

**Ezybite Pty Ltd**

Level 3, 44 Market Street  
Sydney NSW 2000

Tel: +61 2 8295 2900  
Fax: +61 2 8295 2905

[www.accorservices.com.au](http://www.accorservices.com.au)

EzyBite Pty Ltd  
ABN 64 115 852 349

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The Secretary  
Senate Standing Committee on Economics  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Secretary

**Submission on the Tax Laws Amendment (Budget measures) Bill 2008**

We refer to the Committee's Inquiry into the above Bill.

Our submission which is attached concerns one measure in the Bill. This is the measure changing fringe benefits tax as it applies to 'meal card arrangements'.

For more information please contact me on 0417779703 or Mr Vishal Beri, Director, Aegis Consulting Australia on 0407992633.

Yours sincerely

Thomas Beurthey  
**Managing Director**

**SUBMISSION TO THE SENATE STANDING COMMITTEE ON  
ECONOMICS FROM ACCOR SERVICES ON THE TAX LAWS  
AMENDMENT (BUDGET MEASURES) BILL 2008**

**WHY THE SENATE SHOULD AMEND THE BILL TO PROVIDE  
AN EXPLICIT PROVISION FOR SALARY SACRIFICING FOR  
SUSTENANCE OR LIGHT MEALS PURCHASED AND  
CONSUMED AT WORK**

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## 1. EXECUTIVE SUMMARY

This submission concerns the Tax Laws Amendment (Budget Measures) Bill 2008 and its removal of the Fringe Benefits Tax (FBT) exemption for sustenance (light meals like sandwiches) purchased and consumed at work.

The submission urges the Senate Standing Committee on Economics to amend the Bill to allow employees to salary sacrifice to purchase and consume sustenance (light meals) at work.

For many years the Australian Tax Office has interpreted section 41 of the Fringe Benefits Tax Administration Act (FBTAA) as being broad enough to permit salary sacrificing for sustenance purchased and consumed at work. Sustenance is distinct from tax breaks provided for 'meal entertainment'.

While sustenance must be work related and by its nature constitutes meals like sandwiches and salads that workers need to keep productive during the day, 'meal entertainment' includes restaurant meals and alcohol and dining out that are not work related.

The Government's Bill may seek to close a perceived 'loophole' where employees using the salary sacrificed benefit leave their workplaces to purchase a sandwich from a food vendor and return to work to consume it. This may not be within the intention of section 41 of the FBTAA which indicates that sustenance must be purchased and consumed at an employer's business premises.

However in seeking to close this perceived 'loophole' the Government has removed the sustenance benefit for employees who were legitimately using on-line systems to order and purchase their lunch remotely from a range of vendors. This is the kind of system provided by EzyBite, a company owned by Accor Services.

Accordingly we propose that the Senate Committee rectify this adverse impact on legitimate users of the sustenance benefit by allowing the benefit where it is provided by means (such as on-line systems) that prevent its misuse.

There are a range of reasons why we believe the Senate Committee should support such an amendment and these are detailed in this submission. In summary the reasons can be grouped into two categories. These are:

- The positive benefits of substance for employees, employers and food vendors; and
- The poor public policy outcomes generated by the Bill.

In relation to the positive benefits for employees, employers and food vendors, key issues are as follows:

- **Salary sacrificing for sustenance is proven to assist employees' budget and save** for lunch which is a valuable outcome as living costs rise.
- **Salary sacrificing for lunch is predominately used by busy ordinary workers who have limited lunch breaks.** This can be any worker in an

organisation regardless of income. The capacity to rely on the sustenance benefit gives workers surety of lunch and avoids the risk that they will skip meals because of time constraints in purchasing lunch outside. This supports the health and well being of workers. Many workers, particularly those with children in care, choose to work through lunch breaks to take advantage of flexible working hours that permit them to leave early. For these workers sustenance is an ideal way to ensure they have lunch and on-line systems give them a choice of food.

