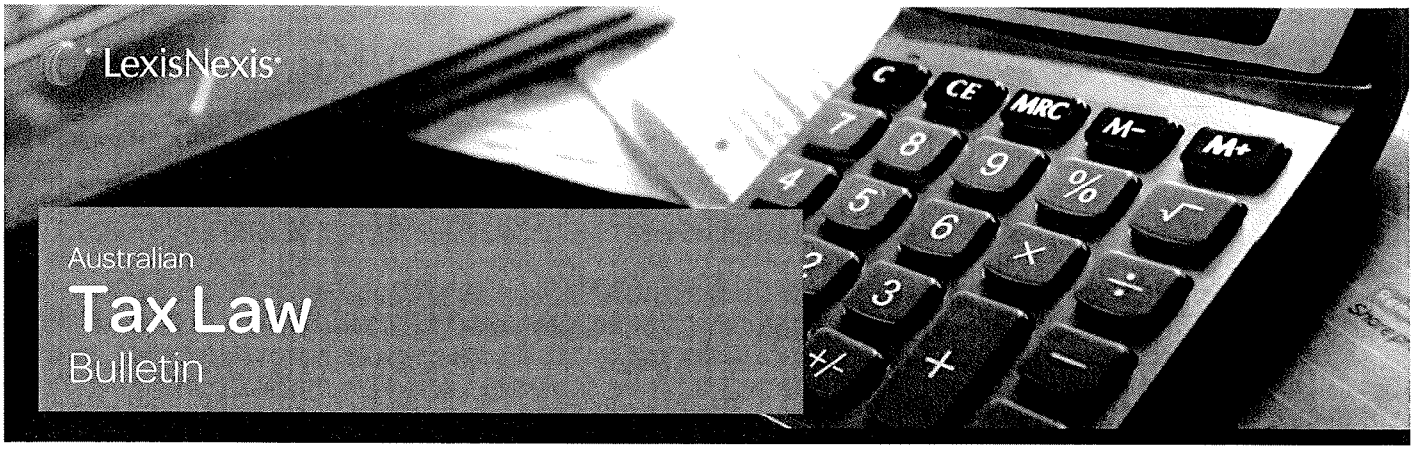

2015 . Vol 2 No 2

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Information contained in this newsletter is current as at March 2015

LexisNexis Butterworths

General Editor's introduction

Dr Helen Hodgson *CURTIN LAW SCHOOL*

The three articles in this month's issue of the *Australian Tax Law Bulletin* consider three very different issues that are all topical in the current tax environment.

Michael Blissenden has prepared a case note on the *Gashi* case[1] relating to the right of review that a taxpayer has under the Taxation Administration Act 1953 (Cth) (TAA). The *Futuris* case[2] states that the TAA is the proper avenue for challenge, yet *Gashi* shows that the court may not be able to resolve a case requiring the review of an assessment that has been made as the result of an audit where the income was estimated. Michael's analysis highlights the new approach that the Australian Taxation Office (ATO) is adopting to dispute resolution, where matters that cannot be resolved by the courts, under either the TAA or through judicial review, may need to be resolved by negotiation.

From another perspective, in this edition I have contributed an article relating to the fringe benefits tax (FBT) implications where an employer wants to support employees that choose alternatives to a car to travel between home and work. Although the FBT bias to subsidise cars has been raised many times before through enquiries and in the academic literature, this article looks at some of the incentives currently being offered by employers and how the current FBT regime applies to those incentives. In the absence of a specific concession in the Fringe Benefits Tax Assessment Act 1986 (Cth), it can at least give guidance to employers wanting to look at providing packages to support alternative travel.

The third article, by Chris Wallis, looks at the practicalities of capital gains tax in the context of the main residence exemption. The real lesson from the case study is, however, largely about how to prepare a brief. The client sometimes knows just enough about the issue to frame a question — but that is not always the question that needs to be asked. Without access to all of the facts, the adviser doesn't always know what the question should be and the advice can be inappropriate.

