

# ***TR 2019/D5 - Fringe benefits tax: car parking benefits***

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This document has been finalised by TR 2021/2.

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

! This draft Ruling is accompanied by a draft update to Chapter 16 of *Fringe benefits tax - a guide for employers*.



## Draft Taxation Ruling

### Fringe benefits tax: car parking benefits

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❶ This draft Ruling is accompanied by a [draft update](#) to Chapter 16 of *Fringe benefits tax - a guide for employers*.

#### ❶ Relying on this draft Ruling

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Ruling applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

## What this draft Ruling is about

1. This draft Ruling<sup>1</sup> 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>2</sup>

## Background

2. This Ruling replaces Taxation Ruling TR 96/26 *Fringe benefits tax: car parking fringe benefits* (now withdrawn). Chapter 16 of the *Fringe benefits tax – a guide for employers*<sup>3</sup> (Employers' guide) provides additional guidance to help employers calculate the taxable value of a car parking fringe benefit<sup>4</sup> and provides practical examples.

<sup>1</sup> All further references to 'this Ruling' refer to the Ruling as it will read when finalised. Note that this Ruling will not take effect until finalised.

<sup>2</sup> All legislative references in this Ruling are to the *Fringe Benefits Tax Assessment Act 1986* unless otherwise indicated.

<sup>3</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>4</sup> A car parking fringe benefit is defined in subsection 136(1) as a fringe benefit that is a car parking benefit.

## Definitions

3. 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>5</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>6</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>7</sup> provided on that day.<sup>8</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>9</sup> as referred to in paragraph 12 of this Ruling.
- **Minimum parking period** is a combined parking period of more than four hours.<sup>10</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.
- **Place of residence**<sup>11</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**<sup>12</sup> is the employee's primary place of employment as referred to in paragraph 10 of this Ruling.

<sup>5</sup> Subsection 136(1).

<sup>6</sup> Subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

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

<sup>8</sup> Paragraph 39A(1)(c).

<sup>9</sup> 'Commercial parking station' is defined in subsection 136(1).

<sup>10</sup> It does not matter whether the parking is continuous, as long as the cumulative total is more than four hours.

<sup>11</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>12</sup> 'Primary place of employment' is defined in subsection 136(1).

- **Work car park** is a business premises<sup>13</sup> or associated premises<sup>14</sup> of the provider<sup>15</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

4. 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?

5. You provide a car parking benefit on a particular day when, between 7.00am–7.00pm<sup>16</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**<sup>17</sup> at least once on that day
- the **work car park** is located at or 'in the vicinity of'<sup>18</sup> the **primary place of employment**, on that day
- a **commercial parking station**<sup>19</sup> is located within a one kilometre radius of the **work car park** used by the employee

<sup>13</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>14</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>15</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>16</sup> Subsection 39A(1) specifies the conditions 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>17</sup> See paragraph 10 of this Ruling.

<sup>18</sup> See paragraph 9 of this Ruling.

<sup>19</sup> See paragraph 12 of this Ruling.

- the ‘lowest representative fee’<sup>20</sup> 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<sup>21</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. 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>22</sup>

6. 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>23</sup>

7. 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.

8. 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>24</sup> their employment.

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

9. The work car park must be located at or ‘in the vicinity of’ the 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>25</sup> and geographical<sup>26</sup> separation that is significant.<sup>27</sup>

<sup>20</sup> See paragraphs 21 to 26 of this Ruling.

<sup>21</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>22</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>23</sup> Certain cars may be exempt under subsection 8(2).

<sup>24</sup> ‘In respect of’ is defined in subsection 136(1) to mean in relation to the employment of an employee, includes by reason of, by virtue of, or for or in relation directly or indirectly to, that employment.

<sup>25</sup> ‘Spatial’ refers to the physical measured distance between the places.

<sup>26</sup> Geographical ‘encompasses 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’ (*Virgin Blue Airlines Pty Ltd v Commissioner of Taxation* [2010] FCAFC 137 at [54]).

<sup>27</sup> *Virgin Blue Airlines Pty Ltd v Commissioner of Taxation* [2010] FCAFC 137 at [54].

***Where is the ‘primary place of employment’?***

10. An employee’s primary place of employment is the place where they perform their employment duties on a given day<sup>28</sup>, as long as it was business premises, or associated premises, of their employer (or the employer’s associate<sup>29</sup>). This means that a temporary or alternative place can be an employee’s primary place of employment. An employee’s primary place of employment on a particular day may not be the employee’s regular place of employment.

11. Where an employee has only one place of employment on a particular day (for example, an office), that place will be their primary place of employment for that day. Where an employee has more than one place of employment on a particular day, their 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 place to be the primary place of employment. Time sheets and other employment data may be used to substantiate where the employee’s primary place of employment was on that day.

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

12. A car park is a commercial parking station<sup>30</sup> when it meets all of the following for a particular day. The car park:

- is permanent
- is a commercial car parking facility
- makes all-day parking available to the public on payment of a fee
- is not on-street parking, and
- does this in the ordinary course of business.

13. 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>31</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.

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<sup>28</sup> This means duties on that day, or, if none were performed on that day, the most recent day before that day on which the employee performed those duties.

<sup>29</sup> ‘Associate’ is defined in subsection 136(1) to have the meaning given by section 318 of the *Income Tax Assessment Act 1936*.

<sup>30</sup> Subsection 136(1).

<sup>31</sup> Section 39B.

*Permanent*

14. The term 'permanent' is not defined. Considering its ordinary meaning<sup>32</sup> and the statutory context, a permanent commercial parking facility is enduring or lasting as such and not temporary or transient in nature. Factors that would support whether a commercial parking facility is permanent in nature include whether it:

- has pavement or bitumen, or permanently marked bays
- has signage, advertising and/or online booking facilities, or
- is not intended to be solely used for a special event.