- **The sustenance benefit is not a perk for the high income earner.** Of the 30 000 employees using the sustenance benefit industry surveys demonstrate that over 60% are in the 30% tax bracket. Industry data shows that 60% are female single or second earners in families and over 70% work in the manufacturing, hospitality, health and insurance industries. These are 'working families' within the definition adopted by the Government. The Government's illustrative examples in the Explanatory Memorandum on the Bill to do not reflect real life situations and are contrived to show extreme situations more akin to 'meal entertainment', which is a completely distinct benefit to sustenance. The Government has retained tax breaks for meal entertainment.
- **Employees want and employers choose to offer the sustenance benefit because it is available to and used by all employees within a company.** This is not the case with most other employee benefits that are FBT free, such as cars and workplace childcare.
- **The sustenance benefit is available at any location that an employer may operate whether or not they have a canteen.** It equalises tax breaks for work related meals between those employees who have access to a canteen and those that do not. The bulk of employers offering EzyBite to their employees are in non-CBD areas where there are limited, if any, food vendors. The on-line service gives them access to a range of food options.
- **Employers can use the sustenance benefit as an alternative to or in conjunction with an in-house staff canteen and it assists them with staff recruitment and retention.** Employers usually demand healthy food options as part of Ezybite to support the health and well being of their staff.
- Contrary to the views expressed by the Treasurer in his second reading speech, the provision of the **sustenance benefit actually promotes competition amongst food vendors** and reduces the stranglehold that café's in the bottom of buildings tend to have on time poor employees seeking a quick take away lunch. The choice of food vendors offered through the EzyBite system is made following a survey of the needs and wants of employees and employers at each workplace.

We strongly encourage the Committee to carefully consider the views of ordinary employees, employers and café owners which we have attached to this submission at **Attachment A, B and C**. Their views support all of the above points and more.

With respect to the inferior public policy outcomes created by the Bill the key issues are as follows:

- **The business activity that has developed around the provision and use of the sustenance benefit has occurred on the basis of private rulings from the Australian Tax Office** that supported salary sacrificing for light meals

purchased and consumed at work. It seems contrary to good administration for the Government to dictate an end to this activity without consultation with industry to understand how the market operates and why the ATO does not consider sustenance to be a 'loophole' or some form of tax avoidance.

- **The Bill creates rather than resolves inequity in the tax treatment of various meal benefits.** Although the Government has removed the FBT exemption for sustenance that about 30 000 employees use, it has retained the tax breaks for salary sacrificing for meal entertainment (a 50% FBT rate that only high income earners can afford to pay on top of meals), tax breaks for canteens (300 000 employees can access a staff canteen), and tax breaks that permit health and charity workers to salary sacrifice up to \$30 000 and \$17 000 respectively free of FBT. See **Attachment D** to this submission for more detail.
- **The Bill creates inequity in the tax treatment of sustenance and other non-meal benefits.** It does not appreciate that amongst all employee benefits receiving concessional tax treatment (like childcare and cars) only the sustenance benefit was available to all employees, regardless of income level, seniority and personal circumstances, and was guaranteed to be used at work to support an employee's productive capacity.
- **Treasury's savings estimates are not realistic.** While Treasury has estimated that the measure in the Bill will save \$730 million over 4 years (\$100 million in 2008/09) the sustenance industry as a whole has a turnover of only \$36 million, which would cost the Budget less than \$15 million in 2008/09. This is because there are only about 30 000 users of the sustenance benefit and they salary sacrifice on average \$100 per month. If Treasury's 4<sup>th</sup> year estimated saving of \$250 million is to be believed the number of users of sustenance (based on the current average amount being salary sacrificed per year) would need to grow by 102% every year for the next 4 years. This is impossible for any industry.
- **Treasury's savings estimates are not based on industry consultation and data.** In evidence to the Senate Committee on 20 June we understand that Treasury indicated that its savings were based on FBT receipts and extrapolations from that. It is not clear whether the FBT receipts it relied on were for general items or meal entertainment. Nevertheless it could not be based on the actual use of sustenance because this benefit is a non-reportable fringe benefit and therefore Treasury would have no data on it. Accordingly it is clear that Treasury has based a \$730M savings measure on a less than robust process of estimation that has no connection to the actual business activity the measure is seeking to put an end to.

On all these grounds we urge the Committee to amend the Bill to provide for a sustenance benefit delivered in a way that prevents abuse of the kind that Treasury may be concerned about. Those delivery mechanisms, such as on-line systems, already exist in the market.