I hope you find this edition relevant and useful in the issues that you deal with in your practice.

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Footnotes

1. *Gashi v Commissioner of Taxation* (2013) 209 FCR 301; 296 ALR 497; [2013] FCAFC 30; BC201301112.
2. *Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146; 247 ALR 605; [2008] HCA 32; BC200806862.

Fringe benefits tax and travel to and from work: how can employers sponsor alternative forms of travel?

Dr Helen Hodgson *CURTIN LAW SCHOOL*

It is well known that there are significant fringe benefits tax concessions available to employees through salary packaging of cars, but there is also demand, currently small but increasing, for employers to support other forms of travel. The motives for providing alternative travel benefits vary, but both employers and employees cite congestion, parking and health as reasons to adopt alternative forms of transport to and from work. There are a range of state and federal government policies that impact on the choice that commuters make in relation to travel to and from work, including the availability of public transport and cycling infrastructure or parking planning rules, and commuters may have personal circumstances, such as travel distances or childcare arrangements that limit their choices.

Fringe benefits tax is one of the policy considerations. Alternative modes of travel are not supported by a broad fringe benefits tax concession such as that available in respect of cars, which creates a barrier to developing employee incentive schemes. The purpose of this article is to consider the types of benefits that an employer could provide to support alternative modes of travel and the fringe benefits tax consequences of such benefits. It focuses on employers that are subject to full rates of fringe benefits tax and are not eligible for exemptions under s 57A or rebates under s 65J of the Fringe Benefits Tax Assessment Act 1986 (Cth) (FBTAA).

Application of fringe benefits tax to travel to and from work

Incentive schemes to encourage employees to use alternative modes of travel, including public transport, cycling and walking, can incorporate a range of strategies. The benefits that employers offer employees can include:

- subsidised public transport fares;
- discounts on bicycles and other cycling equipment;
- workplace facilities, including bicycle storage;
- rewards programs that can be exchanged for goods and services; and
- workplace challenges and events, which may include prizes.

The definition of a benefit is found in s 136 of the FBTAA, and includes: "...any right (including a right in relation to, and an interest in, real or personal property), privilege, service or facility..." provided in respect of employment. Accordingly any assistance provided by an employer in connection with travel to and from work needs to be considered as a potential fringe benefit.

The structure of the FBTAA requires that after a benefit is identified, it is categorised for the purposes of establishing the appropriate taxable value. Car benefits are covered by Div 2, which is the source of the concessional treatment of car benefits. The default method of calculation of car benefits is the statutory formula method which is based on a set rate[1] for every kilometre travelled during the FBT year and does not separate the business component from the private component of travel. In the context of travel to and from work, this is a significant concession. Similarly, the concessional nature of calculating parking benefits encourages driving to work where the employer provides parking or the business premises are located more than 1 km from a commercial parking station.

Most other benefits are calculated on the basis that the proportion of the cost that is deductible for income tax purposes is excluded. The employee may provide a "no private use" declaration[2] in respect of expense payment benefits, or the "otherwise deductible rule"[3] applies to reduce the value of the benefit by the amount that would be deductible by the recipient if they had incurred the expenditure personally. It is a long established principle of income tax law that travel to and from work is not tax deductible[4] and this has been clarified legislatively[5] to allow a deduction where an employee is travelling between two workplaces but only if one of those workplaces is not the taxpayer's residence. The

statutory formula method does not make this distinction and for many recipients of this benefit,[6] travel between home and work constitutes a significant proportion of the travel.

