

LI 2024/4 - Explanatory statement -



Explanatory Statement

Fringe Benefits Tax Assessment (Adequate Alternative Records – Fly-in Fly-out and Drive-in Drive-out Employees) Determination 2024

General outline of instrument

1. This instrument is made under section 123AA of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).
2. The instrument specifies records the Commissioner of Taxation will accept as an alternative to an employee declaration in certain circumstances, where an employee:
 - (a) works on a fly-in fly-out or drive-in drive-out basis (to which section 31E of the FBTAA applies),
 - (b) has residential accommodation at or near their usual place of employment, and
 - (c) receives a living-away-from-home allowance (LAFHA) fringe benefit, an exempt accommodation expense payment benefit as described in section 21 of the FBTAA, or an exempt residual benefit as described in subsection 47(5) of the FBTAA.
3. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Date of effect

4. This instrument commences on 1 April 2024.

Effect of this instrument

5. This instrument may reduce compliance costs for employers by allowing them to rely on adequate alternative records (rather than employee declarations) to meet their FBT record keeping obligations.
6. Section 123AA of the FBTAA allows the Commissioner to make a legislative instrument that specifies alternative records that employers can rely on, in lieu of statutory evidentiary documents, for FBT record keeping purposes.
7. The instrument applies for the FBT year ending 31 March 2025, and all subsequent years (paragraph 5(1)(a) of the instrument). It allows an employer to which the instrument applies to accept adequate alternative records instead of a declaration referred to in paragraph 31F(1)(b) of the FBTAA.
8. The instrument applies to the class of employers specified in subsection 5(2) in certain circumstances. The class of employers is those that:
 - (a) are reducing the taxable value of a LAFHA fringe benefit described in section 31A of the FBTAA,
 - (b) have provided an exempt accommodation expense payment benefit as described in section 21 of the FBTAA, or

- (c) have provided an exempt residual benefit as described in subsection 47(5) of the FBTAA.

9. This instrument does not apply to employers who provide benefits that meet the requirements for the exemption in subsection 47(7) of the FBTAA.

10. Section 6 of the instrument sets out what records are adequate alternative records that can be accepted instead of a relevant employee declaration. It stipulates that the alternative records must be written in English and contain, at a minimum, the following information:

- (a) the name of the employee who received the benefit,
- (b) the address of the employee's normal residence,
- (c) confirmation that it is reasonable to expect the employee will resume living at their normal residence when their duties of employment no longer require them to live away from it,
- (d) the dates (inclusive) that the employee's duties of employment required them to live away from their normal residence, and
- (e) the address of each place the employee actually resided at when their duties of employment required them to live away from their normal residence.

11. There is no limit on the number of records that may, in aggregate, meet the minimum information requirements. Further, there is no prescribed type or form of record in which the required information must be contained. If multiple different records collectively contain the minimum information when viewed together, the records will be accepted in aggregate as satisfying the requirements. For example, records can be stored electronically or in paper form, and the required information could be contained in various types of documents such as employment contracts, payroll records, job descriptions, employer and employee correspondence (for example, via emails or text messages), log books and employer policies.

12. Records can only be accepted as an alternative to the declaration if they are obtained and held by the employer by the employer's declaration date. This is the date of lodgment of their FBT return for the relevant year, or such later date as the Commissioner allows. This is because section 123AA of the FBTAA deems the employee to have the declaration at the time that they hold the records, and the underlying declaration is required to be obtained by the declaration date.

Example 1: information kept from multiple sources during the ordinary process of providing the benefit

Wayan works for Mining Co on a fly-in fly-out basis. Under her roster, Wayan spends 2 weeks living in a house she rents with co-workers near her worksite in Western Australia and then returns to her home in Bali for 2 weeks. Her worksite in Western Australia is not in a remote area.

Wayan's employment contract is for 2 years with the possibility of it being extended. Wayan's offer of employment stipulates that Wayan's intention is to resume living at her home in Bali when her employment with Mining Co finishes, and Wayan accepts this offer.

Mining Co's employee records list both addresses for Wayan. Wayan is required under her employment contract to advise if there are any changes to these addresses. Mining Co's HR department confirms with Wayan via email that no details have changed for the proceeding FBT years.

