For some months, we have expressed a hope for early release of the Government's tax plans.

Last week, we had a foretaste, with a mooted return to the past with the proposal that income taxes be levied by the States. Malcom T's proposal was short lived however and appears not to have survived the weekend!

We now know that we have to wait until the Federal Budget on May 3 when the Government will, in addition to usual Budget business , spell out plans for taxation reform. It is looking unlikely there will be any major overhaul. However, we will at least finally get some idea on what the Government is planning.

By the way, given the possible significance of this year's Budget, TaxEd has secured an exclusive discount for TaxEd members to attend TaxBanter's Federal Budget Analysis on May 4. For more information on this webinar please see the training feature below. We will also email TaxEd members a free and comprehensive summary of the Budget (as it impacts the TaxEd membership) on the morning after the Budget.

On more mundane (but still important) topics …

Its 'FBT time' and the March Newsletter has a strong bias on this subject – starting with a list of top 10 tips. Some of you will have already delved into FBT, having participated in TaxEd FBT training sessions over past few weeks. However, there is always more to consider as the questions on FBT keep coming.

This month, we have also included an article on superannuation. The TaxEd team will have more to say on superannuation at the forthcoming webinar on 20 April, so you can hone your knowledge of your organisation's obligations in this area.

Regards

Andrew Orange

TaxEd Team

Salary Packaging – Superannuation is complex – no matter how easy the politicians claim it is!

The constant changes to, and nuances of, the superannuation rules can present a challenge for payroll officers.

A recent question posed to the TaxEd Enquiries team raised nuances in relation to a salary sacrificed contribution for an older worker. The question asked was: Can salary sacrificed superannuation contributions be made for a 78 year-old employee?

The short answer was "**no**" – salary sacrificed contributions cannot be accepted for workers aged over 75.

By way of elaboration:

- Prior to a recent law change, superannuation guarantee support stopped once an employee reached 70. This upper age limit has now been completely abolished – as a result, employers must generally provide superannuation guarantee support for employees aged over 70.
- However it is important to note that once an employee reaches age 75 their superannuation fund can generally only accept the minimum superannuation guarantee contributions (i.e., at the 9.5% rate).

It follows that employers cannot make salary sacrificed contributions for employees aged at least 75, because the fund is not permitted to accept them.

> **EXAMPLE** –
>
> Evelyn, aged 78, is an employee working full-time. As a general rule, her employer is required to make superannuation guarantee contributions for her – even though she is over 75.
>
> Evelyn asks you, as payroll officer, to make extra salary sacrifice contributions. Can this be done?
>
> No, Evelyn's fund cannot accept the additional salary sacrifice contributions. Therefore, her employer should not enter into this arrangement with Evelyn.

Other commonly encountered questions relating to salary sacrifice arrangements include:

- Can termination payments be salary sacrificed into superannuation?
- Can annual and long service leave payments be paid over to superannuation?
- Can superannuation payments be made for a spouse?

Space constraints preclude further comment.

However, these and other practical superannuation issues confronting payroll staff will be considered at an upcoming TaxEd webinar session: Superannuation hot spots for Government and NFP finance and payroll staff – Wednesday 20 April.

Fuel Tax Credits – incidental travel on public roads

In Practical Compliance Guideline 2016/4, the ATO considers guidelines for what is fair and reasonable apportionment of taxable fuel by certain types of vehicles between travel that is on public roads and on non-public roads.

The type of vehicles are:

- Grader
- Backhoe loader
- Front-end loader
- Wheeled excavator
- Forklift
- Wheeled bulldozer
- Fertiliser spreader
- Combine Harvester
- Tractor

PCG 2016/4 accepts that travel on public roads in the above vehicles is no more than incidental to their off-road purpose. Accordingly, no apportionment is required for travel on public roads.

PCG 2016/4 is stated to apply to tax periods ending on or after 31 March 2016.