Types of benefits

Benefits provided to employees using alternative forms of travel most commonly fall within one of the following divisions of the FBTAA:

- Division 5: Expense payment fringe benefits
- Division 11: Property fringe benefits
- Division 12: residual fringe benefits

Determining the taxable value of the benefit depends on whether the benefit is an in-house benefit or an external benefit, and in each case determining the taxable value of an in-house benefit is more complex than an external benefit. An in-house benefit includes a benefit provided where the employer and any other provider involved in the provision of the benefit, carry on a business of providing identical or similar goods or services to the general public.[7]

In-house benefits

The method of determining the taxable value of an in-house property benefit is set out in s 42 of the FBTAA, and this also forms the basis to determine the taxable value of in-house expense payment benefits and in-house residual benefits. The value of the benefit depends on the nature of the business providing the benefit. If the provider manufactures or processes identical property, the value depends on who usually purchases the property:

- if any identical property was sold to purchasers who are manufacturers, wholesalers or retailers, the value is the lowest arms-length sale price;
- if sold to the general public at an arms-length price the value is 75% of the lowest price to a member of the public; or
- if neither of the above applies, 75% of the notional value, which is the value that the provider could be expected to acquire the property from an arms-length provider.[8]

It is important to note that if the property benefit is provided under a salary packaging, the taxable value is the notional value without discounting.[9] This measure applies to any salary packaging agreement entered into after 22 October 2012 and to pre-existing salary agreements from 1 April 2014.[10] The effect of this measure is to reduce the incentive to salary package in-house benefits, as the taxable value is the arms-length value without any discount.

The 2013 amendments were the first acknowledgement in the FBTAA of salary packaging agreements. The Tax Laws Amendment (2012 Measures No 6) Act 2013 (Cth) included the following definition of salary packaging in s 136:

> *salary packaging arrangement* means an arrangement under which a benefit is provided to an employee if:
> (a) the benefit is provided in return for the employee agreeing to a reduction in the employee's salary or wages that would not have happened apart from the arrangement; or
> (b) the arrangement is part of the employee's remuneration package, and the benefit is provided in circumstances where it is reasonable to conclude that the employee's salary or wages would be greater if the benefit were not provided.

This limitation in respect of in-house benefits requires any in-house benefit to be provided in circumstances where it is clearly not related to a reduction in salary.

Expense payment benefits

An expense payment fringe benefit is defined in s 20 as a benefit where the provider either reimburses expenditure of the recipient, or discharges an obligation of the recipient to pay a third party in respect of expenditure incurred by that third party. Determining the taxable value depends on whether the benefit is an external or an in-house fringe benefit. The taxable value of an external benefit is the amount of the payment or the reimbursement,[11] while the taxable value of an in-house benefit is calculated by reference to whether the benefit would have been a property benefit or a residual benefit.[12] The value is reduced by any contribution paid by the recipient or if either the "otherwise deductible" rule applies[13] or the employee gives a no-private use declaration.[14]

An example of an expense benefit in relation to alternative transport is the provision of subsidised public transport. If the provider reimburses the cost of the employee using public transport, the full amount of the payment is an expense payment fringe benefit. An alternative to reimbursing public transport is the payment of a travel allowance. An allowance is outside the operation of the FBTAA, but is assessable income to the employee,[15] and if the allowance is in relation to travel to and from work there is no corresponding deduction. This shifts the responsibility for the taxation consequences from the employer, through FBT, to the employee, through income tax.

Property benefits

Section 40 defines a property benefit as property provided to the recipient that is either tangible or intangible.[16] For example, the provision of a bicycle

would be a property fringe benefit. Again the method of determining the taxable value is different for an external or an in-house benefit. An external benefit would be valued at the arms-length cost to the provider to acquire the property, reduced by any amount that the recipient has paid to acquire the property.[17]

The rules to determine the taxable value of an in-house fringe benefit are set out above, but it is worth noting that a property benefit must be in respect of tangible property to be an in-house benefit.[18] Intangible property will be valued as an external property fringe benefit.

Residual benefits

The third relevant benefit is a residual benefit defined in Div 13, which is a benefit that does not fall into any of the other divisions.[19] As an example, if an employer provided a "bike pool" and allowed employees to use the bicycles to travel between home and work, this would be a residual benefit.

