

Fringe Benefits Tax (FBT) Reform

Living-away-from-home benefits

Consultation Paper
November 2011

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CONSULTATION PROCESS

Request for feedback and comments

The Government is seeking your input to its reform of the fringe benefits tax treatment of living-away-from-home benefits.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment. A request made under the *Freedom of Information Act 1982* (Commonwealth) for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Closing date for submissions: 3 February 2012

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FOREWORD



I am pleased to release this consultation paper on reform of the living-away-from-home (LAFH) benefits concessions in the *Fringe Benefits Tax Assessment Act 1986*.

In the *2011-12 Mid-Year Economic and Fiscal Outlook*, the Treasurer announced reforms to the LAFH benefits concessions in the FBT law to address growing exploitation of the concessions.

The LAFH benefits are intended to compensate employees for additional costs they incur when they are temporarily relocated by their employer for their work.

However, the LAFH benefit concessions are now being widely exploited in a manner that is outside the original policy intent. Some employers do not have to pay FBT and employees do not pay tax on income claimed to be spent on accommodation and food for those living away from home. From 1 July 2012, employers and employees will need to substantiate these claims.

A particular concern is the growing use of the concession by employers (including through labour hire and contract management companies) to allow temporary resident workers coming to Australia to convert their taxable salary into a tax-free allowance. This provides them with an unfair advantage over local Australian workers.

There have been attempts in the past to restrict the exemption, such as in the 1995 cost of compliance review and by the Australian Taxation Office (ATO) through the issue of public rulings. The Inspector General of Taxation has also reported on the misuse of this concession. The rorting of the LAFH benefits concessions was also raised at the 2011 Tax Forum.

In recognition of the increasing cost to revenue, the inequitable treatment that has arisen between employees and the growing community concern regarding the operation of the LAFH benefits concessions, the Government has decided to act to reform the concessions.

The changes will ensure a level playing field exists between hiring an Australian worker or a temporary resident worker living at home in Australia, in the same place, doing the same job. The Government welcomes temporary resident workers, but our skilled migration program is a better way of making sure temporary resident workers go to sectors of the economy where they are needed most.

No permanent resident receiving LAFHA for genuine reasons will lose any existing entitlement under the changes. This means that residents who are currently receiving LAFH benefits that can be substantiated, employees operating under fly-in, fly-out arrangements and community sector employees who are not currently using all of their FBT exemptions cap will not be affected by the reforms.

In addition, the changes will not affect travel allowances provided to employees who have to travel from their usual place of work for short periods, or any FBT remote area concessions.

The Government has allowed time to undertake consultation with stakeholders before the changes commence. In particular, we are seeking views on transitional and implementation issues, particularly from the community sector, and to identify whether there are any unintended consequences.

The Hon Bill Shorten MP

Assistant Treasurer and Minister for Financial Services and Superannuation

SUMMARY

The payment of a living-away-from-home allowance (LAFHA) is treated as a fringe benefit under the current tax system. This differs from most allowances paid to an employee, which are assessable income to the employee.

The part of LAFHA that is taxed is usually minimal, as the taxable part of the benefit is reduced by any reasonable amounts paid in compensation for accommodation and increased expenditure on food.

For fringe benefits tax (FBT), a LAFHA is an allowance paid by an employer to an employee to compensate for additional expenses incurred and any disadvantages suffered because the employee is required to live away from their usual place of residence in order to perform their employment duties. Additional expenses do not include expenses the employee would be entitled to claim as an income tax deduction. No FBT is payable on the exempt accommodation or exempt food components of LAFHA.

As a result of the interpretation of the LAFHA provisions adopted by tax professionals and employers, salary and wages are increasingly being re-characterised as exempt LAFHA benefits, serving to erode the pay-as-you-go withholding revenue base.

This has allowed employees to access tax-free income outside the original policy intent, which is resulting in a significant and growing cost to revenue. The ATO has attempted to limit abuse of the concessions through the issue of public rulings and taxpayer alerts on a number of occasions. However, each attempt has resulted in the ATO withdrawing its view because of strong industry submissions indicating the law did not support the ATO interpretations.

An area of growing concern is the use of LAFHA by employers (including through labour hire and contract management companies) to attract temporary resident workers to Australia by including tax-free LAFHA payments as part of their remuneration. These payments are effectively a re-characterisation of taxable salary or wage income.

