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10 August 2020

The Treasurer
The Australian Government Treasury Department
Langton Crescent
PARKES ACT 2600

By email: prebudgetsubs@treasury.gov.au

Dear Sir/Madam

2019-2020 Pre-Budget Submission
Review of the *Fringe Benefits Tax Assessment Act 1986* (Cth) to change the fringe benefits tax law with respect to when a car parking fringe benefit arises

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The Hills Shire Council (**Council**) has recently made submissions to the Senate Standing Committee on Economics on 17 February 2020 and the Australian Taxation Office (**ATO**) 17 February 2020 with respect to Draft Taxation Ruling TR 2019/D5 Fringe Benefits Tax: car parking benefits (the **Draft Ruling**) and Draft FBT Guide for Employers Chapter 16 – Car parking fringe benefits (the **Draft Guide**) that the ATO released in November 2019. We have attached our submission to the Senate Standing Committee on Economics at **Appendix A** to provide further clarity and context.

Broadly, the Draft Ruling articulates the Commissioner of Taxation's (**the Commissioner**) revised view as to the definition of what is a 'commercial parking station' under the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTAA**) – which is the trigger point as to whether an employer will be liable to pay Fringe Benefits Tax (**FBT**) on the provision of all-day car spaces to their employees. This view was revised as a result of recent case law. There is further detailed guidance as to how the law has operated in the past and how the Commissioner is planning to apply the law in the future at **Appendix A**.

Under the revised definition, the scope of the definition has greatly expanded so that commercial parking stations will now include parking facilities that actually discourage all-day parking by charging disproportionately higher hourly rates the longer a car space is used. This has become a particular area of concern within our local government area due the growing number of facilities that now charge for car parking. This issue has become even more prevalent in our community due to the opening of the Sydney Metro public transport network which has resulted in many facilities now charging for car parking to discourage commuters from parking on their property and using the Sydney Metro trains.

There are now many parking facilities within our community that charge for car parking including, amongst others, Castle Towers shopping centre; Rouse Hill Town Centre; Hillsong Church;

Norwest Private Hospital; and Lakeview Hospital. Under the former interpretation of the FBT law, these facilities would not ordinarily be considered commercial parking stations and would therefore not have given rise to an FBT liability for local businesses within a 1km radius of these facilities. That interpretation is now expected to change with the release of the Draft Ruling and a large number of local businesses within our community will now have a significant FBT liability. Council itself estimates an $800,000 or more per annum increase in FBT.

Such high taxes will decrease further economic investment in our community as businesses consider relocating to other areas. Furthermore, the timing of the implementation of the expanded definition of a commercial parking station is not appropriate given the current state of the Australian economy and the ongoing public health crisis due to COVID-19. As you would be aware, there has been a significant cost to local businesses and to the broader Australian economy due to the impacts of COVID-19 including the closing down of many businesses on either a temporary or longer-term basis. Over this period a large majority of workers have either been stood down or forced to work from home as they are unable to work in standard office environments.

Part of the Government's plan to grow the economy over this period is to encourage enough people to return to work in a safe way. In order to do so, one of the greatest concerns for workers is travel via the public transport network due to greater exposure to COVID-19. As a consequence, in order to encourage more people to return to work and to make workplaces safer, alternatives to public transport should be encouraged. One of the best ways of doing this is to make it easier for employees to drive to and from work, thereby limiting their potential exposure to COVID-19 as well as providing less ways for the virus to spread.

As such, the Government should be encouraging more businesses to provided car parking to their employees on a regular basis so that they are able to drive to work and avoid public transport. The more people who can return to work, the faster the economic recovery will be. However, the proposed expanded definition of a commercial parking station will have a negative impact on this goal and will actually discourage businesses to provide car parking to their employees due to the significant tax imposition. Furthermore, businesses that currently provide car parking may be forced to stop doing so given the increased tax liability. Such actions will likely force a greater number of employees to catch public transport, thereby increasing the risk of more members of the community being exposed to COVID-19.

In a time of national crisis, the Government should be looking at a variety of different ways to first and foremost protect Australian lives and help drive the economic recovery. By making it easier for businesses to provide car parking to their employees so that less people are using the public transport network, the Government would be protecting the community from the spread of COVID-19 and encouraging people to return to work in a safe way to drive the economic recovery. For this reason it is vital that the Government intervene to ensure that a significant new tax is not imposed on businesses who are providing car parking to their employees.

As such, we are seeking your assistance to push for changes to the law that would resolve this issue and not result in a significant new tax on local businesses and Council. In our submission we have proposed three options:

a) **Option A:** the definition of 'commercial parking station' in the FBTAA should be redefined to exclude what we refer to as 'special purpose parking stations' that were not established to solely provide parking spaces for a fee and instead were provided incidentally to the ordinary business activities of the car parking provider (such as, shopping centres; airports; hospitals; not-for-profit organisations etc.);

b) **Option B:** amend the FBTAA so that only car parking fringe benefits provided in certain geographical areas are taxable, namely parking spaces located in central business districts of major cities; or

c) **Option C:** make a recommendation to the Governor-General to issue a new regulation to the *Fringe Benefits Tax Assessment Regulations 1992* (Cth) (**the Regulations**) to specifically exclude special purpose parking stations.

