


# ***TD 2020/D2 - Income tax and fringe benefits tax: treatment of allowances and benefits provided to Australian Government employees posted overseas***

 This cover sheet is provided for information only. It does not form part of *TD 2020/D2 - Income tax and fringe benefits tax: treatment of allowances and benefits provided to Australian Government employees posted overseas*

This document has been finalised by TD 2020/8.



# Draft Taxation Determination

## Income tax and fringe benefits tax: treatment of allowances and benefits provided to Australian Government employees posted overseas

### **❶ Relying on this draft Determination**

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Determination applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

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### What this draft Determination is about

1. This draft Determination<sup>1</sup> sets out the tax consequences when an Australian Government Agency (Agency) provides employees employed under the *Public Service Act 1999* certain payments or benefits in respect of their overseas posting.
2. This Determination applies in respect of an Agency's employees who:
  - are posted overseas for a period of greater than six months
  - will continue to be paid salary and other entitlements for the duration of their posting by the Agency
  - will stay in settled accommodation (such as a house, unit or apartment) provided by the Agency while posted overseas, and
  - will remain a resident of Australia while posted overseas.
3. This Determination applies when an Agency makes the following payments or provides the following benefits to an employee in respect of their overseas posting:
  - cost of living adjustment (COLA), as described in paragraphs 26 and 27 of this Determination
  - child supplement, as described in paragraphs 28 to 31 of this Determination
  - education assistance as described in paragraphs 40 and 41 of this Determination
  - health provisions, as described in paragraphs 46 and 47 of this Determination
  - regional leave fare, as described in paragraph 54 of this Determination
  - location allowance, as described in paragraphs 57 and 58 of this Determination
  - transfer allowance, as described in paragraph 59 of this Determination, or
  - cost of posting allowance (COPA), as described in paragraphs 65 to 67 of this Determination.
4. This Determination will not apply to:
  - Defence personnel on operational deployment, and
  - Australian Federal Police serving in a disciplined police contingent.

<sup>1</sup> All further references to 'this Determination' refer to the Determination as it will read when finalised. Note that this Determination will not take effect until finalised.

## Ruling

5. The tax treatments to apply when an Agency provides a payment or benefit as described within this Determination to an employee in respect of their overseas posting are:

Name of payment or benefit	Tax treatment	Reported on payment summary or income statement
COLA	Fringe benefits tax (FBT) – living-away-from-home allowance (LAFHA), subject to the conditions set out in paragraphs 6 and 7 of this Determination Otherwise, income tax – assessable income – subject to pay as you go (PAYG) withholding (see paragraph 9 of this Determination)	No, if FBT Yes, if income – as salary or wages and tax withheld
Child supplement	FBT – LAFHA, subject to the conditions set out in paragraphs 6 and 7 of this Determination Otherwise, income tax – assessable income – subject to PAYG withholding (see paragraph 9 of this Determination)	No, if FBT Yes, if income – as salary or wages and tax withheld
Education assistance	FBT – expense payment fringe benefit (see paragraph 10 of this Determination)	Yes – as reportable fringe benefit amount
Health provisions	FBT – expense payment fringe benefit (see paragraph 10 of this Determination)	No – if the benefits are exempt benefits or excluded fringe benefits
Regional leave fares	FBT – expense payment fringe benefit (see paragraph 10 of this Determination)	Yes – as reportable fringe benefit amount
Location allowance	Income tax – assessable income – subject to PAYG withholding (see paragraphs 11 and 12 of this Determination)	Yes – as reportable fringe benefit amount
Transfer allowance	Income tax – assessable income – subject to PAYG withholding (see paragraphs 11 and 12 of this Determination)	Yes – as salary or wages and tax withheld
Cost of Posting Allowance (COPA)		
Where COPA (or a component) compensates for additional expenditure likely to be incurred by an employee that is not deductible and the other component (if any) relates to additional disadvantages to which they are subject	FBT – LAFHA, subject to paragraph 13 of this Determination	No

Name of payment or benefit	Tax treatment	Reported on payment summary or income statement
Where no component of COPA compensates for additional expenditure likely to be incurred by an employee	Income tax – assessable income – subject to PAYG withholding (see paragraph 15 of this Determination)	Yes – as salary or wages and tax withheld

***Where the payment or benefit is a living-away-from-home allowance***

6. The payment of COLA and child supplement are in the nature of compensation to employees for non-deductible additional expenses an employee may be expected to incur. However, to qualify as a LAFHA, additional expenses must arise by reason that the duties of employment require the employee to live away from his or her normal residence.<sup>2</sup>

7. This requirement will be met where the duties of employment require the employee to live away from his or her normal residence<sup>3</sup> on a temporary basis and the employee intends to return to their normal residence at the end of the posting.

8. Where COLA and child supplement qualify as a LAFHA:

- the taxable value of COLA is the amount of the benefit, reduced by any applicable exempt food component for the first 12 months of deployment provided certain conditions are met<sup>4</sup>
- the taxable value of the child supplement benefit is the amount of the allowance
- they are excluded fringe benefits<sup>5</sup> and are not required to be reported on the employee's payment summary or income statement, and
- there is no obligation to withhold an amount from the allowance and it is not included in the employee's assessable income.