Similar problems exist in relation to the use of other living-away-from-home (LAFH) benefit provisions, which complement the LAFHA provisions. Under these provisions, employers are exempt from FBT for accommodation and food benefits provided to employees as expense reimbursements and as direct benefits.

1. BACKGROUND

The Government has announced that changes will be made to the fringe benefits tax (FBT) treatment of living-away-from-home (LAFH) benefits.

In principle, employees should pay for their housing and food costs out of income that has already been taxed. Indeed, that is how most Australians currently pay for their rent and food costs.

However, the tax system currently assists people who are living away from home with their accommodation and food expenses. Their employer does not have to pay FBT on such expenses and the employee doesn't pay income tax on cash provided for those purposes. These tax concessions assist labour mobility within Australia.

These tax concessions have been subject to growing exploitation, allowing people to claim significant amounts of tax-free income. In particular, temporary resident employees who are not genuinely living away from an Australian home receive the benefits. Since temporary residents all live away from their overseas homes, they have an advantage in receiving the tax-free income over Australian workers who must live away from an Australian residence. Further, the concessions currently allow some employees to access large amounts of tax-free remuneration through allowances that are well in excess of the actual costs incurred by the employee. This is outside the scope of the original policy intent of the concession, and represents a significant and growing cost to revenue.

1.1 CURRENT TREATMENT

1.1.1 Existing law

The *Fringe Benefits Tax Assessment Act 1986* (FBTAA) provides concessional taxation treatment of benefits provided to employees who are required to live away from their usual place of residence in order to perform employment duties.

Living-away-from-home allowance (LAFHA)

A LAFHA benefit is dealt with under Division 7 of Part III of the FBTAA.

Where an allowance is paid to an employee for living away from home, and the allowance does not fall within Division 7, it will generally be taxable in the hands of the employee for income tax purposes.

Section 30 of the FBTAA sets out the circumstances in which an allowance paid by an employer to an employee will qualify as a LAFH benefit. It is an allowance paid to an employee that is in the nature of compensation for additional expenses incurred, and other disadvantages suffered, because the employee is required to live away from his or her usual place of residence in order to perform the duties of employment. Additional expenses do not include expenses for which the employee would be entitled to an income tax deduction.

The taxable value of the LAFHA fringe benefit is calculated in accordance with rules set out in section 31 of the FBTA. The taxable value is the amount of the LAFHA fringe benefit reduced by either or both of two components, the 'exempt accommodation component' and the 'exempt food component'. These terms are defined in subsection 136(1) of the FBTA:

- 'exempt accommodation component' is so much of the allowance that is in the nature of compensation for additional expenses on accommodation that the employee could reasonably be expected to incur;
- 'exempt food component' is so much of the allowance as is reasonable compensation for additional expenses on food.

To determine what is reasonable compensation for increased expenditure on food, the following terms are defined in subsection 136(1):

- 'food component', which is so much of the allowance as is in the nature of compensation for expenses the employee could reasonably be expected to incur on food and drink (it can represent either additional food expenses or total food expenses); and
- 'statutory food amount', which is set at \$42 for persons aged 12 and over and \$21 for persons less than 12 years of age.

Under the definition of 'exempt food component', only the amount of the food component portion of the allowance that exceeds the statutory amount for home food costs is treated as an exempt food component.

If the amount of the food component of the allowance which is set to cover additional food costs has been determined after estimating the normal cost of food at the employee's home, and the estimated home food cost for this purpose is at least equal to the \$42 statutory amount, the 'exempt food component' will be the full amount of the food component of the allowance.

If the estimated home food cost adopted in paying the allowance was less than the \$42 statutory amount, so much of the food component as exceeds the difference between the estimated home food cost and the \$42 statutory amount will apply to reduce the taxable value of the LAFHA fringe benefit.

The purpose of the definition is to tax only that part of the food component that covers expenses on food that the employee would have incurred anyway while living at home.

The taxable value of a LAFHA fringe benefit cannot be reduced by the 'exempt accommodation component' or the 'exempt food component', unless the employee gives the employer a LAFH declaration that sets out particulars of the employee's usual place of residence and actual place of residence for the period during which the LAFHA was paid in the FBT year.

Living-away-from-home — accommodation expense payment benefit

Under section 21 of the FBTA, an expense payment benefit which relates to expenditure incurred by an employee on accommodation because the employee was required to live away from home is exempt from FBT.

