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29 May 2012

The Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: fbt@treasury.gov.au

Dear Sir or Madam

Re: Consultation Paper - Living Away From Home Allowances

We understand that you are seeking input from stakeholders in relation to the draft amendments to the Living Away From Allowance legislation released on 15 May 2012 (the draft legislation).

By way of background, we are a leading accounting firm that has a specialised Employment and Remuneration Service division with significant involvement in managing expatriate employees, overseas assignments and company obligations surrounding the above.

The ongoing decimation of the LAFHA has continued, with the Government announcing a further broadening and tightening of the rules.

The May 2012 Budget night announcement have considerably increased the scope of the changes to LAFHA from that originally outlined in the November 2011 Consultative document.

Permanent residents from 1 July 2012 will be treated in exactly the same manner as temporary residents, they need to maintain a home in Australia and be living from that home. This represents a very significant departure from the existing rules and permanent residents will be disadvantaged from 1 July 2012.

Has there been breakdown in communication between Treasury and its Ministers as the proposed position as at 1 July 2012 is diametrically opposed to position stated by the Hon Bill Shorten, the then Assistant Treasurer in his forward to the Consultative document[1] that issued in November 2011 at page vi;

> 'No permanent residents receiving LAFHA benefits for genuine reasons will lose any existing entitlement under the changes'

We have a strong belief that these changes are being driven for short term political expediency without any due regard to the broader needs of the community.

The proposed measure will have the following fiscal impact over the forward estimates:

2011-12	***2012-13***	***2013-14***	***2014-15***	***2015-16***
-$0.5m	$261.2m	$432.9m	$590.6m	$661.4m

[1] http://archive.treasury.gov.au/documents/2235/PDF/CP_FBT_LAFH_Benefits.pdf

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We have a concern that is echoed by many participants in the previous consultation process and in the current process that those views that do not reflect the short term objectives of the Government will continue to be ignored.

Our key concerns are as follows:

- It should be noted that if Treasury and the ATO were concerned with the level of perceived rorting, the ATO could have undertaken enhanced and targeted audit activity. We see no evidence of such activity in the published statistics available from the ATO.
- These changes dramatically impact everyday Australians.
- The transitional rule as it currently applies to temporary residents severely disadvantages individuals who accepted roles in Australia on the basis that they qualified as living away from home under the existing rules as compared to permanent residents.
- A key part of Australia's taxation laws are Australia's Double Taxation Treaties. Many of these treaties have non-discrimination articles which are for the most part are consistent with Article 24 of the OECD Model Convention. Under this non-discrimination article, nationals of the foreign country cannot be worse off under taxation or connected laws than an Australian national in the same circumstances. It is difficult to see how the existing transition rule satisfies these requirements.
- The proposed changes do not segregate between the various temporary visa categories (i.e. 417, 419, 442 and 457). The proposed changes could be better targeted in this regard.
- Most employers historically set the food component of the LAFHA to only compensate the employee for additional non-deductible food costs that they might reasonably be expected to incur **over** the statutory food amount. There appears to be no such mechanism under the new rules post 1 July 2012.
- Will the first $110 per week (assuming a single adult) of that part of a LAFH representing food be non-tax deductible and therefore subject to PAYG withholdings?
- Section 12-35 of Subdivision 12-B of the *Taxation Administration Act 1953* makes it clear that an employer must withhold PAYG from any allowance that it pays to an employee
  - What documentation will the employer are required to maintain in order to vary the PAYG withholdings?
  - What penalties will apply if the employer incorrectly categories the employee i.e. the LAFHA is taxable and no deductions are available?
- Will the LAFHA paid to an employee who is either a permanent resident or a temporary resident maintaining a home in Australia fall within the exclusion contained in Paragraph 72 of SGR 2009/2? If yes, will the Commissioner amend SGR 2009/2 with effect from 1 July 2012 to include LAFHA as an example of an allowance that meets the exemption outlined in Paragraph 72?
- The proposed changes will significantly increase Payroll tax and WorkCover obligations

We have outlined our specific issues in detail in the attached Annexure. If you have any queries please contact Michael van Schaik on (03) 8635 1835.

Yours faithfully

Michael van Schaik
MOORE STEPHENS
MELBOURNE PTY LTD

Enclosure

N:\Employment Remuneration Services\20120529 LAFHA submission.docx

Annexure

1 Background

In the Mid-Year Economic Financial Outlook (MYEFO)[2], the Federal Government announced sweeping changes to the tax treatment of Living Away From Home Allowances (LAFHA) and in particular limiting the ability of temporary residents to access these concessions.

The Government proposed limiting access to the tax concession for temporary residents to those who maintained a home for their own use in Australia that they are living away from for work.