We are hopeful that such measures can be announced with the 2020/2021 Budget that is expected to be handed down on 6 October 2020. This will ensure that appropriate changes to the law can be made ahead of the Commissioner's proposed start date of 1 April 2021 for the Draft Ruling to take effect (we note that the Commissioner's previous start date was 1 April 2020, but it was subsequently delayed by 12 months due to the number of submissions the ATO received with respect to this issue).

If you would like to discuss any of the above further, please contact myself on 9843 0105 or Chandi Saba on 02 9843 0117.

Yours faithfully

Michael Edgar
GENERAL MANAGER

17 February 2020

Committee Secretary
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Dear Committee Secretary

Review of Fringe Benefits Tax Assessment Act 1986 (Cth) to Change the Fringe Benefits Tax Law with Respect to When a Car Parking Fringe Benefit Arises

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The Hills Shire Council (**Council**) considers that the taxation of car parking fringe benefits needs to be reviewed in light of the decisions in *Qantas Airways Limited and Commissioner of Taxation* [2014] AATA 316 and *Commissioner of Taxation v Qantas Airways Limited* [2014] FCAFC 168 (**the Qantas Cases**) and Draft Taxation Ruling TR 2019/D5 Fringe Benefits Tax: car parking benefits (the **Draft Ruling**) and Draft FBT Guide for Employers Chapter 16 – Car parking fringe benefits (the **Draft Guide**) that the Australian Taxation Office (**ATO**) recently released in November 2019.

1. Summary

As will be explained in this submission, the issue at hand concerns the definition of 'commercial parking station' for Fringe Benefits Tax (**FBT**) purposes. There is currently a direct conflict in how the definition of 'commercial parking station' contained in the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTAA**) has been interpreted by the courts (in the Qantas Cases) and the Commissioner of Taxation (**the Commissioner**) (in the Draft Ruling) and what situations Parliament intended the definition to cover when drafting the legislation that would tax car parking provided to employees.

Given that the ATO intends to apply the Draft Ruling (once finalised) from 1 April 2020, this issue requires urgent consideration by Treasury. If no action is taken, local governments (including Council) along with many small and medium sized businesses will be subjected to a significant tax impost which they would not have accounted for. Such inaction would go against the Government's intended policy objectives to lower taxes and encourage economic growth.

To correct the conflict outlined above, Council recommends that the following options be considered:

d) **Option A:** the definition of 'commercial parking station' in the FBTAA should be redefined to exclude what we refer to as 'special purpose parking stations' that were not established to solely provide parking spaces for a fee and instead were provided incidentally to the ordinary business activities of the car parking provider (such as, shopping centres; airports; hospitals; not-for-profit organisations etc.);

e) **Option B:** amend the FBTAA so that only car parking fringe benefits provided in certain geographical areas are taxable, namely parking spaces located in central business districts; or

f) **Option C:** make a recommendation to the Governor-General to issue a new regulation to the *Fringe Benefits Tax Assessment Regulations 1992* (Cth) (**the Regulations**) to specifically exclude special purpose parking stations.

2. Discussion

General outline

Parliament introduced Division 10A Car parking Fringe Benefits into Part III of the FBTAA in 1992 following an announcement in the 1992-1993 Federal Budget to apply FBT to car parking spaces provided to employees as a specific category of fringe benefits.

Under the FBT law, broadly, if a commercial parking station is located within 1km of an employer's business premises and charges an amount for all-day parking that is greater than the applicable car parking rate threshold, the employer may be liable to pay FBT if it provides car spaces to its employees. As such, the definition of commercial parking station is crucial in determining whether an FBT liability will arise.

Subsection 136(1) of the FBTAA defines a commercial parking station as:

> " 'commercial parking station', in relation to a particular day, means a permanent commercial car parking facility where any or all of the car parking spaces are available in the **ordinary course of business** to members of the public for all-day parking on that day on payment of a fee, but does not include a parking facility on a public street, road, lane, thoroughfare or footpath paid by inserting money in a meter or by obtaining a voucher [emphasis added]."

Previously, the Commissioner outlined his view regarding the definition of a commercial parking station in the now withdrawn Taxation Ruling TR 96/26 (**TR 96/26**). Specifically, paragraph 81 of TR 96/26 expressed the view that car parking facilitates 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 position aligned with Parliament's original intention when drafting the relevant legislation (as discussed further below). However, TR 96/26 was withdrawn with effect from 13 November 2019, and this view will no longer be applied by the ATO in light of the recent decisions in the Qantas Cases.

In place of TR 96/26, the ATO has recently released the Draft Ruling with outlines the Commissioner's revised interpretation of what a 'commercial parking station' is. In light of the Qantas Cases, the Commissioner's interpretation of what constitutes a commercial parking station has expanded to now include facilities such as hospitals, airports, universities and not-for-profit organisations that meet certain criteria and charge fees for all-day parking to the public. This view significantly differed from the Commissioner's former view which excluded such facilities from the definition, and as such, the ATO has issued the Draft Ruling and Draft Guide to provide guidance to taxpayers so that they can determine whether a commercial parking station exists.