9. If a particular employee does not satisfy the conditions in paragraphs 6 and 7 of this Determination, the allowance or benefit will not qualify as LAFHA and will not be subject to FBT. In this case, the allowance will be assessable income of the employee.<sup>6</sup> An Agency must withhold tax when paying the allowance or benefit to the employee<sup>7</sup> and remit the amount withheld to the ATO. An Agency must also include the amount of the payment and tax withheld on the employee's payment summary or income statement.

<sup>2</sup> Section 30 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).

<sup>3</sup> As defined in subsection 136(1) of the FBTAA.

<sup>4</sup> If an Agency obtains a declaration from an employee that they maintain an Australian home that is available for their use at all times, the taxable value of the COLA can be reduced by an exempt food component for the first 12 months they are posted at a particular overseas location.

As the employee will stay in settled accommodation provided by the Agency for the duration of deployment, no amount of the COLA could be reasonably attributed to additional expenses on accommodation. As such, the COLA cannot be reduced by any exempt accommodation component.

Further details about how to calculate the taxable value of a LAFHA benefit, along with the requirements for the appropriate declaration, can be found in Chapter 11 of [Fringe benefits tax – a guide for employers](#) available at [ato.gov.au/law](http://ato.gov.au/law)

<sup>5</sup> Paragraph 5E(3)(i) of the FBTAA and paragraphs 11(3)(a) and (d) of the *Fringe Benefits Tax Assessment Regulations 2018* (FBT Regulations).

<sup>6</sup> The allowance will be assessable income either because of sections 6-5 or 15-2 of the *Income Tax Assessment Act 1997* (ITAA 1997).

<sup>7</sup> Section 12-35 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

***Where the payment or benefit is an expense payment fringe benefit***

10. Education assistance, health provisions, and regional leave fares are expense payment fringe benefits.<sup>8</sup> As such:

- education assistance
  - The taxable value of education assistance is the amount of the expense paid or reimbursed by the Agency. A reduction in the taxable value may be available because this benefit relates to the children of overseas employees.<sup>9</sup>
  - Education assistance is not an excluded fringe benefit, and the taxable value of the fringe benefit may need to be reported on the employee's payment summary or income statement.
- health provisions
  - The taxable value of health provisions is the amount reimbursed or paid by the Agency less any contribution by the employee.<sup>10</sup>
  - Work-related health benefits or emergency assistance may be exempt benefits<sup>11</sup> where the benefit is
    - for work-related injury<sup>12</sup>
    - for work-related medical examinations, work-related medical screening, work-related preventative health care or work-related counselling<sup>13</sup>, or
    - by way of emergency assistance.<sup>14</sup>
  - Health provisions will be an excluded fringe benefit to the extent that the health care provided relates to emergency or other essential health care provided to an employee or family member while the employee is working outside Australia and no Medicare benefit is payable.<sup>15</sup>
  - If health provisions are not an exempt benefit or excluded fringe benefit, the taxable value of the fringe benefit may need to be reported on the employee's payment summary or income statement.
- regional leave fares
  - The taxable value of regional leave fares is the amount of the expense paid or reimbursed by the Agency, less any contribution by the employee.<sup>16</sup>

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<sup>8</sup> Section 20 of the FBTA.

<sup>9</sup> Section 65A of the FBTA. Further details about this reduction can be found in Chapter 19 of [Fringe benefits tax – a guide for employers](#).

<sup>10</sup> Section 65A of the FBTA.

<sup>11</sup> Further details about these exemptions can be found in Chapter 20 of [Fringe benefits tax – a guide for employers](#).

<sup>12</sup> Section 58J of the FBTA.

<sup>13</sup> Section 58M of the FBTA.

<sup>14</sup> Section 58N of the FBTA.

<sup>15</sup> Paragraph 5E(3)(i) of the FBTA and subsections 6(2) and (3) of the FBT Regulations.

<sup>16</sup> Section 23 of the FBTA.

- Regional leave fares are not an excluded fringe benefit, and the taxable value of the fringe benefit may need to be reported on the employee's payment summary or income statement.

***Where an allowance is assessable income and subject to PAYG withholding***

11. Location allowance and transfer allowance are not subject to FBT.
12. These allowances are assessable income of the employee.<sup>17</sup> An Agency must withhold tax when making the payment of these allowances to the employee<sup>18</sup> and remit the amount withheld to the ATO. An Agency must also include the amount of the payment and tax withheld on the employee's payment summary or income statement.

***Where the payment or benefit relates to cost of posting allowance***

13. COPA payments generally reflect likely extra non-deductible expenses the employee is expected to incur, or sometimes a mix of such expenses and compensation for additional non-financial disadvantages. If a particular employee satisfies the conditions in paragraphs 6 and 7 of this Determination (about the duties of employment requiring the employee to live away from their normal residence) and the payment of COPA is wholly in the nature of compensation for:

- likely non-deductible additional expenses they might be expected to incur, or
- likely non-deductible additional expenses they might be expected to incur and other additional disadvantages to which they are subject,

the allowance or benefit will qualify as a LAFHA and is subject to FBT.