The reforms were to apply from 1 July 2012 for both new and existing arrangements.

The Federal Government indicated that permanent residents would not be affected by these reforms, unless they are receiving living-away-from-home allowance in excess of their actual expenses[3]. This position was reconfirmed by the Hon Bill Shorten, the then Assistant Treasurer in his forward to the Consultative document[4] that issued in November 2011 at page VI;

> 'No permanent residents receiving LAFHA benefits for genuine reasons will lose any existing entitlement under the changes'

The Government indicated that it would undertake an extensive consultation process on these reforms, so it can put in place appropriate transitional arrangements. Submissions were invited to be lodged by 3 February 2012.

When we spoke with Treasurer on 15 March 2012, they indicated that over 100 submissions had been received and a recurring theme was the need for some form of transitional rule in respect of temporary residents already in Australia at the time the proposed changes were announced.

Until 7.30 pm on 8 May 2012, no further communication had issued from either Treasury or the Assistant Treasurer charged with the implementation of the changes. We had been disappointed with the lack of consultation from Treasury.

1.1 Pre-existing eligibility for LAFHA

We dispute the inference that tax professionals and employers have sought to erode the PAYG withholding revenue base. Rather the Commissioner of Taxation has provided a definitive pathway for the provision of LAFHA.

It should be noted that if Treasury and the ATO were concerned with the level of perceived rorting, the ATO could have undertaken enhanced and targeted audit activity. We see no evidence of such activity in the published statistics available from the ATO.

The fundamental factual prerequisite is that the employee will be living away from home their usual place of residence to perform employment duties with the employer. The Commissioner of Taxation (the Commissioner) has published his guidance as to when this requirement is satisfied in Miscellaneous Taxation Ruling MT 2030[5].

Over the years the professional bodies have sought clarification from the Commissioner on the scope of eligibility for LAFHA as evidenced by the numerous questions raised in the National Tax Liaison Group (NTLG) FBT Subcommittee as follows:

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[2] http://www.budget.gov.au/2011-12/content/myefo/download/08_Revenue.pdf

[3] http://www.treasurer.gov.au/wmsDisplayDocs.aspx?doc=pressreleases/2011/148.htm&pageID=003&min=wms&Year=2011&DocType=0

[4] http://archive.treasury.gov.au/documents/2235/PDF/CP_FBT_LAFH_Benefits.pdf

[5] *Miscellaneous Taxation Ruling MT 2030 Fringe benefits tax : living-away-from-home allowance benefits*

Date	Agenda Item
Aug-01	Distinction between living away from home and travelling (CPAA)
Feb-03	Valuation of living-away-from-home allowance (LAFHA) fringe benefits (CPAA)
May-03	Reasonable food component of a living-away-from-home-allowance (NTAA)
May-03	The meaning of travelling v living-away-from-home - the 21 day test (NTAA)
Aug-04	LAFHA - Mentions that two rulings that discuss whether a foreign national on a working holiday maker visa qualify for LAFHA fringe benefit.
Nov-04	Living away from home travel versus private travel (CPA Aust)
Nov-04	Reduction of living-away-from-home food fringe benefits (ICAA)
May-06	Living-away-from-home allowances (TA)
Feb-07	LAFHA and amount 'spent' on accommodation (NZICA)
Nov-07	How is the reasonable food component of a living away from home allowance calculated for one adult and one child? (ICAA)
May-08	LAFH benefits (Discussion of numerous issues)
Nov-08	LAFHA - same place of employment (NIA)
Nov-08	LAFHA - unit of accommodation or location (NIA)
Nov-08	LAFHA - recipients allowance period (NIA)
May-09	Employees live away from home part of each week (TIA)
Feb-10	Living away from home reimbursements and minimum salary rules for the Department of Immigration and Citizenship purposes (NIA)
May-10	Update on ATO review of LAFHA allowance (TIA)
May-11	Living-away-from-home declarations in advance (IPA)

The Commissioner has not recoiled from his stated position that MT 2030 is stated position and provides adequate guidance on the matter.