The method of determining the taxable value is similar to the method discussed in relation to property benefits. Where the residual benefit is an external benefit, the value is the arms-length value that the provider paid for the benefit.[20] Where the benefit is an in-house benefit, the value is 75% of the amount that the provider received from a member of the public in an arms-length transaction, or if the benefit was not provided to the public, 75% of the notional value of the benefit.[21]

Miscellaneous other benefits

Although these are the three categories of benefits that are most likely to be relevant, a provider could provide a benefit that falls under another division.

For example, if an employer were to provide financial assistance to purchase a mode of alternative transport, it would be a loan benefit under Div 4, with the taxable value determined as the prevailing notional interest rate reduced by the interest rate paid. Accordingly an arrangement under which an advance on salary was provided to purchase a bicycle or a prepaid public transport ticket and repayable through payroll deductions would be a loan fringe benefit within this division.[22]

Other benefits may need to be considered as entertainment. Entertainment is defined as food, drink or recreation, or accommodation or travel to do with providing food, drink or recreation.[23] Recreation is separately defined as including amusement, sport or similar leisure-time pursuits.[24] The provision of bicycles or other recreational sporting equipment used for alternative transport could, therefore, be regarded as entertainment.[25] This article does not detail the relationship between the treatment of entertainment expenses for income tax and fringe benefits tax purposes but to summarise, where the employer is not a tax exempt body, entertainment expenses generally are not an allowable income tax deduction but are not subject to fringe benefits tax. Where the provider is a tax exempt body, Divs 9A and 10 apply to subject "non-deductible exempt entertainment expenditure"[26] in respect of meals and other entertainment respectively to fringe benefits tax.

Exemptions and reductions in value

Having identified the categories of benefits that are most likely to apply, the next step is to identify whether there are any exemptions or reductions available to reduce the taxable value of the benefit. Exemptions and reductions set out in Divs 13 and 14 are general concessions that apply to all benefits, and there are further concessions set out in each relevant division applicable to that specific fringe benefit.

The exemptions and concessions most likely to be relevant to the provision of alternative transport are:

- Section 58P: minor benefits
- Section 58X: certain work related items
- Section 58Y: membership subscriptions
- Section 58Z: taxi travel
- Section 62: reduction in value of in-house benefits
- Section 41: property consumed on employer's premises
- Section 47(1A): transport provided by a public transport provider to employees
- Sections 47(3) and (4): employee amenities on business premises

The two exemptions most commonly relied upon are minor benefits under s 58P, and employee amenities under ss 47(3) and (4).

Minor benefits

The minor benefit exemption is available to exclude benefits up to a value of $300 in a year, and is not available in respect of an in-house benefit.[27] Not all low value benefits will be a minor benefit, as it must "be concluded that it would be unreasonable to treat the minor benefit as a fringe benefit in relation to the employer in relation to the current year of tax".[28]

The criteria to be applied when making this conclusion are set out as follows:[29]

> (f) having regard to:
> (i) the infrequency and irregularity with which associated benefits, being benefits that are identical or similar to:
> (A) the minor benefit; or

(B) benefits provided in connection with the provision of the minor benefit have been or can reasonably be expected to be provided;

(ii) the amount that is, or might reasonably be expected to be, the sum of the notional taxable values of the minor benefit and any associated benefits, being benefits that are identical or similar to the minor benefit, in relation to the current year of tax or any other year of tax;

(iii) the amount that is, or might reasonably be expected to be, the sum of the notional taxable values of any other associated benefits in relation to the current year of tax or any other year of tax;

(iv) the practical difficulty for the employer in determining the notional taxable values in relation to the current year of tax of:

(A) if the minor benefit is not a car benefit — the minor benefit; and

(B) if there are any associated benefits that are not car benefits — those associated benefits; and

(v) the circumstances surrounding the provision of the minor benefit and any associated benefits including, but without limiting the generality of the foregoing:

(A) whether the benefit concerned was provided to assist the employee to deal with an unexpected event; and

(B) whether the benefit concerned was provided otherwise than wholly or principally by way of a reward for services rendered, or to be rendered, by the employee[.]