Living-away-from-home — accommodation residual benefits

Under subsection 47(5) of the FBTA, a residual benefit consisting of a lease of residential accommodation granted to an employee who is required to live away from his or her usual place of residence in order to perform employment duties is exempt from FBT.

In order to qualify for the exemption, either the accommodation must have been provided under certain limited 'fly-in fly-out' arrangements that are to remote areas *or* the employee must give the employer a LAFH declaration that sets out particulars of the employee's usual place of residence and actual place of residence.

Living-away-from-home — food fringe benefits

Section 63 of the FBTA reduces the taxable value of LAFH food fringe benefits. A LAFH food fringe benefit can be provided by an employer to an employee as an expense payment fringe benefit or property fringe benefit. This reduction is available in cases where an employee is required to live away from their usual place of residence in order to perform employment duties.

The above three provisions complement the LAFHA fringe benefit provisions.

1.1.2 Administrative aspects

Miscellaneous Taxation Ruling MT 2030, issued on 30 September 1986, continues to set out the ATO view on LAFHA benefits. It provides guidelines for determining the circumstances in which an allowance is to be treated as a LAFHA. It states that '... an allowance will not ordinarily be a precise measure of actual expenses of the recipient' (paragraph 27). It also outlines the principles to be considered when determining whether an employee is living away from home and what are additional expenses on food and accommodation.

The ATO also issues an annual taxation determination on what amount represents a reasonable food component of a LAFHA for expatriate employees for an FBT year. The determination lists amounts that are acceptable as a food component for different size families based on the indexation of the previous year's food component.

1.2 HISTORY

A tax concession for a LAFHA was introduced to the income tax system in 1945. An income tax deduction was provided to offset the taxable allowance as an incentive for employees to move to difficult locations and promote job mobility. The Explanatory Note to the former income tax law states:

'Various wage-fixing authorities have granted away-from-home allowances to employees whose places of employment are located away from their usual places of abode. The allowance is paid to compensate the employee for the additional expenditure he is obliged to incur in providing board and accommodation for himself at his place of employment while, at the same time, maintaining his home elsewhere.'

The Explanatory Note indicates that the LAFHA was intended to be an allowance objectively determined by a wage fixing authority, for the purposes of compensating an employee for additional expenditure incurred on food and accommodation where an employee is required by their current employer to live away from their usual place of residence, where they maintain a residence.

LAFHA was moved to the FBT law in 1986 when FBT was introduced, and the incidence of tax shifted to the employer as a fringe benefit. It was considered that LAFHA would be more appropriately included as a fringe benefit because the employer 'enjoys the benefit'.

Consistent with the income tax exemption, the intention was to tax employers on some legislated proportion of the living away from home costs — that is, the LAFHA was to be tax-free (exempt) to both employer and employee to the extent that it was for the reasonable cost of additional accommodation and the increased expenditure for food.

The ATO issued Miscellaneous Taxation Ruling MT 2030 on 30 September 1986, setting out guidelines for determining the circumstances in which an allowance is to be treated as a LAFHA, including principles for determining whether an employee is living away from home, and the additional expenses on food and accommodation.

In 1993, the ATO advised tax practitioners that it would review MT 2030. The ATO recognised that the ruling may not be adequate in view of a number of court and tribunal decisions, in particular, in respect to the interpretation of the term 'usual place of residence'. It also recognised that the ruling could provide clearer guidance on when an allowance paid to an employee would be treated as a LAFHA. In November 1993, the ATO issued Draft Taxation Determination TD 93/D275 to supplement MT 2030 by providing additional guidelines in relation to how an employee's 'usual place of residence' could be determined. Consultation of the draft taxation determination concluded that legislative change was required — rather than administrative guidance — to provide certainty.

In 1995, the then Government attempted to reform the treatment of LAFHA by introducing amendments to the law to Parliament.¹ The amendments introduced new conditions that needed to be satisfied before a LAFHA benefit arose. These changes were intended to address uncertainty and compliance problems with LAFHAs. Government was advised that many employers found it difficult to apply the guidelines issued by the ATO in MT 2030 because of a lack of clarity in the law.

The changes attempted to clarify whether a person was living away from home by specifying time limits for which a person could be living away from home. The amendments also proposed to redefine the term 'exempt accommodation component' and limit it to the amount actually incurred by the employee on accommodation. There was also to be an added requirement that the amounts be fully substantiated before the taxable value of a LAFHA could be reduced.

