29 January 2021

The Hon. Josh Frydenberg MP

Treasurer

House of Representatives

Parliament House

PO Box 6022

CANBERRA ACT 2600

By email: [josh.frydenberg.mp@aph.gov.au](mailto:josh.frydenberg.mp@aph.gov.au); [prebudgetsubs@treasury.gov.au](mailto:prebudgetsubs@treasury.gov.au)

Dear Treasurer,

**2021-22 Pre-Budget Submission**

The Corporate Tax Association (**CTA**) welcomes the opportunity to make a submission in relation to the upcoming 2021-22 Federal Budget.

The CTA is the key representative body representing 131 major companies in Australia on corporate tax issues and is a united voice for the collective view of the large corporates we represent in advocating for a better corporate tax system in Australia. A list of CTA members is attached as Appendix 1. Further information about the CTA can be found on our website at [www.corptax.com.au](http://www.corptax.com.au).

We firstly commend the Government for the fiscal and other initiatives it has undertaken in response to the COVID-19 pandemic, in particular the temporary JobKeeper and full expensing measures and the more permanent changes to the tax system including the acceleration of personal income tax changes and the changes to the R&D incentive. In our view, the upcoming budget should continue to build upon some of these changes and focus on improving the domestic and international competitiveness of the Australian tax system more permanently. Whilst in the ideal world this should involve a tax-mix switch, with more reliance placed on consumption-based taxes rather than income tax and a reduction in the headline corporate tax for all businesses, we recognise this is unlikely in the current environment which is primarily focused on recovering from a global pandemic. As such, this submission does not focus on the overdue large scale structural reform of our tax system, but rather a few specific issues that are currently creating uncertainty in the tax system, which we believe require legislative responses, at little revenue cost, namely:

1. the extension of the temporary full expensing measure to 30 June 2024;
2. clarity on the tax treatment of capitalised labour costs; and
3. clarity on FBT and car parking benefits.
4. **Extension of the temporary full expensing (TFE) measure to 30 June 2024**

Whilst recognising the TFE is by its nature temporary, we strongly believe extending the timeframe for the measure has significant merit without a significant cost to the revenue. As designed, the TFE requires capital expenditure on certain assets to be installed ready for use before 30 June 2022 to obtain the benefit of the measure. Whilst this timeframe has still some 18 months to run, in the context of large scale investments, and their acceleration, such a window is relatively short. As a rule, large scale capex projects or capex budgets are set in advance, so the ability to utilise the TFE can be unnecessarily limiting. This, coupled with regulatory approval being needed in some cases, may make the potential benefits of a TFE limited given final investment decisions for large projects take time. As the rules currently operate, they tend to encourage smaller “off the shelf” capital expenditure on plant and equipment (notably sourced from outside Australia), not expenditure on buildings or structural improvements to land or larger capex programs requiring input and labour provided by Australian based operators.

An extension of the TFE to 30 June 2024 would improve the likelihood of larger nation building and Australian based job creating projects being accelerated.

We note the TFE measure is a timing difference on budget outcomes, as the TFE reverses in future years. The “real cost” to the budget is in reality the cost of government borrowing as the TFE winds back over the life of a project.

1. **Treatment of labour costs related to the construction and creation of capital assets**

We strongly suggest the Government consider providing legislative certainty on the circumstances in which labour costs (typically salary and wages) will be deductible where such costs are directly or indirectly related to the construction and creation of capital assets.

Under the general deductibility test in sec 8(1) of the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**), losses and outgoings incurred in a year are generally fully deductible in that year except to the extent the loss or outgoings are of a capital (or private) nature or incurred in generating exempt income. Whilst this test is readily ascertainable for the purchase of a piece of capital equipment, it is not clear that salary and wages costs (including on-costs) incurred in constructing or creating capital assets are deductible or the extent to which they are deductible (as they may require apportionment). It is generally accepted direct labour costs incurred specifically for the construction of a capital asset are of a capital nature, but it is not at all clear whether the cost of those employees indirectly involved in the construction or creation of capital assets are capital in nature, nor whether “on-costs” such as long service leave, annual leave, bereavement leave, payroll tax, safety equipment etc have an essential character of being capital because an employee may have some (tenuous) connection to the construction of a capital asset.