Where a benefit is provided in conjunction with a formal scheme that makes benefits available on an ongoing basis, it needs to be carefully designed to meet the requirements of s 58P. Taxation Ruling TR 2007/12 examines the application of s 58P and its application to a range of benefits.[30]

First, the benefits must be infrequent which takes its ordinary meaning and second, if associated benefits are granted during the year, they need to be aggregated when determining the value of the minor benefit. Third, an in-house benefit cannot be a minor benefit. These requirements present a challenge in designing an incentive scheme that is intended to change the behaviour of employees.

An incentive scheme could be a rewards style scheme, with the employee accruing points for continuing use of alternative modes of transport or it could be structured with benefits provided on an ad-hoc basis. If the scheme is a rewards style scheme with participants accruing points to qualify for an award, the taxing point is the time at which the reward is received.[31] The fact that points are accrued on an ongoing basis could disqualify the benefit from being a minor benefit if the level of points required to redeem a reward is established at a level where employees could be expected to receive awards regularly during the FBT year.

TR 2007/12[32] considers a staff incentive scheme under which a store voucher is provided to staff that achieve a set sales target and concludes that the benefit is not a minor benefit. The significant factors are that the sales target is set at a level that most employees would be expected to reach regularly, that it was consequential on services rendered by the employee, and that other vouchers received during the year would be taken into account as associated benefits when establishing the value of the benefit. However an ad-hoc bonus to an employee that is not part of a formal scheme[33] or the granting of a gym membership to all employees with a notional value of less than $300[34] would be considered to be minor benefits.

Therefore if an employer establishes a formal rewards scheme to encourage staff to adopt alternative modes of transport, the scheme may fall outside the minor benefits exemption. However, as long as the maximum notional taxable value of rewards available during the year is capped at $300, the scheme can be distinguished from the example in the ruling as the rewards are not based on services rendered by the employee.

Prizes or rewards offered on an ad-hoc basis, for example as a one-off incentive or to the winner of a competition, would fall within the minor benefits exemption subject to the value of the prize and any other associated benefits. Note that membership of a rewards scheme operated by a third party has been ruled to be a minor benefit.[35]

In respect of in-house benefits, the aggregate notional taxable value of benefits that can be provided without the imposition of fringe benefits tax increases to $1000 per annum. Section 62 of the FBTAA reduces the aggregate value of in-house benefits by $1000 per employee. Note, however, that the minor benefit exemptions do not apply to in-house benefits provided under a salary sacrificing arrangement. Section 62(2) explicitly excludes the application of s 62 to such arrangements and s 58P(1)(c) excludes an in-house benefit from consideration as a minor benefit.

For example, employees in the Queensland Public Service are entitled to enter into salary packaging arrangements. Prior to 2013, this included access to public transport on government operated services up to a value of $1333 per annum, based on the s 62 in-house reduction in value.[36] However following the amendments to the legislation the benefit is now a fully taxed benefit when included in a salary packaging arrangement.[37]

It is also worth noting that the Australian Taxation Office (ATO) also has expressed the view that s 58P does not apply to allow the minor benefits exemption in respect of an external benefit where the benefit is provided under a salary sacrificing agreement.[38]

Public transport fares remain exempt from fringe benefits tax in two circumstances: where an employee of

a transport company or a police officer is provided with free transport to and from work.[39] Note that this does not extend to non-work related travel.[40]

One of the issues to discourage alternative modes of travel is the availability of public transport particularly if an employee works irregular times or may be called on to work additional hours. Section 58Z exempts taxi travel if the travel is a single taxi trip beginning or ending at the employee's place of work. An incentive package to encourage the use of alternative transport could include taxi travel as a backup to support an employee who has travelled to work using an alternative mode of transport and it becomes impractical to travel home in the same way.

