


CR 2013/43 - Fringe benefits tax: FitSense Australia Pty Ltd (FitSense) Health Checks, Health Coaching and Health Seminars provided to employer clients of FitSense

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Class Ruling

Fringe benefits tax: FitSense Australia Pty Ltd (FitSense) Health Checks, Health Coaching and Health Seminars provided to employer clients of FitSense

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❗ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- subparagraph 58M(1)(c)(ii) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA);
- subparagraph 58M(1)(c)(iv) of the FBTAA; and
- subsection 136(1) of the FBTAA.

All subsequent legislative references in this Ruling are to the FBTAA unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is employers who make Health Checks, Health Coaching and Health Seminars provided by FitSense Australia Pty Ltd (FitSense) available to their employees.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 16 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 1 July 2012. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

9. The following description of the scheme is based on information provided by the applicant as detailed in:

- the application for Class Ruling (dated 9 February 2013);

- the booklet 'Making Health Checks Affordable';
- a draft 'FitSense Australia Services Agreement' (forwarded 4 March 2013).

10. FitSense is in the business of providing corporate wellness programs.

11. FitSense supplies various health services to employees of employers who have entered into service agreements with FitSense in respect of Health Checks, Health Coaching and Health Seminars.

12. FitSense will provide services by legally qualified nurses and by exercise physiologists. FitSense exercise physiologists are all members of Exercise and Sports Science Australia (ESSA).

13. FitSense is a corporate wellness provider and member of the Health and Productivity Institute of Australia (HAPIA). FitSense is accredited by the Quality Improvement Council (QIC) in health and community services.

14. The categories of services provided through FitSense may comprise:

Health Checks

Health Checks are conducted at the employer's premises and include the following tests conducted on an employee:

- blood pressure;
- cholesterol;
- glucose;
- body composition;
- overall diabetes risk;
- overall cardiovascular disease risk;
- lifestyle habits;
- aerobic fitness, and
- injury risk.

The Health Checks are carried out by FitSense nurses and by FitSense exercise physiologists, as applicable.

Health Coaching

Health Coaching is conducted in follow up to a Health Check with the specific aim of improving an employee's health and reducing their work-related health risk. Health Coaching focuses on increasing physical activity and improving nutritional habits.

The goal of the program is to reduce health risks for the employee through educating them to take control of their own healthcare.

A FitSense exercise physiologist will work with the employee to develop an objective and plan to achieve their health goals.

Health Coaching is conducted by FitSense exercise physiologists.

Health Seminars

FitSense will offer a variety of seminars and workshops onsite to employees. Topics will include:

- become your own personal trainer;
- healthy eating for a healthy life;
- achieving a fit and healthy work/life balance;
- keeping good health and avoiding winter illness;
- health tips for mature age workers;
- preventing injuries;
- stress management;
- men's health; and
- women's health.

The seminars will be facilitated by FitSense exercise physiologists and also dieticians and psychologists, as applicable.

15. Employers participate in the FitSense program with the view that it will result in:

- screening staff to ensure they can safely undertake their work with minimal risk of injury or illness;
- screen staff to determine their health risk;
- reduce organisational costs through reduced risk of injury, illness and absenteeism to staff;
- educate staff on matters relating to health, fitness and injury reduction;
- improved employee productivity as a result of better employee health.

16. The services made available to employees participating in the FitSense program will not be part of any salary packaging arrangement and will not be provided as a reward for services rendered or to be rendered by the employee.

Ruling

17. The provision of the FitSense Health Checks by a legally qualified nurse will be an exempt benefit under subparagraph 58M(1)(c)(ii) as all the requirements of the definition of 'work-related medical screening' in subsection 136(1) are met.

18. The provision of FitSense Health Checks by an exercise physiologist which are carried out on behalf of a legally qualified nurse will be an exempt benefit under subparagraph 58M(1)(c)(ii)

19. The provision of FitSense Health Checks by an exercise physiologist which are not carried out on behalf of a legally qualified nurse will not be an exempt benefit under subparagraph 58M(1)(c)(ii).