***Background***

The ATO issued draft [*Taxation Ruling TR 2019/D6 Income Tax: application of paragraph 8-1(2)(a) of the Income Tax Assessment Act 1997 to labour costs related to the construction or creation of capital assets*](https://www.ato.gov.au/law/view/pdf/pbr/tr2019-d006.pdf)in late 2019 which sought to provide guidance.[[1]](#footnote-1)

The guidance appears to have stemmed from the ATO reviews of large scale LNG projects with large upfront capital expenditures. Whilst this may be the history behind the draft Ruling, the principles outlined in the draft Ruling have broad application to all industries and taxpayers, both large and small. In essence, the ATO’s view is that labour costs (including on-costs such as long service leave and annual leave) may be required to be capitalised into the costs of construction of assets (and included in the assets’ cost base for depreciation purposes, rather than expensed as incurred) where the labour costs are “incurred specifically for constructing or creating capital assets”. Moreover, this view “is not limited to those involved in the construction work itself but can include the cost of labour for those who perform functions in relation to the construction or creation of capital assets”.[[2]](#footnote-2) The ATO do note that “[N]ot all capital asset labour costs will be regarded as being specifically incurred for constructing or creating capital assets. The cost of workers or employees whose role has a remote connection with the constructing or creating of capital assets, or who have a broader role that involves incidental activities connected with constructing or creating capital assets, will generally not be regarded as …capital or of a capital nature.”

Thus, based on the ATO’s view, whilst the payments received by employees as salary and wages or payments for long service leave and annual leave are assessable to the employee when derived, the costs may take a number of years to become effectively tax deductible by the payer if an employee has some direct or non-remote connection with the construction of an asset. An example is given in the draft Ruling of a supporting team to a capital project (including health and safety staff and human resources staff specifically employed for the construction phase of a capital asset). In such cases, according to the ATO view, the labour and on-costs of such staff should be capitalised and that the amount to be capitalised is to be apportioned on a fair and reasonable basis “using the best information available….including work breakdown structure, time-writing, cost centre allocations, project governance documents, charter of responsibilities, job descriptions, written reports/notes, emails, calendar/diary entries and time sheets”[[3]](#footnote-3).

In our view, regardless of the tax technical merit of the ATO’s view (which we do not agree with) or in fact how a Court may eventually decide the matter, the uncertainty created by the law needs addressing from a policy and compliance perspective. It is noted that this uncertainty does not apply to superannuation contributions which are deductible under section 290-60 of the ITAA97, regardless of whether the employee is working on a capital project or not.

In our view, in principle, certain labour costs, namely salary and wages (but not on-costs), directly related to the construction and creation of capital assets should be capitalised. For example, where an employee is specifically assigned to a capital project for a specific period of their employment, their salary and wages costs could sensibly and easily be capitalised.

However, we consider those not directly engaged in construction or creation of an asset should not be capitalised, but expensed as incurred. The on-costs of those directly engaged in the construction of an asset (such as Annual Leave and Long Service Leave) should also be deductible (e.g. when such leave is taken) as the essential character of such payments relate to discharging liabilities associated with employing someone (when they are not working at all, never mind being on a capital project).

*Suggested solution*

The government should extend the principles of full deductibility for salary and wage costs (and on-costs) regardless of whether an employee is working directly or indirectly on a capital project to equate with rules that apply to superannuation contributions under section 290-60 of the ITAA1997. Deductions would still be denied for expenditure incurred in generating exempt income.

Like the extension of the TFE measure, such changes are of a timing nature, and better reflect the economics of capital projects, by removing some of the economic distortion caused by requiring certain costs to be capitalised and significantly reduces (if not removes) the cost of compliance for all taxpayers.