14. Where COPA qualifies as a LAFHA and is subject to FBT:
- the taxable value of the benefit is the amount of the allowance
  - the allowance is an excluded fringe benefit<sup>19</sup> and the Agency is not required to report the amount on the employee's payment summary or income statement, and
  - there is no obligation to withhold an amount from the allowance and it is not included in the employee's assessable income.

15. If a particular employee does not satisfy the conditions in paragraphs 6 and 7 of this Determination or there is no component at all for likely non-deductible additional expenditure, COPA they are paid is not subject to FBT<sup>20</sup> and will be assessable income of the employee.<sup>21</sup> Where COPA is not subject to FBT, an Agency must withhold tax when making the payment to the employee<sup>22</sup> and remit the amount withheld to the ATO. An Agency must also include the amount of the payment and tax withheld on the employee's payment summary or income statement.

<sup>17</sup> The allowance will be assessable income either because of section 6-5 or 15-2 of the ITAA 1997.

<sup>18</sup> Section 12-35 of Schedule 1 to the TAA.

<sup>19</sup> Paragraph 5E(3)(i) of the FBTAA and paragraph 11(3)(b) of the FBT Regulations.

<sup>20</sup> If COPA has a component that is neither compensation for likely non-deductible expenditure nor for additional disadvantage to which the employee is subject, that component is not subject to FBT and will also be assessable income of the employee.

<sup>21</sup> The allowance will be assessable income either because of sections 6-5 or 15-2 of the ITAA 1997.

<sup>22</sup> Section 12-35 of Schedule 1 to the TAA.

**Date of effect**

16. When the final Determination is issued, it will apply to arrangements begun to be carried out from the date of issue.

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**Commissioner of Taxation**  
27 November 2020

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## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached. It does not form part of the proposed binding public ruling.*

### Withholding payments

17. An Agency is required to withhold tax from payments they make to an employee including ‘salary, wages, commission, bonuses or allowances’<sup>23</sup>, unless they are:

- payments that are exempt or non-assessable and non-exempt for the employee<sup>24</sup>
- the portion of the payment that is a LAFHA<sup>25</sup>, or
- the portion of the payment that is an expense payment benefit.<sup>26</sup>

18. Where an Agency is required to withhold tax, the Agency must remit the amount withheld to the ATO and include the amount of payment and tax withheld on the employee’s payment summary or income statement.

### Fringe benefits

19. Commonwealth departments have the same obligations in relation to fringe benefits provided to employees under the FBTAA as are imposed on employers generally.<sup>27</sup>

20. Benefits which an Agency provides to an employee or an employee’s associate<sup>28</sup> in respect of employment may be a fringe benefit.

21. An Agency is liable to pay fringe benefits tax based on the value of the fringe benefits they provide to an employee or their associate. The value of the fringe benefits will depend upon the circumstances.

22. An Agency may be required to report the amount of fringe benefits tax they pay on the fringe benefit in the employee’s payment summary or income statement.

### Reportable fringe benefits amount

23. The taxable values of fringe benefits provided to an employee or their associate are included in the reportable fringe benefits amount<sup>29</sup>, unless they are excluded fringe benefits.<sup>30</sup>

24. Where the value of the fringe benefits exceeds \$2,000 in an FBT year (1 April to 31 March), the grossed-up taxable value of those benefits is reported on an employee’s

<sup>23</sup> Section 12-35 of Schedule 1 to the TAA.

<sup>24</sup> Subsections 12-1(1) and (1A) of Schedule 1 to the TAA.

<sup>25</sup> Subsection 12-1(2) of Schedule 1 to the TAA.

<sup>26</sup> Paragraph 12-1(3)(a) of Schedule 1 to the TAA.

<sup>27</sup> Refer to the *Fringe Benefits Tax (Application to the Commonwealth) Act 1986*

<sup>28</sup> Section 318 of the *Income Tax Assessment Act 1936*.

<sup>29</sup> Part XIB of the FBTAA.

<sup>30</sup> Paragraph 5E(3)(i) of the FBTAA provides that an excluded fringe benefit may be prescribed by the FBT Regulations.

payment summary or income statement for the corresponding income year (1 July to 30 June).

25. Excluded fringe benefits include:

- emergency or other essential health care provided to an employee or their associate who is an Australian citizen or permanent resident, while the employee is working outside Australia and no Medicare benefit is payable in respect of the service<sup>31</sup>
- a payment of a Commonwealth overseas living allowance to the extent the payment includes the following from this Determination
  - COLA<sup>32</sup>
  - post adjustment<sup>33</sup>
  - child supplement<sup>34</sup>
- a LAFHA<sup>35</sup> that is provided to a Commonwealth employee on or after 1 April 2012<sup>36</sup>
- a benefit relating to accommodation provided to a Commonwealth employee on or after 1 April 2012, that is not an exempt benefit<sup>37</sup>, where the duties of employment require the employee to live away from their normal residence.<sup>38</sup>

### **Cost of living adjustment and child supplement**

26. COLA is paid to compensate for the increased cost of purchasing goods and services at overseas posts. An independent provider calculates the difference in costs of living between the overseas post and the relevant home capital city and recommends a cost of living index. Where the cost of living at the overseas post is greater than the home capital city, the cost of living index is applied to the employee's spendable salary. COLA is also adjusted in line with exchange rate variations.