The then Government decided in late 1995 not to proceed with the proposed changes that were introduced because of concerns raised by industry groups.

In the intervening years, the ATO undertook a number of investigations concerning LAFHA. The ATO issued Draft Taxation Determination TD 2000/D5 in an attempt to clarify the application of the LAFHA provisions and Taxpayer Alert TA 2002/7 — both were later withdrawn.

1 The amendments were introduced in the Taxation Laws Amendment (FBT Cost of Compliance) Bill 1995.

On 24 January 2007, the Inspector-General of Taxation provided the Government with a report, *Review of Tax Office's management of complex issues — Case Study on living-away-from-home allowances*. In the report, the Inspector-General specifically dealt with the ATO's ability to identify and deal with major, complex issues within reasonable timeframes in respect to arrangements involving the payment of living-away-from-home allowances to foreign nationals, including working-holiday visitors or 'backpackers'.

In particular, the Inspector-General noted (at paragraph 2.31):

The current administrative outcome and legal position appears to be that anyone, including backpackers, who claims to be living away from their usual place of residence can, as part of their remuneration agreement with their employer, receive tax-free remuneration to cover their accommodation and food expenses for extended periods. In simple terms, some employees including overseas visitors to Australia who find employment after they arrive, can effectively salary sacrifice for normal living expenses if their employer agrees.

As a result of the interpretation of the LAFHA provisions adopted by tax professionals and employers over the years, salary and wages are increasingly being re-characterised as exempt LAFHA benefits, serving to erode the pay-as-you-go withholding revenue base. An area of growing concern is the use of LAFHA by employers (including through labour hire and contract management companies) to attract temporary resident workers to Australia by including tax-free LAFHA payments as part of their remuneration. These payments are effectively a re-characterisation of salary or wage income.

Examples can be found on the internet of labour hire firms promoting the use of LAFHA. The following examples are extracts from web pages found by searching for 'LAFHA'.

Example 1:

If you're moving Interstate or have just moved to Australia, you may be eligible for living-away-from-home allowance (LAFHA). The LAFHA payments can effectively reduce your taxable income thereby savings thousands of dollars on tax. While this may sound easy, many employers and agencies shy away from LAFHA due to the inherent risk of incorrect claims and consequences from the tax offices as the result of such claims.

Example 2:

LAFHA is an Australian Tax Office allowance that can be provided through employers to help eligible employees cover the additional costs of relocating and living away from their usual place of residence for employment.

Case Study #2: International Relocation (457 Visa Holder)

The facts

Patrick is a 33 year old Systems Engineer from Dublin who decides to immigrate to Australia with his family. He finds a job with a large retail head office in Sydney, and his employer sponsors him on a schedule A 457 Visa for four years. He has brought with him to Sydney his wife and two children, aged four and eight.

The figures

Patrick's salary of \$95,000, exclusive of super, gives him \$69,575 take home pay after tax. It costs him \$5,000 in airfares and additional moving costs, over and above the relocation reimbursement provided by his employer. They move into a two bedroom unit in Randwick which they rent for \$400 per week, and they pay \$4,000 per year in school fees. When LAFHA is applied, without his employer increasing his salary, Patrick's take home (after tax) pay increases by \$13,247 in the first year, and \$10,412 for the subsequent three years. This allows him and his family to enjoy a good standard of living and take advantage of their new outdoor lifestyle.

Example 3:

The living-away-from-home allowance is one of the most popular searched terms for workers on the 457 Visa.

This tax benefit can be very advantageous to certain groups of Temporary Visa holders, and can make up for some of the disadvantages of that Visa class.

1.3 EXAMPLES OF LAFHA USE

The following are examples of how LAFHA is currently being used.

Example 1:

A Chief Financial Officer in the information technology sector receives a salary package of \$105,000 per annum, which includes a LAFHA of \$71,185 for a period of nine months. The spouse of this employee works for the same employer and is also being paid a LAFHA while living in the same property.

Example 2:

An employer in the financial services industry pays an employee over \$950,000 in salary and provides an exempt LAFHA of \$5,250 per week (\$273,000 per annum). The basis for the exempt accommodation amount is the actual accommodation cost incurred by the tenant, and this is substantiated by a tenancy agreement for a property in Sydney.