Work related items

Rewards available under a reward scheme could be exempt from fringe benefit tax under s 58X, which exempts work related items, specifically:

- a portable electronic device;
- computer software;
- protective clothing;
- a briefcase; or
- a tool of trade primarily for use in the employee's employment,

or section 58Y which applies to eligible subscriptions to a professional journal, corporate credit card or airport lounge membership. These exemptions are aligned with the otherwise deductible rule, which reduces the taxable value of an expense payment, property or residual benefit by the amount that would be allowed as a tax deduction if the employee had incurred the expense personally. A corporate card can be provided to pay for work-related purchases, as long as expenditure is restricted to relevant goods and services.[41]

The requirement that the work-related item is for use primarily in the employee's employment does contemplate that there may be some private use, but is determined having regard to:[42]

- the reason or reasons the work-related item was provided to the employee;
- the type of work to be performed by the employee;
- how the use of the work-related item relates to the employee's employment duties; and
- the employer's policy and any conditions relating to the use of the work-related item.

Although work related items may be a less attractive incentive than a reward that is not work related, it is not subject to the $300 cap on minor benefits.

Workplace facilities and refreshments

If an employer provides facilities to employees that use alternative modes of transport, those facilities are exempted under ss 41, 47(3) and (4). Section 41 applies to property consumed on the premises on a working day, on business premises and s 47(3) applies to residual benefits resulting from the use of employee amenities, defined in s 47(4), on the employer's business premises. One of the most common benefits provided by employers[43] to encourage alternative transport is the provision of facilities for employees to shower and change. This can also be extended to lockers, bicycle storage or a cyclists' lounge.

There are also a number of special events promoted by external organisations to encourage changes in commuter behaviour.[44] Employers are encouraged to support participants in these events through the provision of breakfast or other refreshments. An employer could go further to establish a regular event for employees. The ATO has determined that morning and afternoon teas and light lunches provided to employees on the employer's premises would not constitute meal entertainment, and an income tax deduction is allowable; however where the event is considered to be a social function the exemption does not apply and no tax deduction is allowable.[45] Arguably, where a light meal is provided at the start of the business day, it could be considered a light meal within the terms of the ruling[46] and is distinguishable from a social event as the purpose of the provision is refreshment not recreational.

Conclusion

There are a range of commercial reasons for employers to encourage their employees to change their commuting behaviour to adopt alternative modes of transport. Apart from environmental considerations, reducing the number of vehicles at a workplace will reduce parking congestion and a more active workforce will have improved health and productivity.

In developing a program to encourage changes in behaviour, an employer needs to take into account the fringe benefits tax consequences that may result. Some of the issues that will impact on the incentives offered to employees include the following:

- Salary packaging may be most appropriate where the initiative is employee driven. Salary packaging of certain benefits is viable, but attracts fringe benefits tax unless the benefit falls within an appropriate exemption. For example it may be appropriate to package the cost of public transport fares or purchase of a bicycle. However some concessions are not available. In particular, if in-house benefits are included in a salary package the benefits of a concessional determination of taxable value is lost as the value of the benefit is based on the notional taxable value, and the ATO

does not consider that a salary packaged item would be a minor benefit.

- Funding the purchase cost of a high cost item through a payroll advance does not attract any fringe benefits tax on the loan component of the advance payment.
- Where the initiative is employer driven, a rewards scheme to encourage sustained changes in behaviour could be constructed relying on:
  - — the minor benefits exemption where the notional value of the reward is less than $300;
  - — the in-house benefits exemption where the notional value of the reward is less than $1,000 and there is no salary sacrificing involved; and
  - — provision of work-related benefits.
- Facilities and property, including refreshments, provided on the employer's premises for the use of employees will be exempt from fringe benefits tax.
- Minor benefits provided on an ad-hoc basis, for example as prizes, will be exempt from FBT as long as the aggregated taxable value of all associated benefits during the FBT year does not exceed the $300 threshold.

However without reform, fringe benefits tax will continue to provide greater incentives to employees that drive to work than those who choose to adopt other forms of travel. Long term, the structure of the fringe benefit tax needs to be amended to reduce the benefits to employees who drive to work although they do not need the car for work related travel, and to specifically incorporate concessional treatment of fringe benefits provided to employees using alternative modes of travel.