However, as discussed further below, the proposed guidance contained in the Draft Ruling and Draft Guide does not adequately provide taxpayers with enough information to apply the Commissioner's proposed tests to determine if a commercial parking station exists. As submitted by Council (and discussed further below), this inadequacy is largely due to onerous requirements placed on taxpayers to determine if the car parking provider is providing car parking in the *ordinary course of its business*. As the ATO is restricted in what guidance it can provide taxpayers in light of

the recent Qantas Cases, it is Council's view that this issue cannot be resolved by administrative means (such as a taxation ruling) and instead, action must be taken by Parliament to amend the FBTAA or new regulations should be issued. Such action is intended to correct the inconsistency between Parliament's original intentions when introducing the relevant FBT legislation and how the Commissioner and the courts have interpreted the legislation as to the meaning of 'commercial parking station'. We have provided the following comments with respect to the ATO's views expressed in the Draft Ruling and Draft Guide, and Council's grounds on why the law should be amended.

3. Historical context regarding the taxing of car parking fringe benefits

Parliament's original intention

Broadly, section 15AB(2) of the *Acts Interpretation Act 1901* (Cth) (**AIA**) sets out that materials such as the explanatory memorandums relating to the Bill containing the provision, speeches, and any official record of debates in the Parliament can be used for interpretation of a provision of an Act. For the purposes of illustrating the background to the establishment of the relevant FBT legislation and interpreting the meaning of the word 'commercial' in the context of the definition of 'commercial parking station', we turn to these materials.

In the speech that the then Treasurer, the Hon. John Dawkins MP, gave in his 1992-93 Federal budget Speech introducing the budget measure relating to car parking fringe benefits, Mr Dawkins stated that the alterations to the relevant provisions of the FBTAA were to be applied to '*valuable car parking facilities - mainly in central business districts (CBD) – that are provided by employers to their employees*'.

It is worth noting that Parliament's intention when introducing the legislation was to focus on parking stations in central business areas rather than non-CBD, suburban and low value areas.
In the Explanatory Memorandum to the *Taxation Laws Amendment (Car Parking) Bill 1992* (Cth), page 6 states that:

> "In relation to the definition of "commercial parking station", the words "permanent" and "commercial" have their normal dictionary meanings. For example, a car park set up for a short period to cater for a special function (like an Easter Show) would not be permanent. A car park which was not run with a view to making a profit (usually reflected in significantly lower car parking rates charged compared with the normal market value for that facility) would not be commercial.
>
> Some car parking facilities have a primary purpose to provide short-term shopper parking. **To discourage all-day parking, the operators of these facilities charge penalty rates for all-day parking. These rates are significantly greater than the rates that would be charged by a similar facility which encouraged all-day parking. For the purposes of these provisions, short-term shopper parking facilities using penalty rates for all-day parking will not be treated as a 'commercial parking station'** [emphasis added]."

The Explanatory Memorandum indicates that the primary purpose of special purpose parking facilities is to provide short-term parking to service users and to charge penalty rates for all-day parking to discourage all-day parking. In such situations, the Explanatory Memorandum states that by discouraging all-day parking, such special purpose parking facilities would not be commercial parking stations as the operators of these facilities are not acting in a commercial manner.

Current interpretation of the law

In the Qantas Cases, at first instance, the Administrative Appeals Tribunal held that the car spaces provided to employees on Qantas' own business premises at or near Australian airports (with the exception of Canberra Airport) were car parking fringe benefits and subject to FBT. The Tribunal found that the airport parking facilities which were located within 1km of Qantas' business premises

and charged the public significantly high parking rates were commercial parking stations as defined under the FBTAA. The Federal Court later upheld the Tribunal's decision and went a step further to rule that the car spaces provided at Canberra Airport were also car parking fringe benefits despite Canberra Airport placing restrictions on its car parking facilities limiting users of the facilities to airline passengers or 'meeters and greeters' or airline passengers (i.e. Qantas employees were prevented from parking in the facility).

The Court held the view that the test as to whether a car parking fringe benefit arose was not whether or not an employee who was not provided with a car space by their employer would be required to pay for parking in a parking facility, but rather, the commercial parking station test contained in the FBTAA was simply a criterion to be used to determine whether a car space provided to an employee was sufficiently valuable to warrant assessment as a fringe benefit.[1] At paragraph 12, the Court noted:

> "The statute does not operate on the basis that the commercial parking station has to be something which the employee might or could use. This is made clear by s 148(1)(c) of the Assessment Act, which provides that a benefit to the employee within the meaning of the Assessment Act will have been provided, whether or not the benefit is surplus to the needs or wants of that employee. The condition that there be a commercial car parking station within a one kilometre radius of the employer's business premises to constitute a car parking fringe benefit is not a proxy for the value of the benefit to the employee of receiving an actual parking space at the employer's business premises, **but a proxy for determining the taxable value of a benefit provided by the employer to an employee on which tax on the employer is imposed**. **This is confirmed in the reference in the definition** [in section 136] **to any of the car parking spaces being available in the ordinary course of business to members of the public for all-day parking on that day on payment of a fee."**

At paragraph 20, the Court noted:

> "Its relevance is to indicate that the car spaces which have in fact been provided have a value which ought to be assessed under the Assessment Act. "

Paragraph 21 further states that:

> "The significance of the existence of a nearby commercial parking station is that it signifies the presence of value in the employer's car spaces and not that it provides an alternative to the staff".