27. COLA commences the day an employee starts duty at the overseas post and ends the day they cease duty at the overseas post.

28. Child supplement recognises the additional costs incurred when employees are accompanied by dependent children<sup>39</sup> at an overseas post.

29. It is paid for an employee's child, or the child of their spouse, who is dependent on the employee and ordinarily lives with the employee at the overseas post. An employee receives child supplement for each dependent child living at the overseas post.

30. The eligibility for child supplement starts on the later of the day a dependent child arrives to take up residence with the employee at the overseas post and the day the employee commences duty at the overseas post. It ends on the earlier of a day the

<sup>31</sup> Subsections 6(2) and (3) of the FBT Regulations.

<sup>32</sup> Paragraph 11(3)(a) of the FBT Regulations.

<sup>33</sup> Paragraph 11(3)(b) of the FBT Regulations.

<sup>34</sup> Paragraph 11(3)(d) of the FBT Regulations.

<sup>35</sup> Section 30 of the FBTA.

<sup>36</sup> Paragraph 11(2)(a) of the FBT Regulations.

<sup>37</sup> Section 21 or subsection 47(5) of the FBTA.

<sup>38</sup> Paragraph 11(2)(c) of the FBT Regulations.

<sup>39</sup> A dependent child is defined as less than 18 years of age or, if 18 years of age or older, still undertaking full-time secondary education.

dependent child ceases to be a dependent child, leaves the post, or the day the employee ceases duty at the overseas post.

31. Child supplement is calculated as a percentage of the average annual salary of overseas-based employees and adjusted by the cost of living and exchange rate variations where the cost of living index is over 100.

32. COLA and child supplement as described in paragraphs 26 to 31 of this Determination are a LAFHA when the<sup>40</sup>:

- allowance is paid to an employee in respect of their employment
- duties of their employment require them to temporarily live away from their normal residence, and
- whole of the allowance is in the nature of compensation for non-deductible additional expenses the employee might be expected to incur, or non-deductible additional expenses and other disadvantages suffered, because the duties of their employment require them to live away from their normal residence.

33. Whether an employee is living away from home depends on the facts of each case. Relevant factors to consider include:

- the time spent working away from their normal residence (for example, their usual place of residence)<sup>41</sup>
- whether the employee has a normal residence at a previous location in Australia<sup>42</sup>, and
- the nature of the accommodation at the overseas post.<sup>43</sup>

34. The taxable value of the LAFHA fringe benefit depends on the circumstances of the employee. For the purposes of this Determination, the calculation of the taxable value falls into two circumstances:

- the employee maintains a home in Australia at which they usually reside<sup>44</sup> and the fringe benefit relates to the first 12-month period<sup>45</sup>
- all other cases.

<sup>40</sup> Section 30 of the FBTA.

<sup>41</sup> The longer an employee spends working away from their normal residence at a particular work location, the more likely that the employee is living away from home.

<sup>42</sup> An employee who moves to a new locality on a posting of limited duration with an intention to return to the old locality at the end of the posting would be regarded as living away from their normal residence. However, an employee may be unable to establish they are living away from their normal residence where, for example, they move from one posting location to another posting location, and do not have a normal residence in Australia.

<sup>43</sup> Where an employee works away from home for a considerable period and, for that period, stays in settled accommodation (such as a house, unit or apartment), this supports the view that they are living away from home.

<sup>44</sup> Section 31C of the FBTA. See also section 11.7 of Chapter 11 of [Fringe benefits tax – a guide for employers](#) for an explanation of when an employee is considered to maintain a home in Australia at which they normally reside.

<sup>45</sup> Section 31D of the FBTA provides that the LAFHA has to relate to all or part of the first 12 months at a particular work location that an employee is living away from home in Australia for the purposes of their employment. The 12 months do not have to be consecutive.

35. In general, if the conditions in the first dot point of paragraph 34 of this Determination are satisfied, the taxable value would be the amount of the overall LAFHA paid<sup>46</sup>, less:

- any exempt accommodation component, and
- any exempt food component.

36. However, it is noted that in the circumstances outlined in this Determination, an Agency provides accommodation to the employee, so there will not be an exempt accommodation component in determining the taxable value of the LAFHA<sup>47</sup> in these circumstances.

37. The food component in relation to a LAFHA is the amount that might reasonably be concluded is compensation for expenses to be incurred by the employee for food or drink while the employee is living away from home. The expenses can be for food or drink for both the employee and any eligible family members who live with the employee during the period the employee is living away from home.<sup>48</sup>

38. If the conditions in the first dot point of paragraph 34 of this Determination are not satisfied, the taxable value is the amount of the LAFHA paid.