PCG 2016/4 includes the following useful example:

> **Example 2** - travel by a tractor
>
> 10. XYZ Council uses a tractor that is less than 4.5 tonnes that has mower and slasher attachments to maintain the grass on the parks, recreational ovals and school grounds in the council area. The tractor is housed at the council's vehicle depot.
>
> 11. The tractor travels from the depot to the various parks, ovals and school grounds for the purpose of maintaining the grass. The distance travelled varies depending on the location of the park, oval or school and whether the vehicle is travelling directly from the depot to each location or between these locations.
>
> 12. The tractor is not a vehicle for transporting goods or passengers; its main use is to pull and operate the mowing and slashing equipment.
>
> 13. For practical compliance purposes, it is accepted that all of the vehicle's travel is on non-public road areas. This is irrespective of whether the travel is from the depot to each location or between the locations.

Something all persons applying tax laws should know about – Law Companion Guidelines

The ATO is issuing a new series of taxation rulings - 'Law Companion Guidelines' **(LCGs)**.

The purpose of these Guidelines is outlined in a draft document LCG 2015/D1. (The draft was issued on 10 March 2016 is open for comment until 8 April 2016.) Over the past few months, the ATO has been issuing draft LCGs to accompany new tax Bills. It is welcome that LCG 2015/D1 describes the status and function of these and future LCGs.

What are LCGs?

Essentially, an LCG is intended to explain how the tax law to which it relates will be applied by the ATO. LCGs will be issued as an intrinsic part of the legislative process, so that a finalised version will be available at the time a taxation Bill becomes law.

When a Bill is introduced into the Commonwealth Parliament, it will invariably be accompanied by issue of an Explanatory Memorandum (EM). Basically, an EM sets out the purposes that the Bill is seeking to achieve and explains the key provisions of the Bill. EMs often include examples which illustrate the meaning/interpretation of the Bill provisions.

However, EMs do not outline how the Bill will be applied by the administering government department. As LCG 2015/D1 notes:

> '8. The purpose of a Guideline is to provide an insight into the practical implications or detail of recently enacted law in ways that may go beyond mere questions of interpretation.'
>
> '12. The content in a Guideline is usually prepared contemporaneously with the development of the policy and the drafting of the Bill and Explanatory Memorandum. Typically, the ATO consults with Treasury and industry throughout this process, and often this continues after introduction. In this way, a Guideline will often represent the considered views of the Commissioner that reflect a common understanding of the intended policy and the compliance realities facing taxpayers at the very time that the law itself is shaped.
>
> 13. The draft Guideline, the Bill and the Explanatory Memorandum will typically form a package that sets out what the new measure will mean in practice for affected taxpayers.'

The LCG further notes:

> '10. For example, a Guideline may:
>
> - set out the Commissioner's view on the meaning of an expression or concept in the new law;
> - set out practical examples of how the new law will or will not apply;
> - identify factors we may use to assess the risk of certain activities or transactions not being compliant with the new law, and examples of high and low risk scenarios;
> - contain general information about the new law and our approach to it, such as links to other useful material, and what we are planning to do to implement the new law and foster willing compliance;
> - address practical considerations, such as documentation requirements and how they can be met;
> - explain how the new law interacts with existing tax law;
> - note issues that might emerge in the future.'

Why are LCGs important?

LCGs (or in some cases parts of LCGs) will have the status of ATO public rulings.

As a result, taxpayers who act within the LCG (or, as the case may be, the relevant parts) will be protected for underpaid tax, penalties and interest, if the LCG/relevant part does 'not correctly state how a relevant provision' applies to the taxpayer.

However, taxpayers need to 'rely on … [the LCG/relevant part] in good faith' in order to obtain this protection. LCG 2015/D1 illustrates this requirement with examples.

Need to monitor LCGs for changes and to check for further rulings

LCGs are intended to provide immediate guidance. In the past, the ATO has often not issued public rulings for some considerable time following enactment of legislation, leaving taxpayers without interim guidance.