The key guidance provided from MT 2030 can be summarised as follows:

- A person is regarded as living away from his or her usual place of residence if, but having to change residence in order to work temporarily for his employer at another locality, the employee would have continued to live at the former place (para. 14)
- The general presumption is that a person's "usual place of residence" is close to where he or she is permanently employed. Consequently, an employee who changes his or her place of residence because of change in location of a **permanent** job, whether be reason of a transfer with the same employer or a change of employment would not usually be living away from home on moving to a new place of residence close to the new job location. This is so even though the new place of residence was temporary pending the obtaining of suitable long term accommodation (para. 19)
- The new position must be **temporary** or for a **limited period** of time. Provided the appointment is for a limited period and the employee can be expected in the normal course to return to the same city or district of their home country to live, the employee will be treated as living away from his or her usual place of residence (para. 22)
- A LAFHA may be paid to an employee who transfers to a new locality within Australia for a period of **2-3 years** on the basis that the employee returns to the permanent position at the end of that time (para. 23)

The Commissioner has also adopted this position when issuing a number of Private Binding Rulings on eligibility to receive a LAFHA:

Authorisation number of Ruling	Scheme commencement date	LAFHA approved
1011812014237	2011 to 2014 FBT years	Yes
1011779755168	2011 to 2014 FBT years	Yes
55166	2003 and 2004 income years	Yes
60366	2006 to 2009 income years	Yes
77822	2008 to 2011 FBT years	Yes

61863	2004 to 2010 FBT years	Yes
76568	2006 to 2010 FBT years	Yes
76625	2008 to 2011 FBT years	Yes
84417	2009 FBT year	Yes
84162	2006 to 2010 FBT years	Yes
84219	2006 to 2010 FBT years	Yes
44152	2005 to 2008 FBT years	Yes
60362	2006 to 2008 FBT years	Yes
83559	2004 to 2009 FBT years	Yes
64894	2006 to 2009 FBT years	Yes
65554	2005 to 2008 FBT years	Yes
51585	2005 to 2008 FBT years	Yes
68580 - Scenario 1	2007 FBT year	Yes
68580 - Scenario 2	2007 FBT year	Yes
68580 - Scenario 3	2007 FBT year	Yes
68659	2007 to 2011 FBT years	Yes
72085	2007 to 2008 FBT years	Yes
73815	2005 to 2009 FBT years	Yes
71796	2007 to 2010 FBT years	Yes
80996	2009 to 2011 FBT years	Yes
58015 - Scenario 1	2006 to 2010 FBT years	Yes
58015 - Scenario 2	2006 to 2010 FBT years	Yes
58015 - Scenario 3	2006 to 2010 FBT years	Yes
83380	2008 to 2011 FBT years	Yes
80034	2008 to 2010 FBT years	Yes

1.2 Budget night – 8 May 2012

Budget night explained why no consultation had occurred with Treasury in respect of the proposed changes.

The ongoing decimation of the LAFHA has continued, with the Government announcing a further broadening and tightening of the rules.

These changes have considerably increased the scope of the changes to LAFHA from that originally outlined in the November 2011 Consultative document.

2 When is a transitional rule not a transitional rule?

The Treasurer announced the following transitional rule in respect of the further reform of living away from home allowances:

> 'The reforms will apply from 1 July 2012 for arrangements entered into after 7.30pm (AEST) on 8 May 2012, and from 1 July 2014 for arrangements entered into prior to that time.'

We spoke with Treasury on 9 May 2012 and they confirmed the transitional rule is capable of being 'misinterpreted'.

The Explanatory memorandum at paragraph 2.58 confirmed the following transitional rule

> 'Transitional rules apply to permanent residents who have employment arrangements for LAFH allowances and benefits in place prior to 7.30 pm (AEST) on 8 May 2012.'

Under this rule, the permanent resident does not need to maintain a home in Australia and be living away from that home in order to qualify for the transitional treatment.

The rule is somewhat different for temporary residents or foreign residents. Paragraph 2.60 outlines the treatment:

> 'The condition in the Budget to limit the concessional treatment to a maximum of 12 months will not apply to temporary residents or foreign residents maintaining a home in Australia until the earlier of 1 July 2014 or the date a new employment arrangement is entered into, but not so as to give anyone an additional 12 months after the transitional arrangements end'

This transitional rule is discriminatory against temporary and foreign residents.

2.1 Non-discrimination rule within Australia's Double Tax Treaties

A key part of Australia's taxation laws are Australia's Double Taxation Treaties. Many of these treaties have non-discrimination articles which are for the most part are consistent with Article 24 of the OECD Model Convention

Under this non-discrimination article, nationals of the foreign country cannot be worse off under taxation or connected laws than an Australian national in the same circumstances.

The transitional rules will clearly result in a temporary resident employee who had an arrangement in place prior to 7.30pm (AEST) on 8 May 2012 being denied deductions for accommodation and food expenses. An Australian resident employee who is not a temporary resident and who is also LAFH will be able to claim such deductions.

This is in clear contradiction to the requirements of the non-discrimination articles in Australia's Double Taxation Treaties.