1. **Clarification of the FBT treatment of certain car parking benefits**

We suggest that the Government provide clarity on the treatment of certain car parking benefits and when such benefits are subject to fringe benefits tax (**FBT**). We note the Government in the 2020-21 Budget announced that it intends from 1 April 2021 to exempt businesses with turnover of less than $50 million from FBT on certain car parking benefits when it increased the small business threshold to $50 million turnover.

Since the handing down of the decision in *FCT v Qantas Airways Ltd* [2014] FCAFC 168*,* there remains an unresolved tension between the findings in the *Qantas* case and the current ‘car parking fringe benefits’ provisions in the *Fringe Benefits Tax Assessment Act 1986* (Cth) and the administration of those provisions per [*Taxation Ruling* *TR 96/26 Fringe Benefits Tax: Car Parking Fringe Benefits*](https://www.ato.gov.au/law/view/document?locid=%27TXR/TR9626/NAT/ATO%27&PiT=20030701000001)(now withdrawn effective 13 November 2019). The ATO has attempted to overcome the tension by issuing draft [*Taxation Ruling TR 2019/D5 Fringe Benefits Tax: Car Parking Benefits*](https://www.ato.gov.au/law/view/document?DocID=DTR/TR2019D5/NAT/ATO/00001) (**TR 2019/D5**). As yet, the issue remains unresolved. In essence, despite the original policy intent that accompanied the introduction of car parking benefits, the Courts felt bound by the words of the legislation, which in effect impose FBT where a non-traditional “commercial car park” is established (such as those provided by a public hospital or shopping centre not part of their ordinary business) within 1 kilometre of employer provided car parking facilities.

Following the outcome of the *Qantas* case, it is unclear when circumstances are such that a commercial parking station arises. It now seems that parking stations, such as those attached to shopping centres, private or public hospitals, universities and airports, which happen to provide all-day parking among other types of parking, may satisfy the definition of a ‘commercial parking station’. These parking stations are generally not located in traditional metropolitan ‘central business districts’ such as the Sydney and Melbourne CBDs. As a general rule, the provision of all-day parking is incidental to the ordinary course of the business of those entities providing car parking facilities (such as a public hospital or shopping centre).

Aside from this, there are additional ‘facilities’ located adjacent to places such as hospitals (eg specialist medical offices and diagnostic centres) and airports (eg freight depots). The presence of the hospital, for example, causes the associated medical facilities and a parking station to be located nearby. The parking station (and the associated medical facilities) would not be located where they are if the hospital was not located there. In the absence of the hospital, it is unlikely this additional infrastructure would be warranted in the location. Similarly, for the airport parking station and freight depots. Further, the parking stations in these locations service more than one facility (ie the parking station services the hospital **and** the specialist medical offices and diagnostic centres). The existence of the additional facilities around the hospital, for example, precipitates the parking station adjacent to the hospital being able to be commercialised by a commercial parking station operator.

Notably, the parking stations near these facilities more often than not are operated by a commercial parking station operator rather than the facility itself (except perhaps for airports).

It is also worth noting that a ‘grey area’ has emerged where the sprawling out of locations such as airports where offsite (often long-term) parking located up to 3 kilometres away from the airport has the impact of extending the scope of coverage of these parking stations to unconnected work locations. Members are aware of FBT liabilities arising for employers who may be located near one of these commercial ‘park & ride’ offsite parking stations where FBT is payable by the employer notwithstanding the perceived separation from the source of the liability. These kinds of parking stations are distinguishable from a parking station located in a CBD where the surrounding retail, commercial and office services would indicate the parking station is being run commercially.

*Original policy intent for the imposition of FBT on car parking benefits*

A policy announcement was made to impose fringe benefits tax on car parking fringe benefits in the 1992-93 Federal Budget, where the then Treasurer, the Hon John Dawkins MP stated[[4]](#footnote-4):

‘As part of the continuing task of making the tax system fairer, from April next year, Fringe Benefits Tax will be applied to valuable car parking facilities - mainly in central business districts - that are provided by employers to their employees.’