An inconsistency between Parliament's original intention and the current interpretation of the law

Taken together, the Qantas Cases makes clear that the Court held a view that it is crucial to look to whether a car space which has been provided to the employee has a value high enough to subject the car space to the FBT regime.

The test outlined in the Qantas Cases differs significantly from Parliament's original intention. As a result of the Qantas cases, car parking facilities in shopping centres, airports, hospitals and not-for-profit organisations that charge parking fees for all-day parking that are significantly higher than short-term hourly rates in order to discourage all-day parking can be considered commercial parking stations and thereby trigger an FBT liability for surrounding employers. The test would also capture parking facilities in low value areas outside of CBDs which is a direct contradiction to what the then Treasurer, the Hon. John Dawkins MP stated at the time (as outlined above).

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[1] *Federal Commissioner of Taxation v Qantas Airways* [2014] FCAFC 168, [22].

On this basis, Council holds the view that the definition of 'commercial parking station' as interpreted by the Courts (and subsequently by the Commissioner in the Draft Ruling) delivers an inconsistent outcome with the original intention of Parliament – namely, that Parliament never intended for hospitals, not-for-profits and other similar organisations to be considered commercial parking stations. To this extent, amending the FBTAA or issuing regulations with respect to car parking fringe benefits and what is a 'commercial parking station' seem to be necessary to avoid a significant tax on businesses and local governments.

4. The Commissioner's proposed test in TR 2019/D5

As stated above, the Draft Ruling sets out the Commissioner's updated interpretation of what constitutes a car parking benefit for the purposes of the FBTAA and restates the meaning of 'commercial parking station' with reference to five bullet points (at paragraph 12 of the Draft Ruling), in recognition of the Qantas Cases. These bullet points form the test that taxpayers are expected to apply to determine if there is a commercial parking station within 1km of their business premises.

It is the view of Council that two of those five bullet points (listed at paragraph 12 of the Draft Ruling) concerning the definition of 'commercial parking station' need further clarity. Namely, the second bullet point regarding the meaning of 'commercial parking facility', and the fifth bullet point in relation to whether the car park is provided in the 'ordinary course of business'. Our comments regarding these matters are outlined below which also highlight the difficulties for taxpayers in applying the Commissioner's proposed test. We note that, Council has also made a separate submission to the Commissioner outlining ways that the Draft Ruling can be improved. However, ultimately, it is the view of Council that the test proposed by the Commissioner in the Draft Ruling is impractical and should be set aside in favour of legislative reform.

Commercial parking facility

Paragraph 16 of the Draft Ruling states that

> "A facility is 'commercial' if it is run to make a profit 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."

In the Draft Ruling, the ATO has acknowledged that, determining whether an activity is 'commercial' is a complex issue that involves a weighting of different factors. However, neither the Draft Ruling nor the Draft Guide adequately provide enough information and examples for taxpayers to make such a determination. As illustrated through Example 1 below, this area of law is not straightforward.

In Council's submission to the Commissioner, we suggested that it would be useful if both the Draft Ruling and Draft Guide provided further examples of when a car parking facility is considered commercial and when it is not. Specific examples should also be included outlining when a not-for-profit entity that charges for car parking is doing so in a commercial context and when they are not. For your reference, we would argue that Example 1 below would be a situation that demonstrates when a not-for-profit entity does not provide a commercial parking facility.

Reference to the words 'run to make a profit' in paragraph 16 of the Draft Ruling also requires further clarity. This requirement for the employer to determine whether another entity (being the car parking provider) is providing car parking to make a profit, places an undue burden on the employer to make such a determination, often when they will not have access to the necessary information to make such a determination. How are local employers supposed to determine if the car parking activities of another entity are being run to make a profit?

The inclusion of further examples in the Draft Ruling and Draft Guide may be useful to demonstrate what information employers can rely on in determining if the activities of the other entity are run to make a profit, particularly when employers are unlikely to have any access to the financial information of the other entity. However, placing the onus on the taxpayer to determine the business or financial characteristics of another entity is ultimately an unfair test to apply. Examples 1 and 2 below illustrate the difficulties of making such a determination. Therefore Parliament's action is required to correct this.

Ordinary course of business

The fifth bullet point includes a factor requiring a parking station offer parking in the *ordinary course of its business* in order for it to be a commercial parking station.

Paragraph 21 of the Draft Ruling states "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."