39. Where the conditions in paragraph 32 of this Determination are not satisfied, the LAFHA provisions do not apply. In these circumstances the allowances are assessable income in the hands of the employee.<sup>49</sup> An Agency is required to withhold tax<sup>50</sup> when making the payment (and remit this to the ATO), and include the amount of the payment and tax withheld on the employee's payment summary or income statement.

### **Education assistance**

40. Education assistance is provided to ensure eligible dependent children of employees posted overseas have access to education equivalent to what they would receive in Australia and to minimise student disruption across the school year.

41. Eligible employees are entitled to receive reimbursement for compulsory tuition fees up to the value of the nominated benchmark school, some compulsory school excursions, and public transport or school bus fees (but not other transport options). Assistance with Australian boarding school fees or private boarding costs may also be available for children residing in Australia. Additional fees for extra-curricular and elective activities, educational items and the meal component of school fees are a personal cost to the employee.

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<sup>46</sup> If an Agency pays more than one allowance to an employee that is a LAFHA for the same overseas deployment, the reduction for the exempt accommodation and food component would only apply to the overall amount of those allowances paid. The reduction does not apply to each allowance.

<sup>47</sup> An expense payment benefit arises where an Agency reimburses an employee for accommodation expenses or pays these expenses on behalf of them. Alternatively, a residual benefit arises where an Agency provides an employee with the use of a unit of accommodation. These benefits will be exempt benefits, and not subject to FBT where the conditions in the first dot point of paragraph 34 of this Determination are satisfied and the employee gives the Agency a declaration about living away from home.

<sup>48</sup> Where a family member incurs these expenses on behalf of the employee, that family member is considered to be acting as an agent of the employee and, therefore, the employee is still the person incurring those expenses.

<sup>49</sup> The allowance will be assessable income either because of section 6-5 or 15-2 of the ITAA 1997.

<sup>50</sup> Section 12-1 of Schedule 1 to the TAA.

42. An expense payment benefit arises when an Agency reimburses an employee for, or pays, school expenses on behalf of the employee for their child's education.<sup>51</sup>
43. The taxable value is the amount of the expense paid or reimbursed by the Agency less the amount the employee contributes to the benefit.<sup>52</sup>
44. These benefits may be eligible for the reduction in the taxable value<sup>53</sup> where the employee's child<sup>54</sup> is in full-time education<sup>55</sup> when the employee is posted overseas<sup>56</sup> and the benefits are provided in accordance with an industrial agreement or industry custom.<sup>57</sup>
45. The reduction is proportionate to the period of the employee's service overseas. If the overseas service commences or ceases during a school term, and the child receives their education at a school, college or university, the education costs relating to the whole term will be subject to the reduction.<sup>58</sup> Where the child receives their education by a tutor, the reduction applies to the education costs relating to the period from the day the posting started to the day the posting ended.

### Health provisions

46. Health provisions are intended to provide the same standard of health care for employees and eligible dependants posted overseas as they would receive if they were a public patient in Australia. Where possible, the health provisions aim to mirror coverage under Medicare provisions.
47. Employees are therefore partially or wholly reimbursed for costs incurred in relation to the treatment of day-to-day health matters, illnesses or injuries that arise during, or as a result of, their overseas posting. Reimbursement may or may not be provided for costs associated with specialised treatment for pre-existing conditions or forms of elective treatment.
48. The reimbursement, or payment to a third-party provider, of the employee's (or their family member's) medical expenses on an overseas posting is an expense payment benefit by an Agency.<sup>59</sup>
49. The taxable value of the benefit is the amount paid by the Agency less the amount an employee contributes to the benefit.<sup>60</sup>
50. Certain categories of work-related health benefits or emergency assistance provided to an employee may be an exempt benefit and not subject to FBT.
51. Benefits an Agency provides to an employee for work-related injury are exempt benefits.<sup>61</sup> To qualify, such benefits (for example, the payment of hospital or medical costs

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<sup>51</sup> Section 20 of the FBTA.

<sup>52</sup> Section 23 of the FBTA.

<sup>53</sup> Section 65A of the FBTA.

<sup>54</sup> A child means an employee's child who is less than 25 years of age at the time the benefit is provided.

<sup>55</sup> The full-time education can be provided to a child at a school, college or university, or by a tutor. Where the child receives their education at a school, college or university, the employee must be posted overseas for 28 days or more.

<sup>56</sup> The employee's child does not have to accompany the employee overseas for the employer to be eligible to the reduction.

<sup>57</sup> Paragraphs 65A(c) and (d) of the FBTA.

<sup>58</sup> Paragraph 65A(f) of the FBTA.

<sup>59</sup> Section 20 of the FBTA.

<sup>60</sup> Section 23 of the FBTA.

<sup>61</sup> Section 58J of the FBTA.

or associated ambulance, travel and accommodation costs) must be provided for 'compensable work-related trauma'<sup>62</sup> suffered by the employee.