Mining Co provides Wayan with a LAFHA to compensate her for the additional expenses and other disadvantages she suffers because her duties of employment require her to live away from her home in Bali. The food allowance paid to Wayan is less than the Commissioner's reasonable food amount and Wayan provides receipts of her actual accommodation expenses.

Under subsection 31A(2) of the FBTAA, the taxable value of the LAFHA can be reduced by the exempt food and the exempt accommodation components provided that the requirements of subsection 31A(1) are met.

Instead of obtaining the declaration from Wayan required under paragraph 31A(1)(c) of the FBTAA and setting out the information contained in paragraph 31F(1)(b), Mining Co seeks to rely on section 123AA.

In accordance with this legislative instrument, Mining Co has obtained records containing, in aggregate, the minimum information to be relied upon as an alternative to the declaration. All of the required information was obtained and recorded before the due date of lodgment of Mining Co's FBT return. The relevant records are as follows:

Table 1: Mining Co records that contain the required minimum information

Required minimum information	Records held by Mining Co
<ul style="list-style-type: none"> The name of the employee who received the benefit Confirmation that the employee works on a fly-in fly-out or drive-in drive-out basis The dates (inclusive) that the employee's duties of employment required them to live away from their normal residence 	Employment agreement Roster Flight schedules/itineraries
<ul style="list-style-type: none"> The address of the employee's normal residence The address of each place that the employee actually resided when their duties of employment required them to live away from their normal residence 	Mining Co's employee records Emails between Mining Co's HR Department and Wayan
<ul style="list-style-type: none"> Confirmation that it is reasonable to expect the employee will resume living at their normal residence when their duties of employment no longer require them to live away from it 	Offer of employment accepted by Wayan

Mining Co can reduce the taxable value of the LAFHA fringe benefit in accordance with section 31A of the FBTAA. Due to the operation of subsection 123AA(1) of the FBTAA, Mining Co is taken to have kept and retained the relevant declaration and accordingly has satisfied the requirements in paragraph 31A(1)(c).

Example 2: information kept in different documents – LAFHA assessment

Archie is a chef working for Construction Co on a fly-in fly-out basis. Under his roster, Archie works 2 weeks on, 1 week off, at a remote construction site.

During his 2 weeks on, Archie stays in an apartment near the construction site. On his week off, he returns to his home in Brisbane.

Archie books and pays for his own flights between Brisbane and the nearest airport to the construction site, and his employer reimburses him for those flights.

Before Archie starts his roster, he completes a LAFHA assessment with his manager. The LAFHA assessment contains details such as:

- the address of Archie's apartment near the construction site*
- Archie's roster*
- Archie's Brisbane home address*
- confirmation that Archie intends to return to his home in Brisbane at completion of his fly-in fly-out work*

- a requirement to advise Construction Co if any of these details change
- the amount of the LAFHA paid to Archie; Archie is provided a food allowance that is less than the Commissioner's reasonable food amount and the accommodation component is the actual cost of renting the apartment near the construction site.

Archie provides a copy of his lease for the apartment near the construction site which shows his actual costs.

Archie and his manager both agree via email that the information in the assessment form is correct and, for the proceeding FBT years, Archie advises his manager via email that no details have changed. The emails are sent to the human resources department of Construction Co to be filed.

Instead of obtaining the declaration from Archie required under paragraph 31F(1)(b) of the FBTAA, Construction Co seeks to rely on section 123AA.

In accordance with this legislative instrument, Construction Co has obtained records containing, in aggregate, the minimum information to be relied upon as an alternative to the declaration. All of the required information was obtained and/or recorded before the due date of lodgment of Construction Co's FBT return. The relevant records are as follows:

Table 2: Construction Co records that contain the required minimum information

Required minimum information	Records held by Construction Co
<ul style="list-style-type: none"> • The name of the employee who received the benefit • Confirmation that the employee works on a fly-in fly-out or drive-in drive-out basis • The dates (inclusive) that the employee's duties of employment required them to live away from their normal residence 	Employment agreement Roster Flight schedules
<ul style="list-style-type: none"> • The address of the employee's normal residence • The address of each place that the employee actually resided when their duties of employment required them to live away from their normal residence • Confirmation that it is reasonable to expect the employee will resume living at their normal residence when their duties of employment no longer require them to live away from it 	Construction Co's LAFHA assessment Email between Archie and his manager confirming the LAFHA assessment is correct Emails between Archie and his manager confirming no details have changed for the proceeding FBT years

Compliance cost assessment

13. Minor – there will be no additional regulatory impacts as the instrument is minor and machinery in nature (The Office of Impact Assessment reference: OIA23-06210).