Paragraph 1 of Article 24[6] provides:

> 'Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected'

OECD commentary on paragraph 1 of Article 24[7] provides that it:

> 'Establishes the principle that for the purposes of taxation discrimination on the grounds of nationality is forbidden, and that, subject to reciprocity, the Nationals of a Contracting State may not be less favourably treated in the other Contracting State than nationals of the latter State in the same circumstances.'

We believe the OECD is saying that when a tax is imposed on nationals and foreigners in the same circumstances, it must be in the same form as regards both the basis of charge and the method of assessment, its rate must be the same and, finally, the formalities connected with the taxation (returns, payment, prescribed times, etc.) must not be more onerous for foreigners than for nationals.

It is difficult to see how the existing transition rule satisfies these requirements.

Another potential contravention of the non-discrimination clause could arise where a foreign national who is a temporary resident (as defined) is LAFH but is denied deductions in respect of the LAFH whereas another foreign national who has an Australian spouse (and is therefore not a temporary resident as defined) is LAFH and can claim such deductions.

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[6] OECD, "Model Tax Convention on Income and on Capital (Condensed Version)", 22 July 2010, Article 24 Non Discrimination, para. 1, p. 35.

[7] OECD, "Model Tax Convention on Income and on Capital (Condensed Version)", 22 July 2010, Commentary on Article 24 concerning non-discrimination, para. 5, p. 333.

3 Expansion to permanent residents

It was always intended that that the rules would apply to permanent residents from 1 July 2012, but the permanent residents no suffering a disadvantage.

However the draft legislation makes it clear that access to LAFHA deductions will be restricted to the following scenarios[8]:

- limiting access to the tax concession to employees who maintain a home for their own use in Australia, that they are living away from for work; and
- providing the tax concession for a maximum period of 12 months in respect of an individual employee for any particular work location.

3.1 Maintaining a home

Under the initial proposal as outlined at Section 2.1.3 of the Consultative Document:

> 'Employees who are permanent residents will be able to claim an income tax deduction for the expenses incurred for accommodation and food while living away from home, provided they can substantiate those expenses.'

A more onerous requirement was proposed for temporary residents from 1 July 2012:

> 'Temporary resident employees who maintain a home for their use in Australia, which they are required to live away from to perform their work, will also be able to claim a deduction for expenses they can substantiate.'

Section 2.1.5 of the Consultative document outlined the concept of maintaining a home:

> 'A temporary resident will be considered to be maintaining a home in Australia for their own use when that home is available for their personal use and enjoyment at all times, even though they are living away from it for their work.
>
> To qualify as maintaining a home for their own use in Australia, the temporary resident employee may either own or rent a unit of accommodation. The unit of accommodation must be available for their use at any time and cannot be rented out or sub-let while they are living away from home.'

From 1 July 2012, a permanent resident will need to satisfy this test in order to qualify as living away from home.

Permanent residents from 1 July 2012 will be treated in exactly the same manner as temporary residents, they need to maintain a home in Australia and be living from that home. This represents a very significant departure from the existing rules and permanent residents will be disadvantaged from 1 July 2012.

Under the existing FBT regime in respect of LAFHA, no requirement exists for the maintaining of a home at all times in the former location. The Commissioner of Taxation key ruling in this area remains MT 2030[9] and this ruling (see paragraphs 29 & 30 below) makes it clear that the employee did not need to maintain a home in the former location:

> '29. Another question that has been raised is the extent to which it is necessary, before an employer may treat an allowance as a living-away-from-home allowance, to establish whether

[8] http://www.budget.gov.au/2012-13/content/bp2/html/bp2_revenue-09.htm

[9] http://law.ato.gov.au/atolaw/view.htm?dbwidetocone=07%3AATO%20Rulings%20and%20Determinations%20(Including%20GST%20Bulletins)%3ABy%20Type%3ARulings%3AMiscellaneous%20Tax%3AOld%20Series%3A2000-2100%3A%23020000002030%23MT%202030%20-%20Fringe%20benefits%20tax%20%26c%20living-away-from-home%20allowance%20benefits%3B

the employee does in fact have a residence at a place other than the locality at which the employee is temporarily residing.

30. The Act does not express a requirement, for a person to qualify as having a "usual place of residence", that it be established that he or she actually have such a residence.'

Clearly there is breakdown in communication between Treasury and its Ministers as the proposed position as at 1 July 2012 is diametrically opposed to the Hon Bill Shorten's comment that 'no permanent residents receiving LAFHA benefits for genuine reasons will lose any existing entitlement under the changes'.

Put most simply, unless they are covered by the transitional arrangements, they do lose.

3.2 12 month time period

From 1 July 2012, all temporary resident and permanent residents who qualify as living away from home (see above) will only be entitled to receive the LAFHA for a maximum period of 12 months in that location.