The early issue of LCGs might be thought to make subsequent change a likely eventuality. LCG 2015/D1 observes that:

> '38. Guidelines are intended to be stable public rulings that illustrate the principles expressed in the new law (and as explained in the Explanatory Memorandum) as understood at the time that new law was being developed.'
>
> '40. Where a statement in a Guideline is later found to be incorrect, that part of the Guideline may be withdrawn or amended. Where the change is less favourable to taxpayers, this would usually be done with prospective effect only.'

In any event, LCGs do not remove a need for further rulings as circumstances needing clarification emerge.

Changes to Work Practices?

It is envisaged that LCGs will provide immediate assistance in identifying practical tax law implications. They are expected to contribute to understanding tax law, albeit that courts are not compelled to consider their content.

An LCG is likely to be useful when a person confronted with newly enacted legislation and should be compulsory reading. However, LCGs should also be a valuable first point of reference for persons needing quickly to develop an understanding of legislation that, while in existence for some time, has only recently become relevant to their work.

It is important to recognise that LCGs are not exclusive one-time statements of the ATO's views. It will be necessary to monitor changes in LCGs (albeit that they are primarily intended to be stable) and to check for later public rulings and other ATO materials.

FBT – FBT 2015/16: The top 10 tips for getting your FBT right

As the FBT return lodgement deadline looms it is time for the often thankless but nevertheless significant task of preparing the FBT return. We provide some tips below that may assist and have provided plenty of helpful links to the ATO website. Good luck!

1. **2015/16 FBT rates**: Might sound obvious but … the FBT rate, FBT rebate rate, Type 1 and Type 2 gross-up rates and capping thresholds for exempt and rebateable employers have all changed for 2015/16. Make sure you are using the right rates in all calculations, spreadsheets, employee communications etc. Click here to access 2015/16 rates.
2. **Work horse vehicles**: Where potentially FBT exempt work horse vehicles have been provided to staff, has private use been limited to home-work travel and other private travel that is minor, infrequent and irregular? If not, no FBT exemption applies. The ATO has recently announced it is considering whether further guidance is needed around what constitutes 'minor, infrequent and irregular private use'. This follows recent press raising concerns with compliance issues in this area. There may be some developments in this area coming in 2016/17!!
3. **Grossing Up issues**: Get your Type 1 and Type 2 benefits correct and apply the appropriate gross-up rate. Type 1 is where a GST input tax credit is available. Type 2 is where no GST input tax credit is available. Watch out for GST on entertainment expenses if you are FBT exempt under section 57A.
4. **After tax employee contributions**: Where employees make after-tax contributions towards the fringe benefits they receive, have you:
    a. applied the contribution to reduce the taxable value of benefits to which they relate?
    b. accounted for GST on 1/11th of the contribution if it is made directly by the employee to the employer and where the benefit type is subject to GST (e.g. use of a car as opposed to a contribution for use of residential premises)?
5. **Minimising FBT payable:**
    a. Cars:
        i. Where the operating cost method produces a lower FBT liability, it should be used. Log books should be completed to allow a comparison of the operating cost method and the statutory formula method. The statutory formula method is the default valuation method in respect of a car fringe benefit unless the employer chooses otherwise.
        ii. After-tax employee contributions can reduce taxable value and provide a better outcome for employer and employee – have you considered this?
        iii. Check that cars which have been held for more than four FBT years have had the 1/3rd reduction made to their cost base (if using statutory formula method).
    b. Entertainment:
        i. What valuation method (meal entertainment or actual expenditure) produces the best FBT outcome for your business? Have you compared outcomes? Remember when using the actual expenditure method the minor benefits and property

consumed on employer premises exemption are available (except for tax exempt employers).

ii. Have you correctly identified what is entertainment as regards:

1. Sustenance v entertainment;
2. Working meetings v entertainment; and
3. Entertainment exemptions that may apply.

c. Car Parking Fringe Benefits:

i. Have you correctly determined whether a commercial car park exists within a 1 km radius of the entrance of the car park where you provide employee parking, where the lowest all day parking rate at such commercial car park exceeds the $8.37 2015/16 car parking threshold? In particular, have you computed the lowest all day parking rate by identifying whether any periodic car parking rates (i.e. annual car parking fees) are above the threshold once you divide by business days?

ii. Have you used the most favourable valuation approach to determining how many car parking fringe benefits you have and the valuation thereof? The 12 week register method may most accurately determine how many benefits exist.

iii. Have you taken advantage of exemptions?