Background

14. Section 31A of the FBTAA allows an employer to reduce the taxable value of LAFHA fringe benefits provided to fly-in fly-out and drive-in drive-out employees. The reduction is available where:

- the employee has residential accommodation at or near their usual workplace,
- the employee works on a fly-in fly-out or drive-in drive-out basis, and
- the employee gives the employer a declaration that sets out certain information.

15. As described in section 30 of the FBTA, a LAFHA is an allowance paid wholly or partly to compensate employees for additional expenses and other disadvantages suffered where they are required to live away from home in order to perform employment-related duties. The reduction is limited to the amount of the exempt food component and exempt accommodation component. In accordance with paragraph 31F(1)(b) of the FBTA, the employer ordinarily needs to obtain a signed employee declaration in the approved form by the declaration date to reduce the taxable value of a LAFHA. This instrument prescribes alternative records the employer can use instead of the employee declaration to reduce the taxable value for the relevant FBT year.

16. In addition, instead of paying a cash LAFHA to an employee whose duties of employment require them to live away from their normal residence, an employer may prefer to reimburse the employee for these accommodation expenses or pay these expenses on behalf of the employee – that is, to provide an expense payment benefit. A benefit of this type is exempt from FBT where the requirements in section 21 of the FBTA are met. In accordance with subparagraph 21(e)(ii) of the FBTA, the employer ordinarily needs to obtain a signed employee declaration in the approved form for the exemption to apply. This instrument prescribes alternative records the employer can use instead of the employee declaration for the exemption to apply for the relevant FBT year.

17. Alternatively, where an employee's duties of employment require them to live away from their normal residence, an employer may provide them with the use of accommodation which is a residual benefit. A benefit of this type is exempt from FBT where the requirements in subsection 47(5) of the FBTA are met. In accordance with subparagraph 47(5)(d)(iii) of the FBTA, the employer ordinarily needs to obtain a signed employee declaration in the approved form for the exemption to apply. This instrument prescribes alternative records the employer can use instead of the employee declaration for the exemption to apply for the relevant year.

Consultation

18. Subsection 17(1) of the *Legislation Act 2003* requires that the Commissioner undertake appropriate and reasonably practicable consultation before making a legislative instrument.

19. For this instrument, broad public consultation was undertaken from 12 October 2023 to 9 November 2023.

20. The draft instrument and draft explanatory statement were published to the ATO Legal database on the 'What's new' page. They were also advertised on the ato.gov.au website on the 'Open Consultation' page. Major tax and superannuation publishers and associations monitor these pages and include the details in the daily and weekly alerts and newsletters to their subscribers and members.

21. As a result of feedback received during consultation, the legislative instrument and explanatory statement were expanded to include exempt expense payment and residual benefits (which may be provided as an alternative to a living-away-from-home allowance). Amendments were also made to the explanatory statement to improve its clarity.

Legislative references

Acts Interpretation Act 1901

Fringe Benefits Tax Assessment Act 1986

Human Rights (Parliamentary Scrutiny) Act 2011

Legislation Act 2003

Statement of compatibility with human rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

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This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The instrument specifies records that the Commissioner of Taxation will accept from an employer in certain circumstances, as an alternative to an employee providing a declaration, where the employee works on a fly-in fly-out or drive-in drive-out basis.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms because it merely provides employers with an option to use acceptable alternative records instead of an employee declaration. Importantly, it will help reduce employers' record keeping compliance costs in relation to the fringe benefits tax law and provide them with certainty regarding their record keeping obligations.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.