52. Benefits an Agency provides to an employee to prevent<sup>63</sup>, or determine if they are suffering<sup>64</sup> from a work-related injury or illness are exempt benefits.<sup>65</sup>

53. Benefits provided to an employee by way of emergency assistance<sup>66</sup> are exempt benefits.<sup>67</sup> An emergency<sup>68</sup> is a natural disaster, an armed conflict, a civil disturbance, an accident, a serious illness, or any similar matter. If the emergency assistance is health care, the exemption applies only if the treatment is provided by the employee (or a related company), or on the Agency's premises (or those of a related company) or at or near the Agency's worksite. The exemption would therefore not apply to the payment by an Agency of medical or hospital expenses of an employee.

### **Regional leave fares**

54. Regional leave fares are provided to enable employees and their families stationed overseas to gain access to medical, dental and/or shopping facilities which are unavailable at the overseas post, as well as to obtain relief from a difficult environment. The entitlement to a regional leave fare is limited to the cost of a return airfare from an employee's overseas post to a designated regional leave centre (which may or may not be in Australia). The travel may be coordinated, and the fares paid, by a Department or agency of the Australian Government.

55. The provision of travel (that is, airfares) for an employee and their family that is not for work purposes will be an expense payment benefit provided by an Agency if the Agency reimburses the employee or pays for the travel. This is the case even where another Department or agency (including an Australian embassy in the relevant country<sup>69</sup>) coordinates the travel arrangements for the employee and their family and makes the payment to the travel supplier.<sup>70</sup>

56. The taxable value of the benefit is the amount paid by the Agency less the amount the employee contributes to the benefit.<sup>71</sup>

<sup>62</sup> See also section 20.8 of Chapter 20 of [Fringe benefits tax – a guide for employers](#) for the meaning of compensable work-related trauma.

<sup>63</sup> The care associated with benefits to prevent an employee suffering an injury or illness relating to their employment must be provided by a medical practitioner, nurse, dentist or optometrist and is generally provided to employees with similar work-related risks.

<sup>64</sup> Examination or tests relating to the screening of an employee to determine if they are suffering from, or at risk of suffering from, an injury or illness related to their employment, must be carried out:

- by a medical practitioner, nurse, dentist, optometrist or audiometrist, and
- as part of a screening program that applies generally to employees with similar work-related risks.

<sup>65</sup> Section 58M of the FBTAA.

<sup>66</sup> See subsection 136(1) of the FBTAA for the meaning of emergency assistance.

<sup>67</sup> Section 58N of the FBTAA.

<sup>68</sup> As defined in subsection 136(1) of the FBTAA.

<sup>69</sup> Travel may also be organised on behalf of the relevant department by the Australian embassy in the relevant country.

<sup>70</sup> The meaning of 'fringe benefit' in subsection 136(1) of the FBTAA provides at paragraph (d) that a fringe benefit includes benefits provided to an employee by an associate of the employer. An Agency and the other Department or agency may be considered to be associates under paragraph 159(2)(b) of the FBTAA such that a fringe benefit will have been provided to the employee. Where an Agency and the embassy are not associates, an Agency has provided a fringe benefit to the employee by virtue of paragraph (e) of the definition of 'fringe benefit' in subsection 136(1) of the FBTAA because the Agency has agreed to the embassy providing benefits to the employee or their associates.

<sup>71</sup> Section 23 of the FBTAA.

**Location allowance and transfer allowance**

57. A location allowance compensates for challenging living conditions at some overseas posts that may have a significant adverse effect on the lifestyle or welfare of employees and their families. Location allowance commences the day an employee starts duty at the overseas post and ends the day an employee ceases duty at the overseas post.

58. Location allowance is calculated on a percentage of the average annual salary of overseas-based employees using hardship categories and ratings. An external service provider is contracted to review hardship categories and location ratings annually. The results are factored for accompanied employees (factor of 120%) and unaccompanied employees (factor of 80%).

59. Transfer allowance assists with miscellaneous costs incurred in Australia prior to departure, on posting, moving from one overseas post to another, and when re-establishing a home in Australia on return from a posting.

60. The location allowance compensates an employee for the hardship faced from living in certain locations.

61. The transfer allowance compensates an employee for the additional expenses they might incur as a result of being posted overseas. The expenses may or may not have a dollar value, but an employee is not required to acquit or return the unused amount of the transfer allowance.

62. None of these allowances compensate for the increased costs in day-to-day living or the increased cost of raising dependents in the deployment location.

63. The location allowance and transfer allowance are payments for working conditions and special duties and are not payments that are exempt from the withholding tax provisions.

64. The location allowance and transfer allowance are assessable income in the hands of the employee.<sup>72</sup> An Agency is required to withhold tax<sup>73</sup> when making the payment (and remit this to the ATO), and include the amount of payment and tax withheld on the employee's payment summary or income statement.