6. **Reportable Fringe Benefits**: Where an employee has received fringe benefits (other than excluded benefits) with an aggregate taxable value of more than $2,000 for the FBT year the grossed up amount must be reported on the employee's Payment Summary (note: the Type 2 gross up rate applies). Certain employers (section 57A exempt employers and section 58 employers) are required to include 'quasi' fringe benefits as Reportable Fringe Benefits – these benefits are exempt from FBT but are still reportable!

7. **What value to use?** Make sure when determining the taxable value of fringe benefits provided that the GST-inclusive cost (where applicable) of providing the benefit is always used.

8. **In-house benefits**: If providing in-house benefits, have you applied your $1,000 per employee reduction?

9. **Declarations** Obtain all necessary FBT declarations from employees before lodgement of the FBT return to support positions taken re things like otherwise deductible amounts, LAFHA, remote area concessions etc.

10. **FBT changes coming for 2016/17?**

a. Changes that are effective for the for 2016/7 FBT year:

i. Salary Packaged Meal Entertainment changes:

1. Salary packaged meal entertainment ceases to be an excluded fringe benefit for Reportable Fringe Benefits Tax Purposes (i.e. it now counts in determining whether an employee has received more than $2,000 in taxable value of fringe benefits).

2. A new $5,000 grossed-up cap exists for meal entertainment provided by section 57A exempt employers and section 65J rebateable employers (note – this is in addition to existing caps).
3. Certain valuation methods previously available for salary packaged meal entertainment are discontinued (i.e. 50/50 and 12 week register).

ii. The salary packaged meal entertainment changes are effective 1 April 2016 and apply to the 2016/17 FBT year. The changes are conveniently summarised in the December 2015 TaxEd newsletter article Salary Packaging – Entertainment benefits to be amended.

FBT – The distinction between a volunteer and an employee for FBT purposes

A school enters into an agreement to allow an individual to park their caravan on school grounds and use school facilities, in return for undertaking caretaker duties. There is no payment of salary or wages.

The benefits include:

1. caravan site on school grounds;
2. connection to the school's electricity supply;
3. connection to the school's water supply;
4. access to the school's amenity block; and
5. access to the school's phone.

In some cases the school may provide accommodation located on the school grounds.

The terms of the agreement sets out a list of duties the caretaker is required to undertake and does not allow the caretaker to engage someone else to undertake the duties.

The ATO recently considered this question in the FBT States and Industry Partnership meeting held in November 2015. The ATO responded that for the benefits to be a fringe benefit, the caretaker must be an employee. Generally, a volunteer will not be an employee and therefore benefits provided to volunteers do not attract FBT.

Guidance for determining whether a benefit provided to an individual will not be a fringe benefit on the basis of the person being a volunteer is provided on the ATO website at http://www.ato.gov.au/non-profit/your-workers/volunteers/.

The website in the section headed 'Paying volunteers' states:

> A payment that is not assessable to a volunteer will have many of the following characteristics:
>
> - The payment is to meet incurred or anticipated expenses.
> - The payment has no connection to the volunteer's income-producing activities or services.
> - The payment is not received as remuneration or as a consequence of employment.
> - The payment is not relied upon or expected by the volunteer for day-to-day living.
> - The payment is not legally required or expected.
> - There is no obligation on the part of your organisation to make the payment.
> - The payment is a token amount compared to the services provided or expenses incurred by the volunteer. Whether the payment is token depends on the full facts surrounding the payment and volunteer's circumstances.

It provides the following examples in the section headed Volunteers and FBT:

> Qiaoli volunteers her time with an environmental group planting trees along waterways. While planting in country areas she is provided with accommodation and basic meals. Qiaoli is not considered to be an employee and no FBT will arise on these benefits.
>
> Jorge provides his services to the local volunteer bushfire brigade. He is reimbursed for travel and other minor expenses he incurs in carrying out his duties. Jorge is not considered to be an employee

as the reimbursement he receives does not amount to salary or wages. No FBT will arise on these reimbursements.