20. The provision of the FitSense Health Coaching will be an exempt benefit under subparagraph 58M(1)(c)(iv) as all the requirements of the definition of 'work-related counselling' in subsection 136(1) are met.

21. The provision of the FitSense Health Seminars will be an exempt benefit under subparagraph 58M(1)(c)(iv) as all the requirements of the definition of 'work-related counselling' in subsection 136(1) are met.

Commissioner of Taxation

12 June 2013

Appendix 1 – Explanation

❶ *This Appendix 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.*

What type of benefits do employees participating in the FitSense program receive?

22. The term 'benefit' as defined in subsection 136(1) includes, amongst other things, any right (including a right in relation to, and an interest in, real or personal property), privilege, service or facility.

23. The services provided under FitSense will constitute a benefit being provided by the employer to the relevant employees.

24. Section 45 states that a residual benefit is one that is not a benefit by virtue of any provision of Subdivision A of Divisions 2 to 11 inclusive of the FBTAA. Therefore, in basic terms, a residual benefit is a benefit that does not fall within one of the other more specific benefit types contained in the FBTAA.

25. It is considered that Health Checks, Health Coaching and Health Seminars provided by FitSense will be 'residual benefits' for the purposes of the FBTAA.

26. In general terms, a 'fringe benefit', leading to a liability for fringe benefits tax (FBT), is a 'benefit', provided to an employee in respect of the employee's employment that is not an 'exempt benefit'. Amongst such exempt benefits are those falling within section 58M regarding various types of 'work-related benefits'.

Do employees participating in the FitSense program receive exempt benefits?

27. The FBTAA specifies certain benefits are exempt benefits. For the purpose of this ruling the relevant exempt benefits to be considered are residual benefits that relate to:

- 'work-related medical screening' under subparagraph 58M(1)(c)(ii), and
- 'work-related counselling' under subparagraph 58M(1)(c)(iv) of the FBTAA;

The application of section 58M

28. Again in general terms, section 58M provides an exemption from fringe benefits tax which includes 'work-related medical screening' and 'work-related counselling'.

29. In explaining the circumstances in which these particular exemptions will apply the Explanatory Memorandum (EM) to Taxation Laws Amendment (Fringe Benefits and Substantiation) Bill 1987 stated in Part B:

... 'work-related medical screening' is being defined under amendments proposed by clause 48 to mean, broadly, an examination or test carried out by a medical practitioner, nurse, dentist, optometrist or audiometrist for the purpose of determining whether the employee is suffering from an injury or illness related to the employee's employment. It is also a requirement for exemption that the examination or test is carried out as part of a screening program which applies generally to employees with similar work-related risks.'

... 'work-related counselling' is being defined under amendments proposed by clause 48 to mean, broadly, individual or group counselling (eg a seminar) related to matters such as safe work practices, stress management, fitness, drug or alcohol abuse or retirement problems. It is also necessary that the benefit is provided by the employer in order to improve or maintain the efficiency of employees or to prepare them for retirement and not as a form of remuneration.'

30. Paragraph 58M(1)(c) provides that a residual benefit will be an exempt benefit where it consists of the provision of a 'work-related medical screening' of an employee or 'work-related counselling' of an employee or an associate of an employee.

31. Both of these exemptions have different conditions which require examination against the service provided.

Work-related medical screening and subparagraph 58M(1)(c)(ii) of the FBTA

32. Where the benefit is 'work-related medical screening' it is necessary to determine its purpose.

33. Subparagraph 58M(1)(c)(ii) provides that a residual benefit will be an exempt benefit where it consists of the provision of 'work-related medical screening' of an employee or an associate of an employee.