## **2. INTRODUCTION TO ACCOR SERVICES AND EZYBITE**

### **2.1 Accor Services**

Accor Services is one part of the International Accor Group.

The **Accor Group** was created in 1967. It operates in 140 countries, has over 168 500 employees worldwide, and is listed on the French Stock Exchange.

The Accor Group has two core businesses, Accor Services and Accor Hotels, the 4<sup>th</sup> largest hotel company in the world and the largest in Australia.

**Accor Services**, is the European leader and worldwide provider of payment system services for the delivery of government subsidies and employee benefits such as paper and electronic voucher, card, web, telephone and other systems.

Employee benefits that its systems manage and deliver include childcare, meal benefits, dry cleaning, carer benefits, fleet management, employee expenses.

It operates in 40 countries across 5 continents, including Australia. In summary:

- 370 000 government agencies and private companies contract Accor Services worldwide to deliver benefits and subsidies.
- 25 million people use the benefits Acor Services delivers every day.
- Accor Services has created an international network of over 1 million independent goods and services providers where employee benefits and government subsidies can be used.

The government subsidies and employee benefits that Accor Services systems are designed to support are linked or quarantined to the purchase of items for which the subsidies or benefits are being provided. For example a meal benefit must be used to buy a meal and cannot be converted to cash.

### **2.2 EzyBite**

#### **2.2.1 Why EzyBite is Distinct From So Called Meal Card Arrangements**

In 2006 Accor Services created EzyBite for the Australian market to support salary sacrificing for sustenance (light meals) that employees wanted to use and employers wanted to offer their staff.

By joining the EzyBite Program staff can “salary sacrifice” and use their pre-tax dollars to purchase “light meals, drinks and snacks” (excluding alcohol). The food must be delivered to the employee at the premises of the employer and consumed during ordinary work hours or overtime to be FBT exempt.

Staff nominate a portion of their salary to be allocated to the program and this amount is deducted from their pre-tax salary each pay cycle, prior to consumption of the benefit.

Section 41 of the Fringe Benefits Tax Amendment Act (FBTAA) permits the provision of a sustenance benefit where it was purchased and consumed at work.

As a result EzyBite was delivered in two ways:

- Employees could use an on-line system to select and purchase food from a range of vendors and have those meals delivered to work.
- Employees could use a card in an in-house staff canteen.

EzyBite did not enable employees to walk to a café across from their business premises, purchase food and consume it at their place of work. This activity is not supported by section 41 of the FBTAA.

Employees using the EzyBite service were required to formerly agree to the conditions that meals consumed through the EzyBite Program will be provided for the purpose of refreshment; will be light meals excluding alcohol; will be provided at the business premises of their employer and will be consumed during ordinary working hours or overtime hours.

If illegal activity is the focus of the Government's decision to remove the FBT exemption for salary sacrificing under so called 'meal card' arrangements then it is prudent.

However the nature of the Government's amendment also removes the capacity of workers to salary sacrifice for 'sustenance' that is permitted under section 41 of the FBTAA in the legal ways offered by EzyBite.

As a result the Government, while intending to tackle one form of possible abuse of the law, has removed a legitimate benefit that was not being abused. Accordingly we **recommend** that the Committee amend the Tax Laws Amendment (Budget Measures) Bill to enable salary sacrificing for sustenance delivered in legitimate ways.

### 3. WHY THE SENATE SHOULD SUPPORT AN AMENDMENT

There are four main reasons why we urge the Senate to amend the Tax Laws Amendment (Budget Measures) Bill 2008 to enable salary sacrificing for sustenance purchased and consumed at work. These are:

- The positive benefits for employees and employers, such as financial savings, health and well being and staff retention
- The positive benefits for the café and food vendor industry
- The fact that it is predominantly ordinary low-middle income workers who have been using the sustenance benefit (it is not a rich person's perk)
- The unfairness of removing the FBT exemption for sustenance when business activity has developed around it on the basis of the Australian Tax Office approval
- The inequity of removing the FBT exemption for sustenance but retaining tax breaks for meal entertainment that is not work related
- The fact that Treasury's estimated savings of \$730M over 4 years from the measure cannot be realised from the sustenance benefit which cost the Budget only about \$15 million in 2008/09.