Example 3:

An employee is required to live away from his usual place of residence in New South Wales to work in Victoria. His wife and child also transfer to the new location. The employee is paid \$107,800 in salary and \$39,500 as exempt LAFHA, representing accommodation and food expenses for the family.

Example 4:

An employee is required to live away from their usual place of residence in Victoria to work in the information technology sector in Sydney. The employee's spouse also relocates. The employee is paid \$139,700 in salary and \$9,300 in exempt LAFHA.

Example 5:

An employment services firm has 418 employees receiving LAFHA who are on working holiday visas, 369 of those employees received exactly 55 per cent of their total remuneration as exempt LAFHA.

2. THE GOVERNMENT'S REFORMS

2.1 HOW LIVING-AWAY-FROM-HOME (LAFH) BENEFITS WILL BE TAXED IN THE FUTURE

The fringe benefit tax (FBT) treatment of LAFH benefits will be reformed so:

- temporary resident employees will be required to maintain a home for their own use in Australia (which they are living away from for work) to access the concession, and in those cases the expenses will need to be substantiated; and
- all other employees will be required to substantiate their LAFH expenses.

This means the tax concessions will be maintained for all workers living in Australia who are required to move to work and for genuine expenditures on food and accommodation. No permanent resident receiving LAFH for genuine reasons will lose any existing entitlement.

The taxation treatment of LAFH will return to the income tax system as it was prior to the introduction of the FBT law in 1986. Any allowance paid by an employer to an employee as compensation for being required to live away from home will be included in the assessable income of the employee.

Expenses of a private or domestic nature, such as accommodation and food, are generally not deductible under the income tax law. However, this proposal retains a subsidy to support domestic labour mobility.

Permanent residents will be able to claim an income tax deduction for accommodation expenses they can substantiate and for food expenses beyond a statutory amount. Temporary residents who maintain a home in Australia for their own use and who are required to live away from that home to perform the duties of their employment will be able to claim an income tax deduction for their actual expenses. Allowances for other temporary residents will be taxed like other forms of income under the income tax system.

Employers who provide other LAFH benefits will continue to be exempt from FBT on those benefits provided to permanent residents and to temporary residents maintaining a home in Australia which they are living away from for their work.

Employers who provide direct LAFH benefits to other temporary residents will be liable for FBT on those benefits.

The proposed changes will apply from 1 July 2012 for both new and existing arrangements. All benefits and allowances provided in respect of the period commencing 1 July 2012 will be subject to the new arrangements.

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.	Exempt from FBT for actual expenses for accommodation and for food above a statutory amount.	Exempt from FBT for accommodation and for food above a statutory amount.
Income tax deduction provided for substantiated expenses for accommodation and for food above a statutory amount.	Employer reimburses the expenses incurred by employee.	Employer directly provides accommodation for and food to an employee.

Table 2: Proposed treatment for other temporary residents

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.	LAFH benefits subject to FBT.	LAFH benefits subject to FBT.
No entitlement to a deduction for LAFH expenses.	Employer reimburses expenses incurred by employee.	Employer provides all accommodation and food to employee.

Notes to tables:

- 1 Where an employer provides an allowance to an employee for living away from home but there is no intention that the employee reconciles the allowance with actual accommodation and food costs.
- 2 Where an employer reimburses expense or pays expenses on behalf of an employee and the employee provides supporting documentation to the employer (may be upfront reimbursement or after the fact).
- 3 Where an employer provides all accommodation and food to the employee living away from home.

2.1.1 Who is not affected by these reforms?

The following classes of taxpayer will not be affected by the reforms:

- permanent residents receiving LAFH benefits that can be substantiated;
- employees operating under fly-in fly-out arrangements within Australia; and
- employees of community sector organisations who are not currently using all of their FBT exemptions cap.

The following allowances and concessions will not be affected by the reforms:

- travel allowances provided to employees who have to travel from their usual place of work for short periods;
- employees receiving FBT remote area concessions; and
- employees receiving FBT education expenses concessions for their children when they are living away from home for work.

2.1.2 FBT treatment

Division 7 of Part III of the FBTA will be amended and LAFHA will no longer be treated as a fringe benefit.