Paragraph 22 of the Draft Ruling further states that the "offering of a single car space may be in the ordinary course of business if it is intended to be repeated," and makes reference to paragraphs 38 to 41 of Taxation Ruling TR 2019/1 *Income tax: when does a company carry on a business?* (**TR 2019/1**) The specific paragraphs referred to concern the concepts of 'repetition' and 'regularity' with respect to the factors used to determine whether a company carries on a business.

The concept of 'in the ordinary course of its business' is not defined under the FBTAA, and therefore, the words take their ordinary meaning.

In the discussion of 'ordinary course of business' in the Draft Ruling, the ATO has chosen to focus its guidance on the factors of repetition and regularity, which helps to determine the meaning of 'ordinary' in this context, however, there is currently insufficient information in the Draft Ruling and Draft Guide regarding whether or not a business of providing car parking has been carried on to begin with. It is acknowledged that, whether or not an entity carries on a business is a complex issue. Both case law and ATO guidance has stated that such an issue is largely reliant on the specific facts and circumstances relating to a specific taxpayer as to whether or not that taxpayer carries on a business.

Despite this being a complex area of law, in the Draft Ruling, the ATO requires the taxpayer to not simply determine this question for themselves in respect of their own activities, but rather determine whether another entity is carrying on a business of providing car parking. For this reason, further guidance is required in both the Draft Ruling and Draft Guide to assist taxpayers in determining whether or not another entity is providing car parking in the ordinary course of their business. However, it is unlikely that such examples would cover every situation that could arise and therefore, once again, the test proposed by the Draft Ruling places to high a burden or taxpayers to make such determinations. Parliament's intervention is required to correct this issue.

As the ATO has already made reference to some of the factors relevant to whether a company carries on a business from TR 2019/1 in its discussions in TR 2019/D5, we recommended that the ATO should also make reference to the other factors discussed in TR 2019/1. Paragraph 21 of TR 2019/1 states that the other key indicia considered by the courts in determining whether the activities carried on by an entity amount to the carrying on of a business also consist of elements such as intention, nature and the size and scale of a company's activities. Furthermore, paragraph 30 of TR 2019/1 states that "[w]hether a company's activities have a purpose of profit is critical in determining whether it is carrying on a business."

Accordingly, while a single factor may be important in determining the issue, it should usually involve a combination of factors, which, when appropriately weighted, decides whether the parking offered is in the ordinary course of its business. To this extent, the offering of a single car space

with the intention to be repeated is merely one of the components necessary in determining whether a commercial parking station offers parking in the *ordinary course of its business*.

This view has further been held in case law. In *Federal Commissioner of Taxation v Murry,* Gaudron, McHugh, Gummow and Hayne JJ observed:

> "a business is not a thing or things. It is a course of conduct carried on for the purpose of profit and involves notions of continuity and repetition of actions."

On this basis, the offering of a single car space may not be in the ordinary course of its business even though there is intention to be repeated, provided the conduct has not been carried on for the purpose of profit.

Both the Draft Ruling and Draft Guide should include further examples to illustrate when an entity is actually carrying on a business of providing car parking. These examples should cover the other factors that have been held by the courts and the Commissioner to be relevant in making such a determination as to whether an entity carries on a business, namely factors such as, intention, size, scale and profit-making amongst others. Despite this, the difficulties of making such determinations should be acknowledged and again, Council recommends that Parliament's intervention here is required to prevent an undue burden being place on the taxpayer to not simply determine such questions about their own business, but to make such determinations about a third party, often with inadequate information about that third party.

Further it is submitted that where the car parking is provided incidentally to ordinary business activities it is not part of ordinary business activities. So for example, where some members of the public are charged for parking, but those who use the parking in order to engage in the ordinary business activities of the taxpayer, the ordinary business activities requirement would not be satisfied.

The complexities of this area of law is explored below in Example 1, which discusses the example of Hillsong Church (**Hillsong**), which is headquartered within The Hills Shire Council's local government area. We have briefly outlined the facts involving Hillsong and its car parking facilities below to illustrate the complexities of having taxpayers determine whether another entity is carrying on a business of providing car parking.

Example 1

The Hillsong Church Hills Campus started charging hourly parking fees from August 2019 subsequent to the opening of the new Sydney Metro public transport system in May 2019. The fee structure incorporated discourages all-day parking by charging a substantially inflated price for longer-term parking in comparison to the short-term hourly parking rates. Hillsong operates as a not-for-profit organisation providing religious, charitable and other community services. The church has hundreds of car spaces on its property used for staff, worshipers, students and church visitors and is located directly opposite the new Norwest Metro Station. Since first operating from this location in the late 1990s, Hillsong has never historically charged for car parking spaces on its property and it was only after the opening of the Norwest Metro Station that it chose to charge for car parking. However, Hillsong also exempts its staff, worshipers, students and visitors from paying the fees when they park on the property to undertake activities directly involved with Hillsong's activities. Accordingly, it is arguable that Hillsong's car parking facilities have a primary purpose to provide short-term parking to church users (who are not charged a fee to park onsite), rather than the public at large. It is further arguable that the fee structure attempts to discourage longer-term parking and people seeking to park their cars on the property in order to commute to other locations via Norwest Metro Station. This view is further supplemented by a Hillsong spokesman who stated 'Hillsong Church has over 2,000 people on our property every day, including staff and