The position as outlined in the Consultative document was as follows:

- Employees who are permanent residents will be able to claim an income tax deduction for the expenses incurred for accommodation and food while living away from home, provided they can substantiate those expenses.

- Temporary resident employees who maintain a home for their use in Australia, which they are required to live away from to perform their work, will also be able to claim a deduction for expenses they can substantiate.

The Consultative document imposed no such time period. The following is an extract from Table of the Consultative document:

Table 1: Proposed treatment for permanent residents and for temporary residents maintaining a home in Australia which they are living away from for work

Income tax treatment	Fringe benefits tax treatment	
Allowance provided to an employee for living away from home [1]	Expense payments benefits provided to an employee living away from home for accommodation and food [2]	Accommodation and food provided directly for an employee living away from home [3]
Allowance included in assessable income of the employee. Income tax deduction provided for substantiated expenses for accommodation and for food above a statutory amount.	Exempt from FBT for actual expenses for accommodation and for food above a statutory amount. Employer reimburses the expenses incurred by employee.	Exempt from FBT for accommodation and for food above a statutory amount. Employer directly provides accommodation for and food to an employee.

Further the Commissioner of Taxation made the following statement in MT 2030 in respect of domestic transfers:

'23. The same applies in a case where an employee transfers to a new locality within Australia on an appointment of fixed duration provided the permanent job location does not change, e.g., under an arrangement where an employee transfers to a branch office of the employer in another State for a two or three year term on the basis of return to the permanent position at the end of that time. The employee would be regarded as living away from the usual place of residence provided he or she intends to return there at the end of the term transfer.'

It is clear that under the pre-existing rules that apply for transfers within Australia, the Commissioner accepted that a two or three year assignment with an intention to return to the original location qualified as living away from home.

Permanent residents therefore could be living away from home for periods varying between 24 and 36 months under the existing rules. Unless covered by the transitional rules, these same employees will only qualify for being treated as living from home for 12 months (provided the employee continues to maintain a house in Australia).

Clearly permanent residents will be disadvantaged and we fail to understand how this reconciles with the Hon Bill Shorten's comments.

3.3 Temporary residents who maintain a home in the overseas location

A number of factual situations spring to mind in which the Consultation Paper is silent. These situations are as follows:

1. The employee comes to Australia whilst the remainder of the family remains in the home location. This often typical where the children are in the critical school years or members of the family fail a medical requirement within a visa (i.e. presence of tuberculosis); or
2. The employee retains a property in the home location and is unable to either rent out the property or terminate the lease in the home location and rents a property in Australia thereby incurring additional accommodation costs

Clearly in these circumstances, the temporary resident is incurring double accommodation cost, but will not qualify as living away from home.

This is discrimination both under the transitional rules and the post 1 July 2012 rules.

4 Interaction with other Temporary Visa categories

Consideration needs to be given with the possible interaction with temporary entry permit classes other the 417 and 457 visas and an exemption from the proposed changes in respect of these visa categories.

In addition, a large number of Universities have established or are looking at establishing campuses offshore. A key part of the establishment process is maintaining suitable academic standards which will often equate the University sector to bringing staff to Australia for training and development. Universities may utilise a number of temporary visa categories including:

Type	Length	Overview
411 [10]	This visa allows skilled people to come to Australia for a temporary stay to broaden their work experience and skills. This visa has reciprocal arrangements to allow Australian residents similar opportunities overseas.	With this visa the individual can: • stay and work in the nominated position Australia for the period of the exchange agreement with a maximum stay of two years • bring any eligible secondary applicants with you to Australia (secondary applicants can work and study) • leave and enter Australia as many times as you want while your visa is valid.
416 [11]	This visa requires approved special program sponsors in Australia to invite a person from overseas to participate in an approved Special Program in Australia.	The individual may work or study if these are part of the approved program in which they are participating.

[10] http://www.immi.gov.au/skilled/specialist-entry/411/

[11] http://www.immi.gov.au/skilled/specialist-entry/416/how-the-visa-works.htm#e

419 [12]	This visa is for professional academics to visit Australia on a temporary basis, to observe or participate in an Australian research project at an Australian tertiary or research institution.	The employee must not receive remuneration other than a contribution towards living and travel expenses. You must be sponsored and nominated by an Australian tertiary or research institution for this visa.
442 [13]	This visa allows people to complete workplace-based training in Australia on a temporary basis. The training must provide people with additional or enhanced skills in the nominated occupations, tertiary studies or fields of expertise.	This visa is for people from outside Australia who want to improve their occupational skills through training with an Australian organisation or government agency. People may be nominated for this visa if the proposed occupational training is one of the following: • training or practical experience in the workplace required for the person to obtain registration for employment in their occupation in Australia or in their home country • a structured workplace training program to enhance the person's existing skills in an eligible occupation • structured workplace training to enhance the person's skills and promote capacity building overseas.