Where an employer reimburses an employee for accommodation expenses incurred while they are required to live away from home, the exemption under section 21 of the FBTA will continue to apply for permanent residents. However, the exemption will only be available for benefits provided to temporary resident employees who maintain a home for their use in Australia, which they are required to live away from to perform their work.

For a payment to be a reimbursement, it must be a repayment of expenditure *already incurred* by the employee; however, the expense does not have to be actually paid. Where expenditure is *yet to be incurred*, there is no amount to which any reimbursement can relate. Where an employer makes such an advance payment to an employee, it may, depending on the circumstances, be an allowance which is assessable income of the employee.

Taxation Ruling TR92/15 explains the ATO view of the difference between an allowance and a reimbursement. Broadly it states that an allowance is paid as a 'definite predetermined amount to cover an estimated expense' and 'regardless of whether the recipient incurs the expected expense' (paragraph 2). A reimbursement, on the other hand, occurs where '... the recipient is compensated exactly (meaning precisely, as opposed to approximately), whether wholly or partly, for an expense already incurred although not necessarily disbursed' (paragraph 3).

To qualify for the LAFH expense payment exemption, the expenses of the employee must be substantiated. Employers will be required to obtain documentary evidence from employees to substantiate the expenses incurred on accommodation. This evidence could include lease agreements, mortgage documents and receipts for accommodation.

In the case of shared accommodation, the employee's actual expenditure is their share of the accommodation costs only — not the full amount. If one employer is reimbursing accommodation expenses for two employees who are in a domestic relationship, the costs must be shared between both employees.

The value of accommodation provided to employees will be determined in accordance with the relevant FBT provisions.

The exemption for accommodation provided directly to employees who are required to live away from home under subsection 47(5) will not be changed for permanent resident employees. However, the exemption will only be available for benefits provided to temporary residents who maintain a home for their use in Australia, which they are required to live away from to perform their work. Where these benefits are provided to other temporary residents, FBT will be payable.

Similarly, the reduction in taxable value for LAFH food fringe benefits in section 63 will continue to be available for permanent residents and for temporary residents who maintain a home for their use in Australia, which they are required to live away from to perform their work. However, the reduction will only be available to the extent the employee substantiates their expenses.

To minimise the costs of compliance for employers, substantiation will not be required for food expenses for an amount considered to be reasonable by the Commissioner. The ATO will publish administrative guidance to determine a reasonable food component. If employers choose to

reimburse amounts in excess of the reasonable amount, the full amount must be substantiated in order to reduce the taxable value of the benefits.

The taxable value of LAFH food benefits is currently reduced by the amount the food component (the amount that is considered to be compensation for food and drink expenses while living away from home) exceeds the statutory food amount. The statutory food amount is the expenditure assumed to be spent on food at the employee's usual residence and was determined when the FBT law commenced in 1986. It is \$42 per week for a person of 12 years of age or older, otherwise \$21 per week. These amounts have not been updated since 1986 and will be reviewed as part of this reform.

2.1.3 Income tax treatment

An allowance paid to an employee as compensation for being required to live away from their usual place of residence will no longer be a fringe benefit. Instead, the allowance will be assessable income of the employee, consistent with other employment allowances.

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.

No income tax deduction will be available to temporary resident employees who do not maintain a home for their use in Australia. They will pay income tax on LAFHA amounts — that is, they will not be compensated for incurring expenses of a private or domestic nature.

The existing substantiation requirements in Division 900 of the *Income Tax Assessment Act 1997* (ITAA 1997) will be amended to include reference to a LAFH allowance; however, substantiation will not be required for food expenses up to an amount considered to be reasonable by the Commissioner. The ATO will publish administrative guidance to determine a reasonable food component. If employees choose to claim deductions for amounts in excess of the reasonable amount, the full amount must be substantiated.

2.1.4 Temporary residents

'Temporary resident' will have the same meaning as used in the income tax law. The ITAA 1997 defines temporary resident in subsection 995-1(1) as a person who:

- holds a temporary visa granted under the *Migration Act 1958*;
- is not an Australian resident within the meaning of the *Social Security Act 1991*; and
- whose spouse is not an Australian resident within the meaning of the *Social Security Act 1991*.

2.1.5 Maintaining a home for own use

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.

‘Unit of accommodation’ is defined in subsection 136(1) of the FBTA to include:

- a house, flat or home unit;
- accommodation in a house, flat or home unit;
- accommodation in a hotel, hostel, motel or guesthouse;
- accommodation in a bunkhouse or any living quarters;
- accommodation in a ship, vessel or floating structure; and
- a caravan or other mobile home.