*'Commercial' parking 'facility'*

15. The term 'facility' is not defined. Considering its ordinary meaning and the statutory context, a car space will be provided at a parking facility, if the purpose of the complex at which the car space is available is to provide car parking to the public. Factors that would support whether a car space is provided at a commercial parking facility include whether it:

- is a purpose-built parking facility (including parking provided as part of an office or apartment building)
- offers parking to members of the public (whether by way of advertising or using a mobile application).

16. A facility is 'commercial' if it is run to make a profit<sup>33</sup> which may include a facility operated by a not-for-profit organisation. In determining whether a car parking facility is commercial, you will need to consider all of the surrounding circumstances and the general nature of the operation of the car parking facility. No one factor will be determinative.<sup>34</sup>

*All-day parking available to the public on payment of a fee*

17. The term 'public' takes its ordinary meaning. A car park is offered to the public where car spaces are available to any member of

<sup>32</sup> Macmillan Publishers Australia, *The Macquarie Dictionary* online, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au), viewed 7 November 2019.

<sup>33</sup> 'Commercial' is ordinarily defined, as meaning 'capable of returning a profit; preoccupied with profit or immediate gains', Macmillan Publishers Australia, *The Macquarie Dictionary* online, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au), viewed 7 November 2019 and as 'of, engaged in, or concerned with, commerce; having profit as a primary aim rather than artistic etc. value', Oxford Dictionaries, 2004, *Australian Oxford Dictionary*, 2<sup>nd</sup> edn, Oxford University Press.

<sup>34</sup> *Arab Republic of Egypt Embassy v Gamal-Eldin & Anor* [1996] 2 All ER 237 and *Littrell v United States of America (No 2)* [1994] 4 All ER 203 at [312], per Rose LJ.

the public.<sup>35</sup> Contractual terms may restrict who may use the car park, for instance, an airport car park may be restricted to passengers and meeters and greeters of passengers. Such restrictions do not prevent the car park from being available to the public, provided any member of the public that accepts these restrictions can use the car park.<sup>36</sup>

18. Similarly, if a car park allows all-day parking, but its fee structure discourages it with higher fees, the car park can still be considered a commercial parking station if it satisfies other requirements. This is because the parking facility makes car parking spaces available to the public for all-day parking, on payment of a fee.

19. 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>

20. Only one car space in a parking facility needs to be available in the ordinary course of business, to members of the public, for all-day parking, for the car park to meet the definition of a 'commercial parking station'.

#### *Ordinary course of business*

21. A commercial parking station offers parking in the ordinary course of its business. What constitutes the 'ordinary course' depends on the business being carried on and 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 car parking facility may still qualify as a commercial parking station even if the facility has another purpose other than providing all-day parking, for example, it may also have a purpose of providing short term parking, such as hourly parking at a hospital, shopping centre, hotel, university or an airport.

22. The offering of a single car 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. Entities have been held to carry on a business where its ongoing

<sup>35</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>36</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>37</sup> *Qantas Airways Limited and Commissioner of Taxation* [2014] AATA 316 at [65].

<sup>38</sup> Refer to section 39E.



activities are relatively limited and its key activity consists of letting the company's premises for rent on an ongoing basis.<sup>39</sup>

***Lowest representative fee charged***

23. A fee that is not representative<sup>40</sup> is disregarded when considering if the car parking threshold requirement is met.<sup>41</sup>

24. 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>

25. 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.

26. 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.

27. 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.

28. 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

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<sup>39</sup> Refer to paragraphs 38 to 41 of Taxation Ruling TR 2019/1 *Income tax: when does a company carry on a business?*

<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 Airways Limited and Commissioner of Taxation [2014] AATA 316 at [65].

- arises because the operator and customer were not at arm's length.<sup>46</sup>

## Date of effect

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29. Subject to paragraphs 30 and 31 of this Ruling, when the final Ruling is issued, it is proposed to apply to car parking benefits provided in FBT years commencing before and after its date of issue. In any case, 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 Taxation Ruling TR 2006/10).

30. The Commissioner's view on car parking fringe benefits was contained in Taxation Ruling TR 96/26 *Fringe benefits tax: car parking fringe benefits* (now withdrawn). 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. This view will no longer apply in recognition of the *Qantas* decisions of the Administrative Appeals Tribunal and the Federal Court.

31. This Ruling outlines the Commissioner's current view that if a car park allows all-day parking, but its fee structure discourages it with higher fees, the car park can still be considered a commercial parking station if it satisfies other requirements (paragraph 18 of this Ruling). When this Ruling is finalised, the intention is to apply this view to car benefits provided from 1 April 2020. This provides employers with the opportunity to review their circumstances to determine if they are providing car parking fringe benefits under the current view, calculate the relevant taxable value, and adjust their arrangements if necessary.

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**Commissioner of Taxation**13 November 2019

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

## Appendix 1 – Your comments

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32. You are invited to comment on this draft Ruling, including any practical issues with the proposed date of effect and the interpretative issue addressed at paragraph 18 of this draft Ruling. Please forward your comments to the contact officer by the due date.

33. A compendium of comments is prepared for the consideration of the relevant Public Advice and Guidance Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on [ato.gov.au](http://ato.gov.au)

Please advise if you do not want your comments included in the edited version of the compendium.

**Due date:** 17 January 2020

**Contact officer details have been removed following publication of the final ruling.**

## **Appendix 2 – Detailed contents list**

34. The following is a detailed contents list for this Ruling:

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## References

*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

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

*Previous Rulings/Determinations:*

TR 96/26

*Legislative references:*

- FBTAA 1986 7(1)
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*Cases relied on:*

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