Currently under the 419 visa conditions, the academic is not permitted to receive a salary, wage or scholarship (other than the allowance towards living expenses in Australia and travel costs) from the sponsoring institution. The allowance is currently paid as a LAFHA and is exempt from FBT and not subject to income tax

How will the allowance be treated going forward – if it is assessable income, the academic is in breach of their 419 visa conditions.

Please note that as a 419 visa does not have work rights, the Australian Taxation Office will not issue a Tax file Number. The visa holder is therefore subject to withholding tax rate of 46.5% and cannot lodge an income tax return to recover part or all of the tax withholding.

5 Reasonable food

Under the draft legislation, an employee can deduct food and drink expenses to the extent the expenses are reasonable and exceed $110 in relation to a seven day period for each individual of 12 years of age or older and $55 in relation to a seven day period for each individual under the age of 12 years for the 2012-13 income year.

To minimise the cost of compliance for employees, substantiation will not be required for food expenses unless the expenses exceed an amount specified in a determination by the Commissioner of Taxation. If employees claim amounts in excess of the reasonable amount, the full amount must be substantiated.

Therefore the first $110 per week (assuming a single adult) will not be tax deductible and equates to the statutory food component under the existing FBT legislation.

5.1 Determination of Reasonable Food

The Commissioner has on a number of occasions been asked to determine the reasonable food component of a living away from home allowance for an Australian tax resident working overseas.

[12] http://www.immi.gov.au/skilled/specialist-entry/419/
[13] http://www.immi.gov.au/students/sponsored/otv/

Historically the ATO has not been willing to supply data:

> *"The Tax Office acknowledged that there are no specific Tax Office guidelines to assist employers in determining the reasonable food components of LAFHAs paid to employees who are seconded overseas ('outbound expatriates').*
>
> *The Tax Office acknowledged that it may be a difficult task for some employers to determine what is a reasonable food component of a LAFHA for employees seconded overseas. The Tax Office advised that the information provided by an independent third party that specialises in providing international compensation data for employees working overseas is an objective method of determining the food component of a LAFHA. As long as the figures produced by the third parties are, in accordance with FBT law, reasonable amounts these would be acceptable. It is the employer who must be satisfied that the information provided by the third parties is based on acceptable methodologies and is representative of the population from which it is drawn. Also the amounts are reasonable, that is a 'reasonable persons' test, given the circumstances of the employee.*[14]

This position was reiterated in August 2009 as part of a discussion on the FBT compliance issues associated with the amendments to section 23AG of the *Income Tax Assessment Act 1936* post 1 July 2009, it was up to the employer in determining what was reasonable.

The Commissioner went further in response to a question raised in February 2010[15]:

> "The ATO, while acknowledging there may be some compliance difficulties for employers, advised that it was unlikely that a public ruling setting out the reasonable food component for overseas destinations will be released given other priorities."

These tables or guidelines need to be place by 1 July 2012 so that employers can utilise the amounts in determining the LAFHA to be paid in a similar manner in which they utilise the reasonable travel amounts for business trips of less than 21 days.

5.2 Interaction between the statutory food amount and reasonable food amount

Under the existing rules, the taxable value of a LAFHA is the amount of the allowance less any "exempt accommodation component" and "any exempt food component".

The exempt food component is also defined in section 136 of the FBTA. In broad terms it is the component of the LAFHA that is intended to compensate the employee for additional food costs. The amount of the exempt food component depends upon how the food component of the allowance is set:

- Where it is set so as to only compensate the recipient for reasonable additional food costs above the "statutory food amount" the whole amount of the food component of the allowance will qualify as the exempt food component.
- Where the food component of the allowance is set without reference to the "statutory food amount" the exempt food component of the allowance will be the reasonable food component of the allowance less the "statutory food component".
- Where the food component of the allowance is set with reference to a usual deemed food consumption amount that is less than the "statutory food component", the exempt food component of the allowance will be the reasonable food component of the allowance less the difference between the "statutory food amount" and the usual deemed food consumption amount.

The "statutory food amount" is set in the legislation. It depends upon the number and age of accompanying family members. For an adult person it is $42 per week and for a child under 12 it is $21 per week.

[14] FBT Subcommittee minutes 20 February 2003 Agenda Item 9 valuation of LAFHA benefits
[15] FBT Subcommittee minute February 2010 Agenda item 6.2.7 reasonable food allowances

We do not disagree with the statutory food amount being indexed to $110 pw and $55pw.
Currently the exempt food component of a LAFHA will depend upon how the food component of a LAFHA is set.