Temporary resident employees who work in remote areas on a fly-in fly-out basis and maintain a home in Australia for their use at all times will qualify for the living away from home concessions. For example, a temporary resident rents a home in Perth but works at a remote mining site on a fly-in fly-out basis.

Temporary resident employees will be required to provide documentary evidence to their employers that they are maintaining a home for their own use. The evidence could include lease agreements, mortgage documents and receipts for accommodation. The documents must show that the accommodation is available for the employee’s use at the time for which the LAFH benefits are being paid.

2.1.6 Commencement

The changes will apply from 1 July 2012 for both new and existing arrangements. All benefits and allowances provided in respect of the period commencing 1 July 2012 will be subject to the new arrangements.

2.2 EXAMPLES OF THE NEW ARRANGEMENTS

Example 1:

Ciara is a permanent resident who is asked by her employer to relocate for six months from Brisbane to Canberra. She is paid a LAFHA for each week of her posting.

Ciara will have the LAFHA included in her assessable income. She can substantiate her accommodation and food expenses; therefore, she will be able to claim a deduction for her expenses.

Ciara's employer does not have to withhold tax from the LAFHA because she indicates to them that she will be claiming a deduction.

Example 2:

Max comes to Australia as a temporary resident to work in the mining sector in Western Australia. He rents a home in Perth. He works eight days on and six days off at a mine site in the Pilbara. The employer provides accommodation and food for its employees at the mine site.

Max's home in Perth is available for his use even when he is working at the mine site. He provides a declaration to his employer that this is his Australian home and that he is maintaining it for his use.

Max's employer does not have to pay FBT on the accommodation and food benefits provided to Max while he is living at the mine site.

Example 3:

Steve comes to Australia as a temporary resident to work in the information technology sector for two years. He lives and works in Sydney. His employer reimburses his living expenses while in Australia. Steve's employer is subject to FBT on the accommodation and food benefits provided to Steve.

Example 4:

Fiona comes to Australia as a temporary resident working for an international firm. She is paid LAFHA for the duration of her three year contract. She lives and works in Melbourne.

She will have the LAFHA included in her assessable income. She will not be able to claim a deduction for any expenses incurred from living away from home.

2.3 TRANSITIONAL TREATMENT

The Government will examine the need for special transitional arrangements in specific cases to ensure there are no unintended consequences with the new arrangements. This may be particularly relevant for some sectors, such as the community sector.

The Government recognises that the community sector in particular may face peculiar difficulties in transitioning to the new arrangements. The Government is particularly interested in specific circumstances where the transitional arrangements impose significant hardship and whether there are practical alternatives that deliver the same ongoing policy outcomes.

3. QUESTIONS FOR CONSULTATION

1. Are there any unintended consequences from the proposed reforms?
2. What practical aspects of the proposed reforms need further consideration?
3. Are there any interactions with other areas of the tax law that need to be addressed?
4. As the statutory food amount is intended to reflect the ordinary costs incurred by an Australian in 2011, what should the statutory food amount be updated to?
5. Should the statutory food amount be indexed annually to ensure it remains up to date?
6. What transitional arrangements would be appropriate for the community sector?

4. APPENDIX

4.1 IMPACTS ON EMPLOYERS AND EMPLOYEES

The following tables set out the impacts of the proposed reforms on employers and employees.