34. The term 'work-related medical screening' as defined in subsection 136(1) of the FBTA is:

...in relation to an employee of an employer, means an **examination or test** carried out by, or **on behalf of**, an audiometrist or a legally qualified medical practitioner, nurse, dentist or optometrist wholly or principally in order to ascertain whether the employee has suffered, is suffering or is at risk of suffering, from **work-related trauma**, but does not include an examination or test that is not made available generally to all employees of the employer: (emphasis added)

- (a) who are likely to have suffered, be suffering or be at risk of suffering, from similar work-related trauma;
- (b) who perform the duties of their employment at or near the place where the employee performs the duties of his or her employment; and

- (c) whose duties of employment are similar to those of the employee.

35. **Examination or test** - neither the terms 'examination' or 'test' are defined in the FBTA. *The Macquarie Dictionary*,¹ however, defines 'examination' as:

1 2 . the state of being examined. ...' and 'test' as ' 1 . that by which the presence, quality, or genuineness of anything is determined; a means of trial. 2 5 . *Psychology* a standardised procedure for eliciting responses upon which appraisal of the individual can be based ...

36. **On behalf of** - where the person providing the benefit does not come within one of the listed categories it is necessary to consider whether the benefit is being provided on behalf of a listed medical professional.

37. **Work-related trauma** - the term 'work-related trauma' as defined in subsection 136(1) of the FBTA means:

- (a) the injury of the employee (including the aggravation, acceleration or recurrence of an injury of the employee);
- (b) the contraction, aggravation, acceleration or recurrence of a disease of the employee;
- (c) the loss or destruction of, or damage to:
 - (i) an artificial limb or other artificial substitute;
 - (ii) a medical, surgical or similar aid or appliance used by the employee; or
 - (iii) clothing worn by the employee; or
- (d) the coming into existence, the aggravation, acceleration or recurrence of any other physiological or psychological condition in relation to the employee that is or may be harmful or disadvantageous to, or result in harm or disadvantage to, the employee;

that is related to any employment of the employee.

38. The phrase 'on behalf of' is not defined for the purposes of the FBTA. The *Australian Concise Oxford Dictionary*² defines the term 'behalf' or 'on behalf of' as:

behalf n. **on** (US in) **behalf of** (or **on a person's behalf**) 1 in the interests of (a person, principle, etc.). 2 as representative of (*acting on behalf of my client*).

¹ 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.

² The Australian Concise Oxford Dictionary 2004, 4th edn Oxford University Press

39. In *Cuthbertson & Richards Sawmills v. Thomas* (1999) 93 FCR 141 the meaning of the phrase 'on behalf of' was discussed. It was stated that the phrase does not have a strict legal meaning. The court referred to *R v. Toohey; Ex parte Attorney General* (N.T.) (1980) 145 CLR 374 at 386 where Stephen, Mason, Murphy and Aickin JJ referred to the phrase in these terms:

...it bears no single and constant significance. Instead it may be used in conjunction with a wide-range of relationships, all however, in some way concerned with the standing of one person as auxiliary to or representative of another person or thing.

...Context will always determine to which of the many possible relationships the phrase 'on behalf of' is in a particular case being applied; 'the context and subject matter' (per Dixon J in *R v. Portus; Ex parte Federated Clerks Union* (1949) 79 CLR 428) will be determinative.

40. 'Auxiliary' is defined in the Macquarie Dictionary:

1. giving support, helping, aiding or assisting

41. In the context of 'work-related medical screening' the phrase 'on behalf of' requires a relationship between the two parties such that one party is acting in place of or as representative of the other. That is, if the person carrying out the examination or test (or providing the care) is not a medical professional listed in the definition of 'work-related medical screening', then that person must be giving support or assisting a medical professional listed in the definition of 'work-related medical screening', who is providing the benefit.