The Explanatory Memorandum (**EM**) to the *Taxation Laws Amendment (Car Parking) Bill 1992* (Cth) provided that the purpose of the amendments contained in this Bill was “[T]o impose fringe benefits tax on certain car parking benefits provided to employees and to deny income tax deductibility to employees who incur certain car parking expenses.” In explaining the definition of a ‘commercial parking station’, the EM confirms the word ‘commercial’ has its normal dictionary meaning. Further, a car park not run with a view to making a profit, which was “usually reflected in significantly lower car parking rates charged compared with the normal market value for that facility” would not be commercial. The EM also covers the primary purpose of a car parking facility, with the example used of a shopping centre car park being excluded from being a ‘commercial parking station’ as they used penalty rates to discourage all-day parking, unlike a facility that would encourage all-day parking.

*Suggested solution*

In our view, a fulsome resolution of the tension requires a legislative amendment to restore the policy intent behind the car parking benefits rule. This could be achieved by a restatement of the policy intent behind the circumstances in which the Government intends a valuable car parking fringe benefit to arise, accompanied by any necessary legislative amendments to give effect to that policy intent. The ATO has sought to align the policy intent with Court decisions, but of course is bound by Court deliberations, despite Parliament’s clear intent. To ensure that policy intent is retained and the cost of compliance is reduced, where a traditional commercial car park is within 1 kilometre of an employer who provides parking to employees, FBT could still apply.

Should you have any questions, please do not hesitate to contact Paul Suppree (phone 0408 185 050) or me on 0402 471 973.

Yours sincerely,



Michelle de Niese

Executive Director

Corporate Tax Association

CC: Ms Maryanne Mrakovcic, Deputy Secretary, Revenue Group, Treasury

Mr Bede Fraser, Assistant Secretary, Personal and Small Business Tax Branch, Individuals and Indirect Tax Division, Revenue Group, Treasury