Most employers set the food component of the LAFHA to only compensate the employee for additional non-deductible food costs that they might reasonably be expected to incur **over** the statutory food amount.

There appears to be no such mechanism under the new rules post 1 July 2012.

6 Employee's ability to determine whether they are living away from home?

The employee will be faced with a significantly increased compliance burden in determining whether they qualify as living from home and therefore can claim a deduction for the accommodation and food costs incurred.

Section 12-35 of Subdivision 12-B of the *Taxation Administration Act 1953* makes it clear that an employer must withhold PAYG from any allowance that it pays to an employee.

It would appear that based on the above, the employer can vary the PAYG withholding, however in order to vary the employer must be in a position to ascertain whether the employee is:

- A permanent resident who maintains a home for their own use in Australia;
- A temporary resident who maintains a home for their use in Australia;
- A temporary resident who does not maintain a home in Australia; or
- A transitional rule applies.

What documentation will be required to be obtained by the employee to ascertain whether they will be entitled to a tax deduction?

Will the first $110 per week (assuming a single adult) be non-tax deductible and therefore subject to PAYG withholdings?

7 Previous Government Policy intent

In the policy document[16] entitled "Australia's Future Tax System" the following comments were made in respect of personal income tax compliance.

> *"Personal income tax compliance has become inordinately complex. This complexity hides its policy intent from citizens. For many people, the personal tax system is complex not only because of the rates scale and the lack of a coherent definition of taxable income, but also because they must deal with a large suite of complex deduction rules, numerous tax offsets and a variety of exempt forms of income.*
>
> *Seventy-two per cent of tax filers now seek advice from a tax agent, even though 86 per cent either claim no deductions at all or only claim work-related expenses, gifts and the costs of managing tax affairs."*

The proposed changes will only make personal income tax return compliance more complex and are clearly against previously stated Government policy.

8 Interaction with other provisions within the Fringe Benefits Tax Assessment Act6

The Consultation Paper takes the position that a temporary resident will not qualify as living away from home for LAFHA purposes unless they maintain a home in Australia for their own use and they are required to live away from that home.

[16] http://taxreview.treasury.gov.au/content/FinalReport.aspx?doc=html/Publications/Papers/Final_Report_Part_1/index.htm

We have a concern that the term "the employee is required to live away from his or her usual place of residence" is utilised in other provisions of the *Fringe Benefits Tax Assessment Act 1986* to exempt or provide concessional FBT treatment.

These provisions include:

FBT Exemption	Section
Engagement of relocation consultant	58AA
Removals and storage of household effects as a result of relocation	58B
Exempt benefits – sale or acquisition of dwelling as a result of relocation	58C
Connection or re-connection of certain utilities as a result of relocation	58D
Leasing of household goods while living away from home	58E
Exempt benefits – relocation transport	58F
Reduction of taxable value – overseas employment holiday transport	61A
Reduction of taxable value – temporary accommodation relating to relocation	61C
Reduction of taxable value of temporary accommodation meal fringe benefits	61D
Reduction of taxable value of living-away-from-home food fringe benefits	63
Reduction of taxable value – education of children of overseas employees	65A

We seek a positive statement that the remaining concessional provisions will be available to temporary residents and foreign residents.

We have inferred this to be the case as the draft legislation only repeals sections 21, 30,31,47(5) and 63 of the Fringe Benefits Tax Assessment Act,

9 Superannuation Guarantee

A temporary resident is subject to Superannuation Guarantee unless they fall within one of the exemption provisions contained in sections 27 and 28 of the *Superannuation Guarantee (Administration) Act 1992* (the SGAA). The exemption is typically where the employee is covered by the provisions of a Bilateral Social Security Agreement.

For the majority of temporary residents and permanent residents, their ordinary times earnings (OTE) are subject to superannuation guarantee.

Currently fringe benefits as defined in the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) are excluded under subsection 11(3) of the SGAA. Therefore no SG is payable in respect of LAFHA paid as they currently fall within the meaning of a fringe benefit.

However post 1 July 2012 under the proposed changes, the living away from home allowance will be treated as an allowance and therefore falling within the meaning of OTE.

SGR 2009/2 provides an extensive overview on the meaning of OTE. The following is an extract from this ruling:

> *"Expense allowances and reimbursements*
>
> *72. Expense allowances, that is, those allowances paid to an employee with a reasonable expectation that the employee will fully expend the money in the course of providing services, are not 'salary or wages'.*
>
> *73. A reimbursement that compensates an employee for an expense they have incurred on behalf of the employer is also not 'salary or wages'."*

Will the LAFHA paid to an employee who is either a permanent resident or a temporary resident maintaining a home in Australia fall within the exclusion contained in Paragraph 72 of SGR 2009/2?