42. The tests that apply to 'work-related medical screening' will be met if the following conditions are satisfied:

- (a) the examination or test is carried out by, or on behalf of a medical professional listed in the definition of 'work-related medical screening' in subsection 136(1);
- (b) the examination or test is carried out on an employee; and
- (c) the examination or test is available generally to all employees who come within paragraphs (a) to (c) of the definition of 'work-related medical screening' in subsection 136(1). These are employees:
 - who are likely to have suffered, be suffering or be at risk of suffering from similar 'work-related trauma';
 - who perform their duties of employment at or near the place where the employee performs their duties of employment; and
 - whose duties are similar to those of the employee.

Will the provision of a Health Check by a legally qualified nurse constitute 'work-related medical screening'?

43. In order to establish whether FitSense Health Checks are considered to be work-related medical screenings a review of the criteria provided below is required.

The examination or test is carried out by, or on behalf of a medical professional listed in the definition of 'work-related medical screening' in subsection 136(1)

44. 'Work-related screening', as defined in subsection 136(1), requires the examination or test to be carried out by, or on behalf of an audiometrist, a legally qualified medical practitioner, nurse, dentist or optometrist.

45. The Health Checks offered by FitSense are conducted by legally qualified nurses and exercise physiologists. Health Checks conducted by a nurse meets the legislative criteria necessary to constitute 'work-related medical screening', however an exercise physiologist performing the Health Check must be working on behalf of the nurse to fulfil the legislative criteria.

The examination or test is carried out on an employee

46. Health Checks will be carried out on employees of the employer.

The examination or test is available generally to all employees who come within the definition of 'work-related medical screening' in subsection 136(1)

47. These are employees:

- who are likely to have suffered, be suffering or be at risk of suffering from similar 'work-related trauma';
- who perform their duties of employment at or near the place where the employee performs their duties of employment; and
- whose duties are similar to those of the employee.

48. Health Checks screen for health risks associated with work-related trauma (contraction or aggravation of a disease). The checks include:

- blood pressure;
- cholesterol;
- glucose;
- body composition;

- overall diabetes risk;
- overall cardiovascular disease risk;
- lifestyle habits;
- aerobic fitness, and
- injury risk.

Health Checks are offered to employees principally to ascertain whether the employee is at risk of suffering from work-related trauma.

Will the provision of a supervised Health Check by an exercise physiologist constitute 'work-related medical screening'?

49. Where the Health Checks are undertaken by exercise physiologists, provided these checks are carried out on behalf of a nurse (discussed at paragraphs 40-41) and otherwise meet the requirements (discussed at paragraphs 42-43), such checks will constitute 'work-related medical screening'.

Will the provision of an unsupervised Health Check by an exercise physiologist constitute 'work-related medical screening'?

50. Health Checks by an exercise physiologist not carried out on behalf of a legally qualified nurse will not meet the requirements of 'work-related medical screening' (see paragraph 37).

'Work-related counselling' and subparagraph 58M (1)(c)(iv) of the FBTA

51. Where the benefit is 'work-related counselling' it is necessary to determine its purpose. Subparagraph 58M(1)(c)(iv) provides that a residual benefit will be an exempt benefit where it consists of the provision of 'work-related counselling' of an employee or an associate of an employee.

52. 'Work-related counselling' is defined in subsection 136(1) as:

- (a) in relation to an employee of an employer, means counselling attended by the employee; and
- (b) in relation to an associate of an employee of an employer, means counselling attended by the associate where the associate is accompanied by the employee;

where all of the following conditions are satisfied:

- (c) the attendance of:
 - (i) if paragraph (a) applies - the employee; and
 - (ii) if paragraph (b) applies - both the employee and the associate;

- at the counselling gives effect to an objective, purpose, plan or policy devised, adopted or required to be followed, by the employer to:
- (iii) improve or maintain the quality of the performance of employees' duties; or
 - (iv) prepare employees for retirement;
- (d) the counselling relates to any of the following matters:
- (i) safety;
 - (ii) health;
 - (iii) fitness;
 - (iv) stress management;
 - (v) personal relationships;
 - (vi) retirement problems;
 - (vii) drug or alcohol abuse;
 - (viii) rehabilitation or prevention of work-related trauma or of other disease or injury;
 - (ix) first aid;
 - (x) any similar matter;
- (e) there is no benefit that:
- (i) is provided in respect of the employment of the employee;
 - (ii) consists of the provision of, or relates to, the counselling; and
 - (iii) is provided wholly or principally as a reward for services rendered or to be rendered by the employee.