**Appendix 1**

**List of members**

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| --- | --- |
| ***1*** | Acciona |
| ***2*** | AGL |
| ***3*** | Alcoa of Australia Limited |
| ***4*** | Alinta Servco Pty Ltd |
| ***5*** | Allianz Australia Limited |
| ***6*** | Amazon Web Services |
| ***7*** | AMP |
| ***8*** | Anglo American |
| ***9*** | ANZ Banking Corporation |
| ***10*** | API |
| ***11*** | Aurizon Holdings Ltd |
| ***12*** | Australia Post |
| ***13*** | Australian Unity |
| ***14*** | BAE Systems Australia Ltd |
| ***15*** | Baker Hughes |
| ***16*** | Bank of Queensland |
| ***17*** | Barrick Gold |
| ***18*** | Bendigo & Adelaide Bank |
| ***19*** | BHP Billiton |
| ***20*** | BlueScope Steel |
| ***21*** | Boardriders Group |
| ***22*** | BOC Ltd |
| ***23*** | Boral |
| ***24*** | BP Australia |
| ***25*** | Brambles |
| ***26*** | British American Tobacco |
| ***27*** | Brookfield |
| ***28*** | Caltex Australia Limited |
| ***29*** | CBA |
| ***30*** | Chevron Australia Pty Ltd |
| ***31*** | CIMIC |
| ***32*** | Cleanaway |
| ***33*** | Coca-Cola Amatil |
| ***34*** | Cochlear Limited |
| ***35*** | Coffey |
| ***36*** | Coles |
| ***37*** | Computershare |
| ***38*** | ConocoPhillips |
| ***39*** | CSL |
| ***40*** | CSR |
| ***41*** | CUB |
| ***42*** | Downer EDI Limited |
| ***43*** | Domain |
| ***44*** | Dulux Group |
| ***45*** | EBOS Group Ltd |
| ***46*** | Elders Limited |
| ***47*** | Energy Australia |
| ***48*** | Energy Queensland |
| ***49*** | Esso Australia Pty Ltd |
| ***50*** | Fletcher Building Australia |
| ***51*** | Fortescue Metals |
| ***52*** | Frasers |
| ***53*** | GenesisCare |
| ***54*** | George Weston Foods |
| ***55*** | GFG Alliance |
| ***56*** | Glencore |
| ***57*** | Google |
| ***58*** | GrainCorp Limited |
| ***59*** | Hastings Deering |
| ***60*** | HSBC Bank Australia |
| ***61*** | Huawei Technologies |
| ***62*** | Iluka Resources Limited |
| ***63*** | INPEX |
| ***64*** | Insurance Australia Group |
| ***65*** | Jacobs |
| ***66*** | James Hardie |
| ***67*** | Japan (MIMI) |
| ***68*** | Jemena |
| ***69*** | John Holland Group |
| ***70*** | Landmark |
| ***71*** | Latitude Financial Services |
| ***72*** | Lend Lease Corporation |
| ***73*** | Linfox Pty Ltd |
| ***74*** | Link Group |
| ***75*** | Lion |
| ***76*** | Macquarie Bank Limited |
| ***77*** | Mazda Australia |
| ***78*** | Metal Manufactures |
| ***79*** | MMG Ltd |
| ***80*** | National Australia Bank |
| ***81*** | Nestle Australia |
| ***82*** | Newcrest Mining Ltd |
| ***83*** | Newmont Asia Pacific |
| ***84*** | News Ltd |
| ***85*** | nib |
| ***86*** | Nine Entertainment |
| ***87*** | Norske-Skog |
| ***88*** | Nufarm |
| ***89*** | Optiver |
| ***90*** | Orica |
| ***91*** | Origin Energy |
| ***92*** | Osaka Gas |
| ***93*** | Oz Minerals |
| ***94*** | Pacific Hydro |
| ***95*** | Pacific National |
| ***96*** | Pepper Group Ltd |
| ***97*** | Powercor Australia Ltd |
| ***98*** | Qantas |
| ***99*** | QBE Insurance Group |
| ***100*** | REA Group |
| ***101*** | Rheinmetall |
| ***102*** | Rio Tinto |
| ***103*** | SA Power Networks |
| ***104*** | Santos Ltd |
| ***105*** | Scentre Limited |
| ***106*** | Schneider Electric |
| ***107*** | Seek Ltd |
| ***108*** | Shell |
| ***109*** | Sigma Pharmaceuticals |
| ***110*** | SingTel Optus |
| ***111*** | SMEC |
| ***112*** | Snowy Hydro Limited |
| ***113*** | South32 |
| ***114*** | Stockland |
| ***115*** | Suncorp |
| ***116*** | Swisse Wellness |
| ***117*** | Tabcorp Holdings |
| ***118*** | Telstra |
| ***119*** | Thales Australia |
| ***120*** | Toll Holdings Limited |
| ***121*** | Transurban Group |
| ***122*** | Treasury Wine Estates |
| ***123*** | Tyre and Auto |
| ***124*** | Vicinity Centres |
| ***125*** | Village Roadshow Limited |
| ***126*** | Viva Energy |
| ***127*** | Wesfarmers Limited |
| ***128*** | Westpac Banking |
| ***129*** | Woodside Energy Ltd |
| ***130*** | Woolworths Group Limited |
| ***131*** | Zurich |

**Appendix 2.**



1. The CTA jointly with Chartered Accountants Australia and New Zealand, lodged a comprehensive submission raising numerous technical concerns with TR 2019/D6. A copy of our submission, which contains a detailed analysis of the issues, is attached in the Appendix. [↑](#footnote-ref-1)
2. See paragraphs 8 and 9 of the TR 2019/D6 [↑](#footnote-ref-2)
3. See paragraph 33. [↑](#footnote-ref-3)
4. Extract from Hansard of the Second Reading Speech to the *Appropriation Bill (No. 1) 1992-93* (Cth) in the House of Representatives on 18 August 1992 at p60 [↑](#footnote-ref-4)