Hillsong College students, and we use the entire car park for our church services and public events.'[2]

Taking such facts and circumstances into consideration, namely that, a not-for-profit organisation that primarily provides community and religious services; which decided to charge for car parking in reaction to the opening of a train station across the street from it; which has publically announced that it needs all of its car spaces for its own activities; and introduced a fee structure that was intended to discourage all-day parking; would imply that, it does not intend to make a profit from its car parking activities. Furthermore, as the majority of the users of the car park (being staff, worshipers, students and church visitors) would be exempt from the parking fees, this again shows that Hillsong is unlikely to derive a profit from such car parking activities and therefore lacks the necessary 'commercial' nature required.

So understood, it is apparent that, charging a fee for parking is merely an action to limit commuters parking onsite and to discourage all day parking so that church users can use the parking station for a legitimate reason for Hillsong's church activities. To this extent, the ultimate purpose of providing short term parking is merely an incidental component to Hillsong providing their primary community services to the public. Whilst it involves notions of continuity and repetition of actions, this does not necessarily mean that the Hillsong's car park operates for the purpose of profit, and therefore the offering of car spaces to the public should not be considered to be in the ordinary course of business. Rather it is incidental to the ordinary business activities.

Paragraph 37 of TR 2019/1 also confirms the Commissioner of Taxation's view on when a company is likely to be characterised as having no profit making purpose and whose activities are unlikely to have a commercial nature. Such a view includes incorporated charities and incorporated not-for profit organisations that exist to provide community services.

The above discussion demonstrates the complexities of determining whether another entity providing car parking facilities is both commercial and part of its ordinary business. In Council's submission to the Commissioner, we recommended that examples such as the one above be included to show when the Commissioner considers a commercial car parking station to arise. We suggested that such examples should be focused on the different factors that have been held in case law and other ATO guidance to determine when an entity carries on a business and linked to the meaning of commercial.

Currently, the way that the Draft Ruling and Draft Guide have been written, places an unfair burden on an employer to determine whether another entity is carrying on a business of providing car parking. Since the Draft Ruling currently incorporates some attributes of the tests outlined in TR 2019/1 (namely repetition and regularity), we recommended that the Commissioner also incorporates further discussion and examples that are closely linked to the other factors that are required to determine if a business of car parking has first been provided.

Despite our recommendations, even if they are incorporated into the Draft Ruling once finalised, the test proposed by the Commissioner in the Draft Ruling will still not adequately resolve this issue of determining whether a car parking facility is a commercial parking station. By requiring employers to make a determination of whether a third party is providing car parking in the ordinary course of that third party's business, the Commissioner is requiring the taxpayer to form a view on a situation which is highly complex for them to confirm about their own activities, let alone the activities of an entity which they are not in control of and would not have access to the necessary information (such as financial records) to form such a judgement. Furthermore, such a test would create a liability for tax in situations that Parliament explicitly never intended for tax to arise. As such, we reiterate, the only way to adequately resolve this issue is via legislative or regulatory reform.

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[2] https://www.dailymail.co.uk/news/article-7120773/Million-dollar-Hillsong-church-empire-slug-commuters-200-month-use-car-park.html

Example 2

Another example within the Hills Area is that of Lakeview Hospital. The Lakeview Hospital car parking station is located within Norwest Business Park in Council's local government area. It is located within 1km of Council's Chambers as well as many small and medium sized businesses located within Norwest Business Park. The primary business of the hospital is to provide medical services to the public. The hospital provides hundreds of car spaces on its premises for staffs, patients and visitors, and it charges hourly parking fees with an inflated fee structure to discourage all-day parking, so that the hospital users can use the parking for legitimate reasons that are in line with the hospital's primary business. The hospital does not release financial records to the public and does not publically indicate whether or not revenue derived from its car parking spaces is profitable.

Similar to Example 1, Example 2 demonstrates the complexities of determining whether the hospital has a profit making intention by providing car parking facilitates and whether the activity of offering car spaces to the public should be considered in the ordinary course of its business, given the ultimate purpose of providing short term parking in the hospital is merely an incidental component to the hospital providing medical services to the public. To this extent, the Draft Ruling has put employers located in the Norwest Business Park in an unfair position to make a professional judgement of whether the hospital's parking station is a commercial parking station for the purpose of section 39A under FBTAA. This is an unreasonable test for taxpayers to apply.

Due to the Qantas Cases, the Commissioner is restricted in considering the unique nature of hospitals, shopping centres and not-for-profit organisations in suburban areas where arguably the true value of a car parking space is significantly lower than the inflated price of parking facilities that try to discourage all-day parking. The view of the Court and the Commissioner to broaden the definition of commercial parking stations may distort the actual taxable value of the car parking facilitates in non-CBD areas as it is not reasonable to use the fees charged by those special purpose car parking facilities to determine the taxable value of car parking spaces provided by nearby employers.