**Cost of posting allowance**

65. COPA compensates employees for a wide range of financial and non-financial impacts an overseas posting has on their lives. COPA provides a buffer to even out the effect of costs which are not picked up by other allowances. COPA may compensate for:

- family dislocation
- loss of access to support networks in Australia
- missing out on significant family events or milestones
- the cost of maintaining links to Australia (including personal travel)
- the loss of spouse/partner income, superannuation, and career impact, and

<sup>72</sup> The allowance will be assessable income either because of sections 6-5 or 15-2 of the ITAA 1997.

<sup>73</sup> Section 12-1 of Schedule 1 to the TAA.

- other elements of additional expenditure an employee might be expected to incur as a result of an overseas posting.

66. COPA amounts are based on a percentage of gross salary, within a defined salary range, and vary depending upon whether an employee is accompanied or unaccompanied by a recognised spouse. The amounts are not calculated on the basis of specific and identifiable costs to be incurred by the employee and are paid where the employee has no additional costs.

67. COPA commences the day an employee starts duty at the overseas post and ends the day an employee ceases duty at the overseas post or within three days of ceasing duty at the overseas post if proceeding directly on to approved annual leave.

68. COPA as described in paragraphs 65 to 67 of this Determination compensates an employee for financial and non-financial impacts an overseas posting has on their life.

69. COPA will be a LAFHA when:

- the allowance is paid to an employee in respect of their employment
- the duties of their employment require them to temporarily live away from their normal residence, and
- the whole of the allowance is in the nature of compensation for non-deductible additional expenses the employee might be expected to incur<sup>74</sup>, or non-deductible additional expenses and other disadvantages suffered, because the duties of their employment require them to live away from their normal residence.

70. Whether an employee is living away from home depends on the facts of each case as set out in paragraph 33 of this Determination.

71. Ordinarily the taxable value of a LAFHA fringe benefit will depend on whether the employee maintains a home in Australia at which they usually reside<sup>75</sup> and the fringe benefit relates to the first 12-month period.<sup>76</sup>

72. However, based on the circumstances described in this Determination, the taxable value would be the amount of LAFHA paid. This is because there will not be an exempt accommodation component or exempt food component. An Agency provides the accommodation to the employee and the food components are addressed by other allowances.

73. Where no part of COPA compensates for non-deductible additional expenses an employee might be expected to incur as a result of an overseas posting, the LAFHA provisions do not apply. In these circumstances, the allowance is assessable income in the hands of the employee.<sup>77</sup> An Agency is required to withhold tax<sup>78</sup> when making the payment (and remit this to the ATO), and include the amount of the payment and tax withheld on the employee's payment summary or income statement.

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<sup>74</sup> For instance, part of the allowance is paid to an employee to meet the extra living costs they are likely to incur as a result of living overseas.

<sup>75</sup> Section 31C of the FBTA. See also section 11.7 of Chapter 11 of [Fringe benefits tax – a guide for employers](#) for an explanation of when an employee is considered to maintain a home in Australia at which they normally reside.

<sup>76</sup> Section 31D of the FBTA provides that LAFHA has to relate to all or part of the first 12 months at a particular work location that an employee is living away from home in Australia for the purposes of their employment. The 12 months do not have to be consecutive.

<sup>77</sup> The allowance will be assessable income either because of sections 6-5 or 15-2 of the ITAA 1997.

<sup>78</sup> Section 12-1 of Schedule 1 to the TAA.



## Appendix 2 – Superannuation guarantee

**❶ This Appendix is provided as information to help you understand the Commissioner’s proposed view on the application of the superannuation guarantee to the payments or benefits outlined in the Determination. When the Determination is finalised, this Appendix will not be legally binding on the Commissioner. However, if the Commissioner later takes the view that the law applies less favourably to you than this Appendix indicates, the fact that you acted in accordance with this Appendix would be a relevant factor in your favour in the Commissioner’s exercise of any discretion in regards to the imposition of penalties.**

### Superannuation guarantee

74. In order to prevent a superannuation guarantee charge from arising, an Agency is required to contribute a minimum percentage of each eligible employee’s ‘ordinary time earnings’ (OTE) to a complying superannuation fund or retirement savings account.<sup>79</sup> OTE is the lesser of:

- the total of the employee’s earnings in respect of ordinary hours of work (other than lump sum payments made on termination of employment in lieu of unused sick leave, unused annual leave and unused long service leave), and earnings consisting of over-award payments, shift loading or commission, and
- the maximum contribution base for the quarter.<sup>80</sup>

75. An employee’s ‘earnings’ is the remuneration paid to the employee as reward for the employee’s services – their ‘salary or wages’.<sup>81</sup>

76. An employee’s ‘ordinary hours of work’ are the hours specified as their ordinary hours of work under the relevant award or agreement, or under the combination of such documents, that governs the employee’s conditions of employment.<sup>82</sup>

77. If these hours are not specified, the ordinary hours of work are the normal, regular, usual or customary hours worked by the employee, as determined in all the circumstances of the case. If it is not possible or practicable to determine the normal, regular, usual or customary hours of an employee’s work, the actual hours worked should be taken to be the ordinary hours of work.<sup>83</sup>

78. All amounts of earnings in respect of employment are in respect of the employee’s ordinary hours of work unless they are remuneration for working overtime hours or are otherwise referable only to overtime or to other hours that are not ordinary hours of work.<sup>84</sup>

<sup>79</sup> It should also be noted that in addition to the amount of the contribution, an Agency is also required to satisfy the ‘choice of fund requirements’ per Part 3A of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) to avoid a superannuation guarantee charge.