What is counselling?

53. In understanding the meaning of this term it is helpful to refer to the ordinary dictionary meanings.

54. *The Macquarie Dictionary* defines the word 'counsel' as 'advice; opinion or instruction given in directing the judgment or conduct of another'. *The Australian Concise Oxford Dictionary* defines 'counselling' as the act or process of giving counsel' and relevantly the noun 'counsel' as 'advice, esp. formally given', and the verb as '1 ... advise (a person) 2a give advice to (a person) on social or personal problems, esp. professionally' and 'b assist or guide (a person) in resolving personal difficulties'.

55. The wording of the definitions indicates 'counselling' involves a suitably qualified person (not necessarily a legally qualified medical practitioner, nurse, dentist or optometrist) providing care in relation to their established area of expertise.

56. The EM indicates the advice or information can be given either on an individual basis, or in a group situation such as a seminar. This is reflected in the definition of 'counselling' in subsection 136(1) which states that 'counselling' 'includes the giving of advice or information in a seminar'.

57. The advice or information can be in relation to a wide range of matters. For example, the EM also indicates it can be related to matters such as safe work practices, stress management, fitness, and drug or alcohol abuse or retirement problems. This list of examples is extended by Taxation Determination TD 93/153³ to include outplacement services such as assistance in writing a resume and job application, guidance on seeking new employment or training for employment interviews and selection tests.

58. Although the advice or information provided can be in relation to a wide range of areas a benefit will not be considered to be 'counselling' unless the provision of advice is the principal purpose for the benefit being provided to the employee. For example, although 'counselling' can include training or advice about how to undertake various physical activities, a physical activity session with limited instruction undertaken by an employee for the purpose of keeping fit will not constitute 'counselling'.

The meaning of 'relate'

59. Paragraph (d) of the definition of 'work-related counselling' in subsection 136(1) requires the counselling to 'relate' to certain specified matters. The word 'relate' is not specifically defined in the FBTA and therefore has its ordinary meaning. *The Australian Concise Oxford Dictionary* defines 'relate' to mean '...establish relation between; connected; allied'. *The Macquarie Dictionary*, in so far as is relevant, defines 'relate' to mean 'to bring into or establish association, connection, or relation'. In applying these definitions the counselling will 'relate' to a listed matter if it is connected to or associated with the listed matter.

60. Work-related counselling is appropriate where the following requirements are met:

- (a) Do Health Coaching and Health Seminars constitute the provision of counselling?
- (b) Are the Health Coaching and Health Seminars attended by either an employee, or an employee and an associate?

³ Taxation Determination TD 93/153, Fringe Benefits Tax: are outplacement services provided to current and former employees in the nature of work-related counselling and thus exempt from fringe benefits tax under section 58M of the *Fringe Benefits Tax Assessment Act 1986* ("the Act")?

- (c) Does the attendance of the employee give effect to an objective, purpose plan or policy devised, adopted or required to be followed by the employer?
- (d) Does the counselling relate to a specified matter?
- (e) Is the counselling provided as a reward for services?

Will the provision of Health Coaching constitute ‘work-related counselling’?

Health Coaching

Does Health Coaching constitute the provision of counselling?

61. Health Coaching is described by FitSense as a follow up to a Health Check. Its specific aim is to reduce the employee’s work-related health risk through educating the employee to take control of their own healthcare.