The ATO concludes that in applying these examples to the facts provided in relation to the school caretaker, the benefits listed are unlikely to be fringe benefits as the situation described appears to be similar to the situation of Qiaoli in the above example.

FBT – The taxi exemption and Uber

Section 58Z of the *FBT Act* provides an exemption for taxi travel by an employee to /from work or a trip required because of sickness or injury to the employee.

A taxi is defined in the *FBT Act* as 'a motor vehicle that is licenced to operate as a taxi'.

In the recent FBT States & Territories Industry Partnership minutes (meeting date 6 November 2015) the ATO has confirmed its position that a ride-sourcing service may not be a taxi for the purposes of the section 58Z exemption!

The ATO express the view the section 58Z exemption is limited to travel in a taxi which requires the vehicle to be licensed to operate as a taxi within a particular State or Territory. As it may be the case the relevant State or Territory law will define a taxi licence in terms of a vehicle that plies or stands for hire (including taking pre-bookings) as opposed to a vehicle that takes pre-bookings to procure passengers, the ATO takes the view ride-sourcing vehicles are not within the exemption.

This is a really interesting point of delineation which is further complicated given the GST definition of taxi travel services does not turn on whether the vehicle is licensed to operate as a taxi and hence the ATO require drivers of ride-sourcing vehicles to register for GST regardless of turnover.

Some obvious practical issues are created based on the ATO view regarding what information employees must submit when seeking reimbursement of taxi journeys vs ride-sourcing journeys.

Payroll – PAYGW Variations

The ATO has renewed PAYGW variations that provide a nil PAYGW withholding rate (and no Payment Summary) is required for certain payments related to:

- directors/office holders etc. who are required to pay the monies received to their employer; and
- indigenous artists who do not provide an ABN.

Payments made to a person who acts as director etc. and who is required to pay the monies to their employer.

The variation applies to a payment to an individual (who is a partner in a partnership, or a director or employee of another entity) appointed as:

- a director;
- a member of a committee of management of a company, or
- or an office holder;

who is required to pay those payments to the entity of which they are a partner, director or employee.

The variation contains the following helpful example.

> ' … [A] medical research entity contracts a hospital for a specialised medical practitioner to join its board to manage a medical research project. The hospital provides a specialised medical practitioner as its representative to join the board. The medical research entity makes payments to the specialised medical practitioner who is required, under his contract with the hospital, to pass those payments on to the hospital. Although the payments are for the services of the specialised medical practitioner, the medical research entity is not required to:
>
> - withhold from these payments, and
> - issue a payment summary to the specialised medical practitioner.'

The full variation can be viewed here.

Payments to indigenous artists who do not provide an ABN

The ATO has extended a PAYGW variation that varies withholding to nil (and no Payment Summary is required) where a payment is made to an indigenous artist for artistic works where the artist:

- works or lives in Zone A (ordinary or special);and
- does not quote an ABN.

Artistic work includes:

- painting; and
- performance or presentation by a person (or participation in) a dance, or similar nature of a cultural activity.

The full variation can be viewed here.

FBT Q&A – Does the eligible seminar exclusion for meal entertainment apply where the 50-50 method to value meal entertainment is chosen?

Question:

We are an income tax exempt entity but taxable for FBT purposes. We calculate our meal entertainment benefits based on the 50/50 split method.

If our staff were to attend eligible seminars (that run for more than 4 hours) which includes a sit down lunch that constitutes meal entertainment, are we required to include the portion of the seminar cost relating to the meal in our total meal entertainment spend if we use the 50/50 method?

Answer:

Yes.

Where the 50/50 method is chosen all meal entertainment is required to be added up (including meal entertainment provided to non-employees and their associates) prior to the 50% reduction being applied.