### **3.1 The Positive Benefits for Employees, Employers and Food Vendors**

#### **3.1.1 Benefits for Employees**

Salary packaging for sustenance is:

- Available to and able to be used by all employees within a company, unlike most other employee benefits that are FBT free, such as cars and workplace childcare
- Available at any location that an employer may operate whether or not they have a canteen
- Non discriminatory to income earners, regardless of whether there is a staff cafeteria or not and regardless of income and tax rate

Lunch costs are the same for all employees regardless of income. A lower income earner spends a greater proportion of salary on lunch compare with a higher income earner when they eat the same meal. Salary packaging for meals at work regains some balance with this as the benefit for packaging food is in fact greater for lower income earners that for higher earners when compared to a percentage of salary.

Most of the 7000 employees using the EzyBite system work in non-CBD areas where food costs are higher. For example, in the Sydney CBD a normal coffee costs an average of \$3.00. In Macquarie Park the same coffee costs an average of \$3.50. Accordingly, a system like EzyBite provides equity in the purchasing power of employees in non-CBD and CBD areas.

Salary sacrificing for meals enables employees to budget for their expenditure on lunch, which is a positive outcome, particularly in an environment of rising living costs.

Many employees who use EzyBite and sustenance benefits in general work in occupations where lunch breaks are short or hard to come by because of work load. This can range from call centre staff to other time intensive professions and occupations. An increasing trend in these situations has been for employees to skip lunch because they do not have the time to leave their place of employment to purchase lunch.

The use of sustenance benefits through EzyBite and more generally ensures that this trend is arrested because employees in these situations can order and purchase their lunch remotely.

There is a broader policy debate about whether employees should be in a position at all of having to skip lunch because of work pressure. On any construction working employees so much that they cannot leave the workplace and are forced to skip lunch is not something that should be encouraged but unfortunately is a feature of the modern workplace. Some may see the sustenance benefit as encouraging this outcome, however in reality the situation arises because of employer practices, not because employees can eat at work. By contrast, the actual effect of the sustenance benefit is to reduce the health and well being risk to employees who have to work through lunch because it gives them the capacity to eat, rather than skip meals.

See **Appendix A** for the **views of ordinary employees** who use the EzyBite sustenance benefit. These views give the Committee a real sense of what average employees think about the Government's decision to remove the FBT exemption for sustenance. Their views demonstrate that the Government does not understand the actual impact of the measure in the market.

### **3.1.2 Benefits for Employers**

Employers want to offer the sustenance benefit because:

- It supports the health and well being of their staff
- It can be provided to all staff regardless of income level
- It can be used as an alternative to or in conjunction with an in-house staff canteen
- It assists with staff recruitment and retention.

See **Appendix B** for the views of employers about the advantages of the sustenance benefit. Also provided is a list of employers who would be happy to be contacted by the Committee for further information on the advantages of the sustenance benefit.

### **3.1.3 Benefits for Café's and Food Vendors**

In his second reading speech on the Bill, the Treasurer stated that the removal of the FBT exemption for 'meal cards' would "promote greater competition between meal providers....because it removes a disincentive for employees to shop around for the best price or quality available for meals."

This is a serious misconception as the opposite is in fact true.

In reality the provision of on-line purchasing, such as that provided by EzyBite, enables employees to access many more food vendors beyond the ones located at the bottom of their buildings or adjacent areas. In most cases café's who regard themselves as having a captured market because of their location in the bottom of a building are unwilling to join the network of food vendors offered to employees through the EzyBite system.

In many cases employers specifically have sought out the EzyBite solution because it enables their employees with limited lunch time to source food from places other than the resident café's who charge more for food and coffees because they regard those employees as a captured market.

Any café can be part of the network of food vendors. The choice of food vendors under the EzyBite system is based on a survey of the wishes and needs of employees and employers. It is their choice that drives the kind of food vendors they want to be able to access.

EzyBite's policy is to include independent local businesses in the network of food vendors available to employees at any one location, rather than chains such as McDonald's. All employers using the EzyBite service demand the inclusion of at least a few healthy food choices for their employees and prohibited junk food chains.

This provides further support for the health and wellbeing of employees and promotes café's offering nutritious food choices.