Taken together, we consider that the 'commercial parking station' test captured by the Draft Ruling potentially creates greater FBT exposure on employer provided car parking where there is a special purpose car park within a 1km radius that have been designed to discourage all-day parking at their facilities. This will cause many employers with business operations in many non-CBD areas to be brought into the FBT net, which would seem to deliver an inconsistent outcome with the original intent of Parliament. 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 and go against the Government's policy objectives to lower taxes on individuals and small and medium sized businesses.

Date of effect

Currently, it is intended that the Draft Ruling will apply prospectively from 1 April 2020. Whilst ultimately this is a matter for the ATO, Treasury should consider the imminent and significant impact this will have in considering the appropriate response.

Many employers will have already entered into lease agreements to provide car parking to their employees and will not have accounted for the increase in FBT liability that will likely arise. Such employers should be given the opportunity of determining whether they wish to continue with their current lease agreements. With respect to Council, any increase in FBT liability will need to be factored into an increase in rates for local residents. However, in NSW, council rates are capped by the Independent Pricing and Regulatory Tribunal (**IPART**). IPART sets the maximum amount Council can increase rates for any income year. Currently, IPART has already announced a maximum increase in rates of 2.6% for the 2021 income year and has not factored into the potential increase in FBT liability that will arise under the Draft Ruling. If the Draft Ruling goes into effect from 1 April 2020, Council has estimated a potential increase in FBT of approximately

$206,000 in the 2020 income year and $825,000 in the 2021 income year. As the rate increases have already been set for the 2021 income year, Council is unable to recover the estimated $1 million increase in FBT liability and this may result in a lower level of service to ratepayers and the local community. Furthermore, there is no guarantee that IPART will factor in such costs in future rate increase decisions which may further impede Council's ability to provide services to the local community.

If the Commissioner does not extend the start date for the application of the Draft Ruling, then there is an increased urgency for Parliament to consider the merits of amending the law. Inaction on the part of Parliament to address this issue would result in a significant tax liability for small and medium sized businesses. Furthermore, if IPART does factor in such increases in FBT liability in determining rate increases, the increased FBT liability will ultimately be passed onto ratepayers to avoid hampering essential services, reflecting another increase in taxes for local residents. This is an unfair outcome.

5. Other economic considerations

In this submission, we have also briefly outlined the economic impacts of the Draft Ruling to The Hills Shire Council and its local government area (the **Hills Area**).

Extending the definition of commercial parking station could distort the actual taxable value of providing car parking within the Hills Area resulting in a large increase in employers who would now be subject to FBT on car parking than would have otherwise been the case under the ATO's former view. This will likely have an adverse impact to the local economy and the ability for the Hills Area to attract businesses and boost employment opportunities within the Hills Area.

In the Hills Area alone, over 80% of trips are made by private vehicles and approximately 60% of our workforce comes from outside the Hills Area, with high numbers of local workers coming from the Blacktown Council local government area where the new Sydney Metro services are not easily accessed.

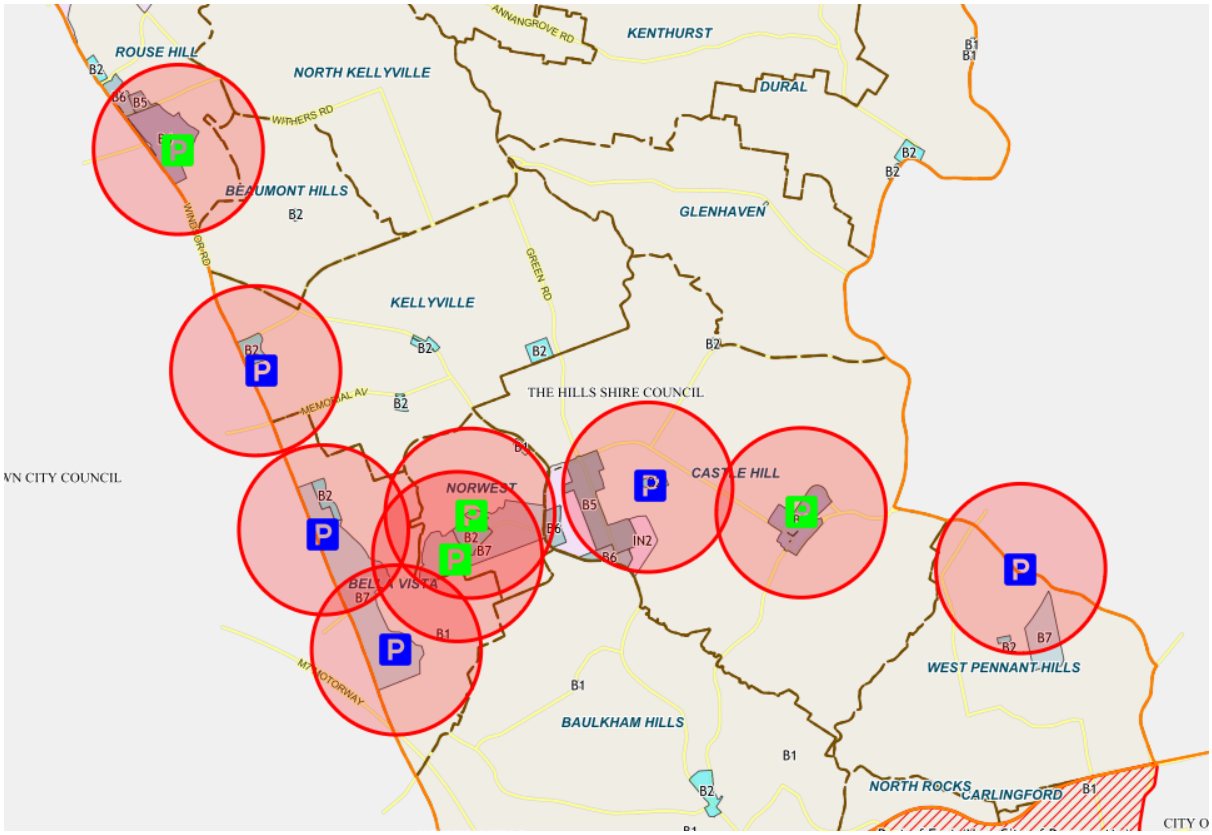
The adequate provision of commuter and employee car parking continues to be a significant challenge. Whilst Council is reviewing car parking rates close to metro stations to influence travel behaviour, it will continue to be necessary for new developments to provide some level of on-site parking. Existing developments within established employment areas generally comply with current car parking requirements.