Where a sit down lunch is provided as an incident of attending an eligible seminar, the question to be asked is whether or not the meal provided constitutes meal entertainment? If the answer to this question is, yes, then the cost of the meal would be required to be included for the purpose of the 50/50 calculation.

If you were using the actual expenditure method, the cost of meal entertainment provided in conjunction with an eligible seminar is generally considered to be otherwise deductible such that no FBT arises.

The ATO generally regard morning and afternoon tea and light meals as not constituting meal entertainment. As to where the line in the sand is for a light meal to become entertainment, no one really knows. However, a sit down meal featuring 2 or more courses is likely to be viewed by the ATO as something more than sustenance, especially if alcohol is also provided.

Refer to Taxation Rulings IT 2675 and particularly TR 97/17 for examples involving eligible seminars. Also Taxation Determination TD 93/195.

FBT Q&A – Will a waiver of overpaid salary always result in a debt waiver fringe benefit where the debt exceeds the minor benefit threshold?

Question:

Will a waiver of overpaid salary always result in a debt waiver fringe benefit where the debt exceeds the minor benefit threshold?

Answer:

Taxation Determination TD 2008/11 states that where an employer mistakenly pays to their employee an amount that the employee is not legally entitled to, but is obliged to repay, the employer's subsequent waiver of that obligation constitutes a debt waiver benefit provided by the employer to the employee at the time of the waiver.

This is on the basis the decision is made in respect of the employee's employment.

Guidance for considering whether a debt waiver is in respect of employment is provided in paragraphs 10 to 12 of TD 2008/11 which state:

> 10. Unless there are facts indicating a contrary conclusion (such as some capacity other than as employee in respect of which the benefit was provided by the employer to their employee), the debt waiver benefit taken under section 14 to be provided by the employer to the employee in the circumstances that are the subject of this ruling is likely to possess a 'sufficient or material' connection with the employee's employment and is therefore considered to be a benefit provided by the employer to the employee 'in respect of the employment of the employee'. However, whether this is the case is a question of fact to be decided on the circumstances of each case.
>
> 11. Facts that may indicate such a contrary conclusion would include where the employee's obligation to repay the amount of the payment made by mistake is waived because it is a bad debt (for example, the amount cannot be recovered because the employee has no assets) rather than by reason of the employment relationship. That fact could be established by showing that reasonable efforts were made to recover the amount from the employee but that was unsuccessful and that the waiver was in line with the employer's policy in relation to the waiver of bad debts owing by non-employees.
>
> 12. Other facts that may also indicate a contrary conclusion would include where the employee's obligation to repay the amount of the payment made by mistake is waived because it is uneconomic to recover the amount from the employee. That fact could be established by showing that the employer adheres to a policy of not pursuing any debts owed to it that are below a certain amount (because the employer has reasonably assessed that it is uneconomic for them to do so) and that the waiver of the employee's obligation to repay the amount of the payment made by mistake occurs under that policy, rather than by reason of the employment relationship. Such a policy would have to apply to all debts owed to it, not only debts owed by employees.

Based on the above paragraphs it is clear that where the overpaid salary is considered a bad debt or is considered uneconomical to recover, a subsequent waiver will not result in a debt waiver fringe benefit arising.

Payroll Q&A – Cents per KM reimbursements

Question:

We have just discovered we have been paying cents per km business reimbursements at above the ATO approved rate of 66 cents per km but not deducting any PAYGW – what should we do?

Answer:

Effective 1 July 2015 the ATO adopted a single approved cents per km business reimbursement rate of 66 cents.

We have covered this issue in our recent newsletter – click here to see the general rules regarding the single approved rate of 66 cents per km and the withholding obligations that apply effective 1 July 2015.

Where you have been paying a cents per km rate in excess of the 66 cents per km rate and not withholding PAYGW as required, you are not required to re-visit and correct. The law in this area only imposes a penalty for failing to correctly withhold and in this transitional year it would not appear to us the ATO will consider penalties in these circumstances.

What you should immediately do is implement the correct withholding for future payments and consider whether additional withholding is required from payments to employees who may find they have an unexpected tax liability at year end because not enough tax has been withheld.