See **Appendix C** for the views of café's and food vendors who use the EzyBite system. Their views demonstrate that the Government does not understand the actual impact of the measure in the market.

### **3.2 How the Bill Affects Ordinary Workers and Business**

The Government's decision was made without any consultation with business and workers and without any apparent understanding of the negative impacts on lower paid employees.

Of the 7000 employees using EzyBite, over 60% earn annual salaries in the 30% marginal tax bracket, and 60% are female. By the Government's own definition these are truly members of 'working families' as they are low-middle income second or single earners.

EzyBite assists employees across Australia in the manufacturing, hospitality, health, insurance and media sectors. Its clients include Goodman Fielder, Smith's Snack Food Company (PepsiCo), Amway, Sony, the Garvan Institute, AXA and Fairfax.

The majority of EzyBite's clients were companies located in non-CBD suburban areas where the choice of food outlets was limited, and employers wanted to offer all their employees a choice of food vendors on-line, particularly healthy food alternatives.

As recently as March 2008 EzyBite met with Centrelink which wanted to offer all its employees these services. It considered that such services were of particular health and well being benefit to low income call centre staff because they have short lunch breaks, and are often located in areas without food choice. It wanted to apply the benefit as a first stage to its Canberra based employees who were relocating to the outskirts of the CBD. The CEO considered that the EzyBite system enabled his staff to connect with each other during their lunch breaks rather than spend time travelling in separate directions to find food.

#### **3.2.1 The Misleading and Incorrect Examples in the Bill's Explanatory Memorandum**

It is clear from the examples used in the Explanatory Memorandum that the Government has chosen to illustrate scenario's that support the Government's assault on salary sacrificing rather than examples based on how the market actually operates for the benefit of ordinary workers. These examples do not reflect market reality and are also based on incorrect interpretation of and assumptions about the law.

As is evident from the reaction of the Not for Profit sector to the Government's proposed changes to their salary sacrificing arrangements, the Government does not have a grip on the actual impacts of their measures on workers or the business activity in the market. Decisions have been made hastily and possibly based only on the advice of Treasury which is not in tune with the nuances in the market.

#### **The Government's Straw Man Example**

The Explanatory Memorandum illustration at page 13 states that:

*“As an employee, Paul’s income is subject to the top rate of taxation.*

*There is a restaurant on the ground floor of Paul’s employer’s premises. The employer has entered into an arrangement whereby the restaurant provides employees with a ‘swipe card’ (meal card) to purchase meals.*

*Paul’s employer offers a salary sacrifice arrangement to its employees to acquire a ‘meal card’. Paul enters into a salary sacrifice arrangement for \$3,000 with his employer to obtain a meal card. Paul orders his lunch each day (and occasionally dinner) and the restaurant delivers this to his office.*

*The provision of lunch consumed in his office is exempt from FBT under section 41 of the FBTA 1986 so Paul’s employer has no FBT liability on the provision of the benefit.*

*Paul has reduced his tax by \$1,350.*

*Karen, who works in the building across the street, earns the same income as Paul. Karen’s employer, however, does not offer these arrangements. Karen pays \$1,350 more tax than Paul and has to buy her own lunch.”*

This example is incorrect in the following ways:

- Paul used in the Government’s example is subject to the top rate of taxation, but in reality industry surveys prove that over 60% of people using the sustenance benefit are in the 30% tax bracket. Further, the average income for full-time adult total earnings in the public & private sector is \$1,173.50 per week which equates to \$61,022.00 per annum, placing the average Australian worker under the 30% income tax rate (plus 1.5% Medicare levy).<sup>1</sup>
- Paul buys his lunch from a restaurant. Under section 41 of the FBTA, restaurants are not included in meal arrangements under an FBT exempt salary sacrificing arrangement as the “property benefit” only includes providers that offer “light meals, snacks and refreshments – excluding alcohol”. Thus Paul cannot salary sacrifice to purchase from the kind of place the Government suggests.
- Paul salary sacrifices \$3000 for lunch. Prior to the Government’s measure being announced in the Budget there were about 30 000 employees salary sacrificing for the sustenance benefit. Industry data demonstrates that on average they were salary sacrificing \$25 per week or \$1200 per year. Thus the amount that the Government suggests Paul is salary sacrificing is significantly inflated above the norm.
- Paul uses his benefit each day. Industry data proves that on average employees were using their benefit 3 to 4 times per week.
- Paul used his benefit to occasionally purchase dinner. Under the FBTA diner cannot be included in the sustenance benefit unless it is in the normal working hours of the employee.