Table 3: Impacts on employers

Employer provides...	... to an employee who is a permanent resident	... to an employee who is a temporary resident and who maintains a home for their use in Australia which they are required to live away from for work	... to an employee who is a temporary resident who does not maintain a home for their use in Australia which they are required to live away from for work
LAFHA	LAFHA is a taxable allowance of the employee. No FBT consequences for the employer. ATO will make a PAYG withholding variation so employers do not have to withhold tax from the LAFHA where the employee is expected to incur deductible LAFH expenses.	LAFHA is a taxable allowance of the employee. No FBT consequences for the employer. ATO will make a PAYG withholding variation so employers do not have to withhold tax from the LAFHA where the employee is expected to incur deductible LAFH expenses.	LAFHA is a taxable allowance of the employee. No FBT consequences for the employer. Employer withholds tax from the LAFHA for the employee.
Reimbursement of expenses for accommodation and food	Exempt from FBT for actual LAFH expenses incurred (subject to the statutory food amount). Employer must obtain declaration from the employee that they are living away from their usual place of residence. Employer must obtain documentary evidence from the employee of actual LAFH expenses incurred on accommodation. Employer may rely on guidance material from the ATO for reasonable amounts for food.	Exempt from FBT for actual LAFH expenses incurred (subject to the statutory food amount). Employer must obtain declaration from the employee that they are maintaining a home for their use in Australia from which they are living away for work. Employer must obtain documentary evidence from the employee of actual LAFH expenses incurred on accommodation. Employer may rely on guidance material from the ATO for reasonable amounts for food.	Employer subject to FBT on taxable value of benefits provided.
Accommodation and food directly to employee	Exempt from FBT for actual LAFH expenses incurred (subject to the statutory food amount).	Exempt from FBT for actual LAFH expenses incurred (subject to the statutory food amount).	Employer subject to FBT on taxable value of benefits provided.

Table 3: Impacts on employers (continued)

Employer provides...	... to an employee who is a permanent resident	... to an employee who is a temporary resident and who maintains a home for their use in Australia which they are required to live away from for work	... to an employee who is a temporary resident who does not maintain a home for their use in Australia which they are required to live away from for work
Accommodation and food directly to employee (continued).	Employer must obtain declaration from the employee that they are living away from their usual place of residence. Employer may rely on guidance material from the ATO for reasonable amounts for food.	Employer must obtain declaration from the employee that they are maintaining a home for their use in Australia from which they are living away for work. Employer may rely on guidance material from the ATO for reasonable amounts for food.	

Table 4: Impacts on employees

	Employee is...		
Employee receives...	a permanent resident	a temporary resident who maintains a home for their use in Australia which they are required to live away from for work	a temporary resident who does not maintain a home for their use in Australia which they are required to live away from for work
LAFHA	LAFHA is included in the employee's assessable income. Employee can claim deductions for actual LAFH expenses incurred. Employee must substantiate LAFH expenses. Employee pays tax only to the extent they cannot substantiate LAFH expenses. Employer will not withhold tax from the LAFHA where the employee is expected to incur deductible LAFH expenses.	LAFHA is included in the employee's assessable income. Employee can claim deductions for actual LAFH expenses incurred. Employee must substantiate LAFH expenses. Employee pays tax only to the extent they cannot substantiate LAFH expenses. Employer will not withhold tax from the LAFHA where the employee is expected to incur deductible LAFH expenses.	LAFHA is included in the employee's assessable income. Employee cannot claim deductions for any LAFH expenses incurred. Employee pays tax on the full amount of the allowance. Employer withholds tax from the LAFHA for the employee.
Reimbursement of expenses for accommodation and food	Exempt from FBT for actual LAFH expenses incurred (subject to the statutory food amount). Employee must provide documentary evidence to employer of actual LAFH expenses incurred on accommodation.	Exempt from FBT for actual LAFH expenses incurred (subject to the statutory food amount). Employee must provide documentary evidence to employer of actual LAFH expenses incurred on accommodation.	Employer subject to FBT on taxable value of benefits provided.

Table 4: Impacts on employees (continued)

	Employee is...		
Employee receives...	a permanent resident	a temporary resident who maintains a home for their use in Australia which they are required to live away from for work	a temporary resident who does not maintain a home for their use in Australia which they are required to live away from for work
Reimbursement of expenses for accommodation and food (continued)	Employee must provide a declaration to the employer that they are living away from their usual place of residence. Employer may rely on guidance material from the ATO for reasonable amounts for food.	Employee must provide a declaration to the employer that they are maintaining a home for their use in Australia from which they are living away for work. Employer may rely on guidance material from the ATO for reasonable amounts for food.	
Accommodation and food directly to employee	Exempt from FBT for actual LAFH expenses incurred (subject to the statutory food amount). Employer may rely on guidance material from the ATO for reasonable amounts for food. Employee must provide a declaration to the employer that they are living away from their usual place of residence.	Exempt from FBT for actual LAFH expenses incurred (subject to the statutory food amount). Employer may rely on guidance material from the ATO for reasonable amounts for food. Employee must provide a declaration to the employer that they are maintaining a home for their use in Australia from which they are living away for work.	Employer subject to FBT on taxable value of benefits provided.