If yes, will the Commissioner amend SGR 2009/2 with effect from 1 July 2012 to include LAFHA as an example of an allowance that meets the exemption outlined in Paragraph 72?

The employer will be required to know the status of each employee in order to ascertain whether the LAFHA is subject to SG. This will place a significant administrative burden on employers

10 Payroll Tax

As you are aware Payroll Tax is a State tax calculated on wages paid or payable by an employer to its employees and deemed employees and applies in all states and territories.

The following comments are predicated on the Victorian payroll tax legislation[17] but apply equally to the other states and territories as a result of the recent harmonisation process.

The term 'wages' for Victorian payroll tax purposes includes:

- wages
- remuneration
- salaries
- allowances
- commissions
- bonuses
- employer (pre-tax) superannuation contributions and includes:
    - superannuation guarantee payments,
    - salary sacrifice contributions,
    - from 1 July 2007, the value of non-monetary contributions, and
    - superannuation contributions to defined benefit funds.
- fringe benefits, within the meaning of the Fringe Benefits Tax Assessment Act - from 1 July 2007, to calculate the total taxable value of the fringe benefits for payroll tax purposes, the fringe benefit aggregate amounts must be grossed up using only the Type 2 factor. Before 1 July 2007, the fringe benefit aggregate amounts were grossed up as calculated under the FBT Act (i.e. Type 1 fringe benefits were grossed up using the Type 1 factor and Type 2 benefits were grossed using the Type 2 factor)
- from 1 July 2007, the value of shares and options granted to employees, directors, former directors and some contractors
- payments to some contractors
- payments by employment agencies arising from employment agency contracts
- remuneration paid by a company to or in relation to company directors, and
- employment termination payments and accrued leave.

Under the current rules, where properly structured a LAFHA is an exempt benefit and is therefore not subject to FBT.

Where the LAFHA is paid in the form of an allowance, the LAFHA is an allowance and is subject to Payroll Tax. An increased cost burden will be placed upon employers in respect of payroll tax.

The only exemption in respect of allowances is contained in section 30 as follows:

"30 Accommodation allowances

> *(1) For the purposes of this Act, **wages** do not include an accommodation allowance paid or payable to an employee in respect of a night's absence from the person's usual place of residence that does not exceed the exempt rate.*

[17] Victorian Payroll Tax Act 2007

*(2) If the accommodation allowance paid or payable to an employee in respect of a night's absence from the person's usual place of residence exceeds the exempt rate, **wages** include that allowance only to the extent that it exceeds the exempt rate.*

*(3) For the purposes of this section, the **exempt rate** for the financial year concerned is—*

(a) the total reasonable amount for daily travel allowance expenses using the lowest capital city for the lowest salary band for the financial year determined by the Commissioner of Taxation of the Commonwealth; or

(b) if no determination referred to in paragraph (a) is in force, the rate prescribed by the regulations."

It can be seen that the above exemption only relates to reasonable travel allowances, not to living away from home allowances that are expected to be fully expended.

11 Work Cover

WorkCover (formerly known as Workers Compensation) is a state impost based upon rateable remuneration. Each state has its own WorkCover guidelines and the comments below are based upon the Victorian legislation.

Rateable remuneration[18] includes:

- Salaries and wages:
  - Salaries
  - Wages
  - Gross pay before tax
  - Allowances
  - Annual leave payments (including leave loading)
  - Long service leave
  - Paid parental leave
  - Make-up pay
  - Back pay
  - Bonuses
  - Directors' fees and all remuneration to directors or members of a governing body of a company
  - Fees for work performed by a worker or deemed worker
- Contractors
- Fringe benefits
- Superannuation
- Other

WorkCover uses the Australian Taxation Office definition of items that are taxable fringe benefit.

Where the LAFHA is paid in the form of an allowance, the LAFHA is an allowance and is subject to WorkCover unless it falls within the following exemption:

- Where an accommodation allowance extends beyond 30 continuous days, a worker must also be maintaining a personal domestic dwelling for their own use in order for the allowance to retain the exemption.
  - For 2010/11 the exempt rate is $227.35 per night
  - For 2011/12 the exempt rate is $238.10 per night
- Any amount paid per night over the exempt rate is considered to be rateable remuneration and should be included in your determination of salaries and wages.

[18] http://www.worksafe.vic.gov.au/wps/wcm/connect/wsinternet/worksafe/home/insurance-and-premiums/determining-your-remuneration/what-to-include-in-your-remuneration