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<sup>1</sup> Australian Bureau of Statistics document 6302.0 - Average Weekly Earnings, Australia, Feb 2008

- Karen's employer does not offer the same benefits. The fact that this does not occur is not a failure of the law or some inherent inequity in the application of the law or the market, but rather a normal market reality that some employers are faster at offering benefits than others. That however does not mean that Karen's employer can't offer her the same benefit if their commitment to their employee's health and well being is the same as Paul's. If Karen is unhappy that her employer does not offer her the same employee benefits as other employers she has the freedom to change employers. For example, the fact that only a small minority of employers (mostly large corporate employers, such as banks and some government departments) can afford to provide on-site childcare does not seem to prompt the Government to remove the FBT exemption for on-site childcare.

### **Our Real Life Example**

As an employee, John's income is subject to the mid-rate of taxation of 30%\*.

There is an in-house staff cafeteria on the ground floor of John's employer's premises. The employer has entered into an arrangement whereby a third party provider provides a 'swipe card' (meal card) for employees to be able to purchase light meals and snacks from the in-house staff cafeteria.

John's employer offers a salary sacrifice arrangement through a third-party provider to its employees to acquire a 'meal card'. John enters into a salary sacrifice arrangement for \$28 a week to be deducted per pay cycle (totaling \$1,344 per annum) with his employer. John purchases his lunch 4 days a week from the in-house staff cafeteria which comprises of a ham, cheese and tomato sandwich (\$4.80) and a coffee (\$2.20).

The provision of lunch consumed in his office is exempt from FBT under section 41 of the FBTA 1986 so John's employer has no FBT liability on the provision of the benefit.

John has reduced his tax by \$403.20 per annum. John uses the additional income to contribute to his mortgage.

Jane, who works in the building across the street, earns the same income as John. Jane's employer does not offer these arrangements as the company does not have an in-house staff cafeteria.

Jane thought it was a really good idea, and asked her employer to organise the same salary sacrificing arrangement through a third party provider; who can offer the same savings by ordering light meals and snacks online from local cafes and restaurants and having them delivered into the workplace. Jane can now make the same savings as John.

### **3.3 Industry Has Relied on ATO Decisions Supporting Sustenance**

We understand that there is a view in Treasury that the FBT exemption was not originally intended to permit salary sacrificing for sustenance at work.

However, in 2005 the Australian Tax Office (ATO) provided Accor Services with a ruling that indicated the following:

- Salary sacrificing for purchasing sustenance at an in-house cafeteria on an employer's business premises is exempt under section 41 of the Fringe Benefits Tax Assessment Act (FBTAA); and
- Salary sacrificing for purchasing sustenance from third parties (food vendors) is exempt under section 41 of the FBTAA if the sustenance is provided to an employee on the employer's business premises. In other words an employee needed to order, purchase and take possession of the food on the employer's business premises. This supported the on-line ordering and purchasing and delivery system deployed by EzyBite.

In its ruling the ATO noted that EzyBite's card and on-line systems would ensure that employees would not overspend their FBT free benefit and transparent accounting of the benefit's use. The ATO considered that these were important factors in the proper operation of the benefit.

In its ruling for Accor Services, the ATO applied the same test first applied in tax ruling 97/17. That test established that food and drink provided to an employee during the working day on an employer's business premises is exempt from FBT. The exemption applies even if the food is not prepared on the employer's business premises.

Tax ruling 97/17 also indicates that for the FBT exemption to apply the food and drink must be provided for sustenance (the why test); must be light meals, finger food or non-elaborate meals (the what test); must be provided during employee's meal breaks (the when test); and must be provided at the workplace (the where test).

These are modest provisions by any fair assessment and certainly do not constitute 'ports' as the Government claims.

