79].
[58] At [78].

Comments

49. We invite you to advise us if you feel this decision has consequences we have not identified. Forward your comments to the contact officer.

Due date: 31 July 2026

Contact officer details have been removed as the comments period has ended.

Commissioner of Taxation
1 July 2026

References

Related rulings and determinations:
MT 2019; MT 2016

Legislative references:
- FBTAA 1986 136(1)
- FBTAA 1986 137
- TAA 1953 Sch 1 12-35
- TAA 1953 Sch 1 12-40

Cases relied on:
BQKD and Commissioner of Taxation [2024] AATA 1796; 120 ATR 107
Commissioner of Taxation v SEPL Pty Ltd as trustee of the SFT Trust [2025] FCA 581; 2025 ATC 20-963; 123 ATR 179
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1; 275 CLR 165; 96 ALJR 89; 398 ALR 404
J & G Knowles v Commissioner of Taxation [2000] FCA 196; 96 FCR 402; 2000 ATC 4151; 44 ATR 22
SEPL Pty Ltd as trustee of the SFT Trust v Commissioner of Taxation [2026] FCAFC 36; 315 FCR 1; 2026 ATC 21-008
ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2; 275 CLR 254; 96 ALJR 144; 398 ALR 603

ATO references

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