Over the next 20 years, the Hills Area is seeking to attract another 50,000 jobs which will largely be located within the area's strategic centres including the suburbs of Rouse Hill, Castle Hill and Norwest. To achieve these targets, various commercial sites with on-site parking spaces will be built. Those on-site parking spaces will be provided to the employees working at the same site. However, the proposed changes in the Draft Ruling is a trigger for liability to tax for the employers on the basis that existing paid car parking facilities within a 1km radius of the strategic centres are charging a parking rate higher than the FBT threshold with clear intentions to actually discourage all-day parking by charging the high rates. Specifically, these special purpose car parking facilities are breaching the car parking threshold and charging a higher rate for the purposes to avoid the public from parking on site all day. Whilst there is an abundance of free or very low value street parking in the area, with special purpose car parks distinctly over-priced in comparison, the mere existence of the special purpose car park will bring surrounding employers (within one kilometre of them) into the FBT net due to the expanded definition of commercial parking station outlined in the Draft Ruling.

The proposed changes to the ATO's interpretation of the FBT law with respect to the provision of car parking will likely impact a majority of employers within the Hills Area. Figure 1 below shows a 1km radius around all existing paid car parking facilities in the Hills overlayed against land zoned for employment purposes. Parking stations indicated in blue are free commuter car parking stations developed as part of the Sydney Metro project. Car parks indicated in green in Rouse Hill

and Castle Hill are associated with established shopping centres where the ones indicated in Norwest relate to two private hospitals and Hillsong Church. The vast majority of businesses in the Hills Area are located near the green parking stations.

Figure 1



We have estimated the potential FBT exposure for businesses within the Hills Area. This FBT liability potentially may well exceed over $100 million dollars in in the 2021 FBT year (equivalent to almost 1% of The Hills Gross Regional Product) and a potential $200+million by 2036. This is on the basis that most businesses in the Hills Area provide car parking to accommodate staff.

We have estimated Council's FBT liability to be approximately $825,000 per year. Such a liability will ultimately be passed onto ratepayers in the form of higher rates and thereby represents another increase in taxes on individual households.

At a time when we need to be focussing on supporting business, boosting productivity and encouraging employment opportunities located closer to home, the proposed FBT changes could serve to make our employment areas less attractive for new businesses and potentially threaten the ongoing viability of businesses already located in The Hills.

Options for reform

As has been discussed, to avoid this significant increase in tax on small and medium sized business and ultimately on individual households (through increase council rates), we have proposed the following three options for reform:

a) **Option A:** the definition of 'commercial parking station' in the FBTAA should be redefined to exclude special purpose parking stations that were not established to solely provide parking spaces and instead were provided incidentally to the ordinary business activities of the car parking provider (such as, shopping centres; airports; hospitals; not-for-profit organisations etc.);

b) **Option B:** amend the FBTAA so that only car parking fringe benefits provided in certain geographical areas are taxable, namely parking spaces located in central business districts; or

c) **Option C:** make a recommendation to the Governor-General to issue a new regulation to the *Fringe Benefits Tax Assessment Regulations 1992* (Cth) (**the Regulations**) to specifically exclude special purposes parking stations.

Such options would alleviate the additional tax burden on employers who were never intended to be subjected to FBT in the first place. We note that Option A is our preferred option as this would clearly exclude special purpose parking stations from triggering an unintended FBT liability on employers.

If you would like to discuss any of the above further, please contact myself on 02 9843 0105 or Chandi Saba on 02 9843 0117.

Yours faithfully

Michael Edgar
GENERAL MANAGER

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