This approach has been confirmed in various current private rulings such as rulings numbered 52251 and 64630. As we understand, it the most recent private ruling of this kind was provided in May 2008 to IP Australia, a Federal Government body.

We are aware that various companies have applied their own caps on the amount their employee's can salary sacrifice for sustenance. This is consistent with the 'what' test which indicates that sustenance should be simple light meals or finger food.

As industry has relied on these rulings from the ATO, it seems very harsh for the Government to terminate the operating capacity of providers like EzyBite without any opportunity for business and government to discuss arrangements that close perceived 'loopholes' but maintain the equity amongst employee benefit schemes and maintain the capacity of sustenance to be provided in legitimate ways.

It seems contrary to good sense and good public policy for the Government to ignore the rulings of the ATO, given that the ATO is tasked with regulating to reduce tax avoidance. If the ATO has supported sustenance through private rulings it surely means that it does consider the sustenance benefit and its use to be tax avoidance or a 'loophole'.

### **3.4 Decision Creates Inequity in the Tax Treatment of Various Meal Benefits**

Based on the Budget Papers, and the Treasurer's comments in Parliament, we understand that the primary rationale for the FBT changes is a perception that salary packaging for sustenance was inequitable because it was not available to all employees and was a 'rort'.

We believe that this is a serious misconception, particularly in relation to working families.

By acting on this misconception and using a broad brush approach, the Government has created rather than solved inequity in the provision and concessional tax treatment of various employee meal benefits.

Compare the following three meal entitlements available to employees.

#### **Sustenance (sandwiches at work)**

In reality the FBT changes prevent ordinary workers from purchasing sustenance, like sandwiches, with their pre-tax income to keep them going at work during the day. On average, employees using EzyBite were salary packaging \$25 per week for sustenance consistent with the ATO's interpretation of the 'what' test. Industry estimates that the total number of employees using sustenance benefits through all salary packagers nationally did not exceed 30 000 and most were earners with marginal tax rates at or below 30%. To be able to salary package for this benefit sustenance had to be consumed in the workplace.

#### **Meal Entertainment (restaurant meals and alcohol)**

While eliminating the benefit for ordinary workers consuming sustenance at work, the Budget has retained the capacity of high income earners in government and the corporate sector to salary package to purchase elaborate restaurant meals and alcohol from their pre-tax income. Meals purchased through these salary package arrangements can be dining experiences with family, friends, colleagues and clients. These meals attract fringe benefits tax at a discounted rate of 50%, meaning only earners in the top marginal tax bracket can afford it. There are an estimated 300 000 people who could be able to salary package in this way.

The Budget also continues to permit all workers in public benevolent institutions (hospitals and charities) and organisations entitled to a \$30 000 cap on FBT (such as sporting clubs and industry associations) to salary package to purchase the full cost of their meal entertainment from their pre-tax income.

#### **Canteens**

Although the Bill now precludes employees from salary sacrificing the purchase of meals at their employer provided canteens, it maintains the tax deductibility for employers subsidising the canteen meals of their employees. Over 300 000 workers have access to a workplace canteen in Australia, but this is generally limited to large corporations based in capital cities. Small companies who cannot afford or justify

canteens do not gain any benefit from this tax deduction. This is hardly fair and certainly not 'equitable'.

## Overall

Thus, with respect to the overall tax treatment of various meal benefits, the Bill leads to discrimination against:

- Low - middle income earners who can't afford elaborate dining out at lunch time, but want light meals to sustain their productive capacity at work;
- Workers who are not employed by public hospitals and charities;
- Employees not fortunate enough to work for employers who can afford to provide canteens (like small business employees); and
- Employers who can't afford a canteen but want to give their employees access to healthy food at work.

See **Attachment D** for more detail on the operation of various meal benefit schemes and the comparative inequity created by the Bill.

With respect to the idea that sustenance is a 'rort' we would point out that the use of card and on-line systems have ensured that the benefit is used only to purchase and consume light meals at work to support employee's productive capacities.

By comparison, under the meal entertainment system for high income employees in the government and private sector, meals with family, colleagues and friends outside of work are supported by the tax payer.

While Treasury may wish to adopt a strict view of what constitutes business property when assessing the original intention of the tax law with respect to sustenance, we believe the Government and Parliament should think beyond these narrow concepts and look at the broader policy equity at stake.