This article has been reviewed by an independent reviewer.

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Footnotes

1. Contracts entered into after 10 May 2011 are subject to a statutory rate of 20c per km, which was phased in to apply to all vehicles from 1 April 2014. A scaled rate of 7c–26c applies in respect of vehicles subject to a contract before 10 May 2011.
2. Fringe Benefits Tax Assessment Act 1986 (Cth), s 20A.
3. FBTAA, ss 24, 44 and 52.
4. *Lunney & Hayley v FCT* (1958) 100 CLR 478; [1958] ALR 225; (1958) 32 ALJR 139; BC5800200.
5. Income Tax Assessment Act 1997 (Cth), s 25-100 [ITAA 97].
6. D Kraal, PWS Yapa, D Harvey "The impact of Australia's fringe benefits tax for cars on petrol consumption and greenhouse emissions" (2008) 23(2) *Australian Tax Forum* 91.
7. FBTAA, s 136: definition of in-house property fringe benefit, in-house residual fringe benefit and in-house residual expense payment fringe benefit.
8. FBTAA, s 136: definition of notional value.
9. FBTAA, s 42(1)(aa).
10. Tax Laws Amendment (2012 Measures No 6) Act 2013 (Cth), Sch 7, item 13,
11. FBTAA, s 23.
12. FBTAA, s 22A.
13. FBTAA, s 24.
14. FBTAA, s 22A.
15. ITAA 97, s 15-2.
16. FBTAA, s 136: definition of property.
17. FBTAA, s 43.
18. FBTAA, s 136: definition of in-house property fringe benefit.
19. FBTAA, s 45.
20. FBTAA, ss 50 and 51.
21. FBTAA, ss 48 and 49.
22. See Australian Taxation Office Interpretative Decision ATO ID 2002/926 Fringe Benefits Tax: minor benefits exemption and interest free loans.
23. FBTAA, s 136: definition of entertainment, refers to above, n 5, at s 32-10.
24. ITAA 97, s 995-1; definition of recreation.
25. See ATO ID 2008/60: Residual fringe benefit: tax-exempt body — recreation centre.
26. Defined in s 136 as "non-deductible entertainment expenditure to the extent to which it is not incurred in producing assessable income".
27. FBTAA, s 58P(1)(c).
28. FBTAA, s 58P.
29. FBTAA, s 58P(f).
30. Taxation Ruling TR 2007/12 Fringe benefits tax: minor benefits.
31. Practice Statement Law Administration (General Administration) PSLA 2004/4 (GA) Income tax and fringe benefits tax — rewards received under consumer loyalty programs.
32. Paragraphs 88–95 (example 8).
33. TR 2007/12, at [96]–[104] (example 9).
34. TR 2007/12, at [105]–[111] (example 10).
35. Class ruling CR 2013/77: Fringe benefits tax: rewards received by an employee under the LM High Flyers incentive program.
36. State of Queensland Department of Housing and Public Works *QGCPO250/10 In-house benefit salary packaging fact sheet (FBT exempt benefit item)* (1 February 2013).
37. State of Queensland Department of Housing and Public Works *Salary Packaging Information Booklet* (October 2014).
38. TR 2007/12, at [123]–[129] (example 13).

39. FBTAA, s 47(6).
40. ATO ID 2009/140 Exempt benefits: free travel on bus — private use.
41. Also see CR 2014/26: Fringe benefits tax: employer clients of Universal Gift Card Pty Ltd who make use of Universal Gift Card Pty Ltd's Minor expenses card.
42. ATO ID 2008/127: Exempt Benefits: work related items — primarily for use in the employee's employment.
43. In a recent focus group conducted by the author, only one of the 22 employers present did not provide changing facilities and that employer was planning to provide them following a removal to new premises.
44. For example, Ride2Work day is held annually in October.
45. TR 97/17: Income tax and fringe benefits tax: entertainment by way of food or drink.
46. Above, n 45, at [113]–[114] in relation to a light breakfast provided at a Continuing Professional Development event.