62. Counselling has been interpreted as an involvement of a suitably qualified person giving advice or guidance in relation to their area of expertise. In this case, the counselling will be facilitated by exercise physiologists (members of Exercise and Sports Science Australia). Therefore, Health Coaching by a FitSense Health Professional will constitute the provision of counselling.

Is Health Coaching attended by either an employee, or an employee and an associate?

63. Health Coaching is attended by employees.

Does the attendance of the employee give effect to an objective, purpose plan or policy devised, adopted or required to be followed by the employer?

64. The employers to whom this program will be offered will have an objective, purpose, plan or policy to improve or maintain the quality of performance of the employee’s duties. The goal of the program is to reduce health risks for the employee by educating them to take control of their own healthcare.

Does the counselling relate to a specified matter?

65. Health Coaching focuses on increasing physical activity and improving nutritional habits and involves an exercise physiologist prescribing goal specific exercise programs. This falls within the list contained in paragraph (d) of the ‘work-related counselling’ definition in subsection 136(1) of the FBTA.

Is the counselling provided as a reward for services?

66. The employer will not be providing the program to employees as a reward for specific achievements, or through a salary sacrifice arrangement. As such, the benefit will not be provided wholly or principally as a reward for services rendered or to be rendered by the employee.

67. Therefore Health Coaching will be an exempt benefit under subparagraph 58(1)(c)(iv) as 'work-related counselling'.

Do Health Seminars constitute 'work-related counselling'?

Do Health Seminars constitute the provision of counselling?

68. Health Seminars as described by FitSense are a variety of seminars and workshops which are offered to employee's onsite.

69. Counselling has been interpreted as an involvement of a suitably qualified person giving advice or guidance in relation to their area of expertise. In this case, the counselling will be facilitated by exercise physiologists, psychologists and dieticians. Therefore, Health Seminars facilitated by a FitSense health professional will constitute the provision of counselling.

Are Health Seminars attended by either an employee, or an employee and an associate?

70. Health Seminars are attended by employees.

Does the attendance of the employee give effect to an objective, purpose plan or policy devised, adopted or required to be followed by the employer?

71. The employers to whom this program will be offered will have an objective, purpose, plan or policy to improve or maintain the quality of performance of the employee's duties.

Does the counselling relate to a specified matter?

72. Health Seminars will cover a range of topics and include:

- become your own personal trainer;
- healthy eating for a healthy life;
- achieving a fit and healthy work/life balance;
- keeping good health and avoiding winter illness;
- health tips for mature age workers;
- preventing injuries;
- stress management;

- men's health, and
- women's health

73. Each of these topics come within the list contained in paragraph (d) of the 'work-related counselling' definition in subsection 136(1).

Is the counselling provided as a reward for services?

74. The employer will not be providing the program to employees as a reward for specific achievements, or through a salary sacrifice arrangement. As such, the benefit will not be provided wholly or principally as a reward for services rendered or to be rendered by the employee.

75. Therefore Health Seminars will be an exempt benefit under subparagraph 58 (1)(c)(iv) as 'work-related counselling'.

Appendix 2 – Detailed contents list

76. 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 2006/10; TD 93/153

Subject references:

- Work-related medical screening
- Work-related counselling
- Exempt benefits

Legislative references:

- FBTA 1986 58M
- FBTA 1986 136(1)
- Copyright Act 1968

Case references:

- Cuthbertson & Richards
Sawmills v. Thomas (1999) 93 FCR 141
- R v. Toohey; Ex parte Attorney General (N.T.) (1980) 145 CLR 374 at 386

Other references:

- Explanatory Memorandum to Taxation Laws Amendment (Fringe Benefits and Substantiation) Bill 1987
- The Australian Concise Oxford Dictionary 2004, 4th edn Oxford University Press
- The Macquarie Dictionary 2001, rev, 3rd edn, The Macquarie Library Pty Ltd, NSW.

ATO references

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