### **3.5 Decision Creates Inequity in the Tax Treatment of Sustenance and Other Non-Meal Employee Benefits**

The Bill raises broader notions of equity between employee benefit schemes subject to concessional tax treatment. It also does not appreciate that amongst all employee benefits receiving concessional tax treatment only the sustenance benefit:

- Was available to all employees, regardless of income level, seniority and personal circumstances; and
- Was guaranteed to be used at work to support an employee's productive capacity.

For example, employer provided childcare on an employer's business premises is FBT free. However this benefit is only available to employees with children who work for large corporations who can afford to provide childcare, and generally taken up by employees who can afford to drive to work.

Similarly, salary packaged motor vehicles that are FBT free are normally only available to executives or senior staff. It is not unknown for salary packaged vehicles to be subject to significant personal, non-work related use.



### 3.6 Treasury's Estimated Savings Are Not Realistic

Treasury has concluded that there is \$730 million worth of savings over 4 years available from eliminating the FBT exemption for salary packaging for sustenance alone.

Budget Paper No 2 estimates savings as follows:

#### Revenue (\$m)

	2007-08	2008-09	2009-10	2010-11	2011-12
Australian Taxation Office	-	110.0	165.0	205.0	250.0

#### Related expense (\$m)

Department of the Treasury	-	15.0	30.0	35.0	40.0
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However, based on industry data it is estimated that there are no more than 30 000 people currently using this benefit and on average they salary sacrifice \$100 per month. This equates to a total industry annual turnover of about \$36 million. Thus removing the FBT benefit and incentive for salary sacrificing would save less than \$15 million in 2008-09, not the \$110 million estimated by Treasury.

As the incentive for salary sacrificing has been removed employers would not wish to incur the 100% FBT liability now attaching to sustenance benefits and therefore usage of the benefit would drop to nil, not increase over 4 years as Treasury suggests.

If the savings estimates in the Budget papers are based on an assumption of growth in usage where sustenance remained FBT free, they should equally assume that the amount able to be salary packaged remains at about \$100 per person per month because this is what the average employee has been salary sacrificing and reflects the self imposed caps that companies have placed on the amount their employees can salary package for sustenance. The cost to government (in lost tax revenue) would be about 40% of the total amount being salary sacrificed per year.

If so, Treasury's estimated savings of \$250 million in 2011-12 mean that by that time 500 000 employees would be using the sustenance benefit compared to 30 000 now. Based on a compound average growth rate calculation Treasury's estimate equates to a growth rate in the use of the sustenance benefit of 102% each year between 2009 and 2011. This is completely unrealistic by any industry standard.

If Treasury has assumed that the value being salary packaged is greater than \$100 per month per employee then we urge the Senate Committee to examine how it reached this conclusion contrary to industry data.

#### **4. AMENDING THE BILL**

To address the inequity created by the Bill we propose that the Senate Committee recommend that the Bill be amended to enable employees to access sustenance during their working day.

We do not believe the Bill should reinstate the perceived 'loophole'.

Instead we consider that the Bill should implement explicit provisions giving ordinary workers the ability to access tax concessions for sustenance in keeping with broader fiscal and other policy objectives and the ATO's long standing interpretation of what constitutes sustenance. Based on the market dynamics before the Budget decision, options include:

- Capping any concessional benefit at a dollar amount that reflects the cost of purchasing light meals during the working day.
- Providing the concessional benefit to low-middle income workers. For example, most sustenance benefit users earn wages in the 30% marginal tax bracket.
- Linking the concessional benefit to the provision of a certain proportion of healthy food choices for employees. This is something that most employers seeking the sustenance benefit for their employees already demand.
- Linking any concessional benefit to delivery mechanisms that ensure the benefit cannot be abused. These mechanisms include on-line systems and card systems that may be restricted to canteens or certain types of food vendors.
- Requiring that any system for employees have a minimum number of food vendor choices.
- Restricting the any concessional benefit to take away food.

We suggest that this approach has particularly significant merit as Treasury's estimates of the projected savings from scrapping the FBT exemptions for sustenance alone are proven to be inflated. Thus the Senate Committee can propose amendments without vandalising the Government's Budget savings.