<sup>80</sup> The total of OTE in respect of an employee for a quarter cannot exceed the maximum contribution base for the quarter: see section 15 and paragraph (b) of the definition of ‘ordinary time earnings’ in subsection 6(1) of the SGAA. For any quarter in the 2020–21 income year, the maximum contribution base is \$57,090. The amount is subject to both yearly indexation (which takes into account movements in full-time adult average weekly ordinary time earnings) and changes in the amount of the concessional contributions cap (within the meaning of the ITAA 1997).

<sup>81</sup> Paragraph 12 of Superannuation Guarantee Ruling SGR 2009/2 *Superannuation guarantee: meaning of the terms ‘ordinary time earnings’ and ‘salary or wages’*.

<sup>82</sup> Paragraph 13 of SGR 2009/2.

<sup>83</sup> Paragraphs 16 and 17 of SGR 2009/2.

<sup>84</sup> Paragraph 25 of SGR 2009/2.

79. An Agency pays employees various additional payments that are described as allowances and that are paid to recognise or compensate them for certain conditions relating to employment.

80. These kinds of payment are OTE except to the extent that they:

- are not salary or wages, for example, if they are payments of a predetermined amount to offset or reimburse particular expenses, or
- relate solely to hours of work other than ordinary hours of work.<sup>85</sup>

81. The kinds of payments that are not salary or wages, and therefore cannot be OTE, include fringe benefits<sup>86</sup> and other non-cash payments.<sup>87</sup>

### **Cost of living adjustment and child supplement**

82. Payments of COLA and child supplement to the extent they are LAFHA are not salary or wages or OTE. A LAFHA payment is a fringe benefit. A fringe benefit is not salary or wages or OTE.

83. Payments which are not LAFHA are considered to be an allowance by way of an unconditional extra payment.<sup>88</sup>

84. Payments of COLA and child supplement which are not LAFHA are salary or wages and OTE which need to be taken into consideration with respect to superannuation guarantee. If, however, any amounts of the payments relate to hours of work other than ordinary hours of work, the amounts are not OTE to that extent.

### **Education assistance, health provisions and regional leave fares**

85. These payments are not salary or wages and are not OTE as they are expense payment fringe benefits.

### **Location allowance and transfer allowance**

86. These types of payments are considered to be an allowance by way of an unconditional extra payment.<sup>89</sup>

87. The payments are salary or wages and OTE which need to be taken into consideration with respect to superannuation guarantee. If, however, any amounts of the payments relate to hours of work other than ordinary hours of work, the amounts are not OTE to that extent.

### **Cost of posting allowance**

88. The payment of COPA to the extent it is a LAFHA is not salary or wages or OTE.

89. Payments of COPA which are not LAFHA are considered to be an allowance by way of an unconditional extra payment.<sup>90</sup>

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<sup>85</sup> Paragraph 27 of SGR 2009/2.

<sup>86</sup> Subsection 11(3) of the SGAA.

<sup>87</sup> Paragraph 46 of SGR 2009/2.

<sup>88</sup> Table item 9 in paragraph 78 of SGR 2009/2.

<sup>89</sup> Table item 9 in paragraph 78 of SGR 2009/2.

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90. COPA payments which are not LAFHA are salary or wages and OTE which need to be taken into consideration with respect to superannuation guarantee. If, however, any amount of the payment relates to hours of work other than ordinary hours of work, the amounts are not OTE to that extent.

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<sup>90</sup> Table item 9 in paragraph 78 of SGR 2009/2.

## **Appendix 3 – Your comments**

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91. This draft Determination is being published using a fast-tracked process designed to accelerate the finalisation of Determinations in certain circumstances and the comments period is reduced to two weeks.

92. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

93. If we receive no comments, the draft Determination will be finalised as soon as possible after the conclusion of the comments period.

94. If comments are received, a compendium of comments is prepared when finalising this Determination, and an edited version (names and identifying information removed) is published to the Legal database on [ato.gov.au](http://ato.gov.au). Please advise if you do not want your comments included in the edited version of the compendium.

<b>Due date:</b>	<b>11 December 2020</b>
<b>Contact officer:</b>	<b>Ruth Geary</b>
<b>Email address:</b>	<b><u><a href="mailto:ruth.geary@ato.gov.au">ruth.geary@ato.gov.au</a></u></b>
<b>Telephone:</b>	<b>(02) 6058 7157</b>

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Not previously issued as a draft

*Related Rulings/Determinations:*

SGR 2009/2; TR 2006/10

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Withholding tax ~~ Other

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