

LI 2024/5 - Explanatory statement -



Explanatory Statement

Fringe Benefits Tax Assessment (Adequate Alternative Records – Living-Away-From-Home – Maintaining an Australian Home) 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) is required to live away from where they usually reside in Australia,
 - (b) maintains a home in Australia (such that they satisfy section 31C of the FBTAA), 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 FBT 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)(a) 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 31 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. 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 place in Australia that the employee usually resides when they are in Australia,
- (c) confirmation that, in respect of the usual place of residence described at paragraph (b):
 - (i) the employee or their spouse has an ownership interest in the home,
 - (ii) the home continues to be available for the employee's immediate use and enjoyment while their duties of employment require them to live away from it, and
 - (iii) it is reasonable to expect that the employee will resume living at that home when their duties of employment no longer require them to live away from it,
- (d) dates (inclusive) that the employee's duties of employment required them to live away from the usual place of residence described at paragraph (b), and
- (e) the address of each place the employee actually resided at when their duties of employment required them to live away the usual place of residence described at paragraph (b).

10. 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, emails or text messages), and employer policies.

11. 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 FBT 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

Vanessa is a teacher who agrees to teach at Primary School in Cairns for 3 months. This is the first time she has taught at this location.

Vanessa rents a home in Cairns for 3 months. Her husband and sons continue to live at their family home in Brisbane, while Vanessa undertakes this position.

Vanessa's employment contract states that a LAFHA is paid where an employee is living away from their usual place of residence in Australia. Employees must apply through Primary School's payroll system to have the allowance paid.

Vanessa applies to receive a LAFHA. Primary School's payroll system asks her to confirm that she is living away from a home that she or her spouse own or lease, which is available for Vanessa's immediate use and which she intends to resume living at once her duties of employment no longer require her to live away from home. It also asks employees who will be receiving such an allowance to provide the address where they will be living while working

for Primary School, and their home address that they will be living away from. Vanessa is required under her employment contract to advise if there are any changes to these addresses.

Primary School provides Vanessa with a LAFHA to compensate her for additional expenses and other disadvantages suffered, because the duties of employment require Vanessa to live away from her home in Brisbane.

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

Instead of obtaining the declaration from Vanessa required under paragraph 31F(1)(a) of the FBTA, Primary School seeks to rely on section 123AA.

Primary School 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 the employer's FBT return. The relevant records are as follows:

Table 1: Primary School records that contain the required minimum information

Required minimum information	Records held by Primary School
<ul style="list-style-type: none"> • The name of the employee who received the benefit • The address in Australia that the employee usually resides at when in Australia • The address of each place that the employee resided at during the period when their duties required them to live away from their usual place of residence in Australia 	Payroll records LAFHA application in payroll system
<ul style="list-style-type: none"> • Confirmation that, in respect of the usual place of residence in Australia: <ul style="list-style-type: none"> – the employee or their spouse has an ownership interest in the home, – the home is available for the employee's immediate use and enjoyment while the duties of employment require them to live away from it, and – the employee expects to resume living at that home when their duties of employment no longer require them to live away from it 	Payroll records LAFHA application in payroll system
<ul style="list-style-type: none"> • The dates (inclusive) that the employee's duties of employment required them to live away from their usual place of residence in Australia 	Contract of employment Payroll records LAFHA application in payroll system

Due to the operation of subsection 123AA(1) of the FBTA, Primary School is taken to have kept and retained the relevant declaration and accordingly has satisfied the requirements in paragraph 31(1)(c).

Example 2: information kept in different document – LAFHA checklist

Mel is an engineer who is an employee of a small business, Construction Co. Mel agrees to work on a construction project within the company in Melbourne for 6 months during the year – from January to June.

While working in Melbourne, Mel and her partner live in an apartment close to the construction site. They otherwise usually reside at an apartment they rent in Perth. Their Perth apartment remains rented to Mel and her partner while they are in Melbourne and it continues to be available for their use.

Construction Co pays Mel a LAFHA to compensate her for the additional food, drink and accommodation expenses she incurs because her duties of employment require her to live in Melbourne. Mel completes a LAFHA checklist which she emailed to her manager before starting work in Melbourne.

The LAFHA checklist contains details of the project Mel will be working on, including the dates she will be in Melbourne. Mel completes the checklist:

- (a) confirming her normal home address when she is not working on the project,
- (b) confirming that she and/or her partner either own or are renting this home and that it is available for their use during the period they are living away from it,
- (c) providing the address/es she will be living at in Melbourne, and
- (d) confirming that she will return to live at her normal home when the construction project has finished.

Mel provides a copy of her lease for the apartment in Melbourne which shows her actual accommodation costs. The food and drink component of the LAFHA is less than the Commissioner's reasonable food amount.

Mel signs and dates the LAFHA checklist. Construction Co gives Mel a scanned copy of the signed checklist and files the original.

Mel's supervisor emails Mel to confirm there are no changes to the information provided in the LAFHA checklist in respect of the period 1 April to 30 June. Mel confirms that there have been no changes.

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

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 • The address in Australia that the employee usually resides at when in Australia • The address of each place that the employee resided at during the period when their duties required them to live away from their usual place of residence in Australia • Confirmation that, in respect of the usual place of residence in Australia: <ul style="list-style-type: none"> – the employee or their spouse has an ownership interest in the home – the home is available for the employee's immediate use and enjoyment while the duties of employment require them to live away from it, and 	Payroll records LAFHA checklist Copy of the lease for the property rented in Melbourne Emails between Mel and her supervisor

Required minimum information	Records held by Construction Co
<ul style="list-style-type: none"> - the employee expects to resume living at that home when their duties of employment no longer require them to live away from it 	
<ul style="list-style-type: none"> • Dates (inclusive) that the employee's duties of employment required them to live away from their usual place of residence in Australia 	LAFHA checklist Construction project agreement

Due to the operation of subsection 123AA(1) of the FBTAA, Construction Co is taken to have kept and retained the relevant declaration and accordingly has satisfied the requirements in paragraph 31(1)(c).

Compliance cost assessment

12. Minor – there will be no additional regulatory impacts as the instrument is minor and machinery in nature (The Office of Impact Assessment reference: OIA23-06209).

Background

13. Section 31 of the FBTAA allows an employer to reduce the taxable value of certain LAFHA fringe benefits provided to employees. The reduction is available where:

- (a) the employee has an ownership interest in a home in Australia where they usually reside when in Australia,
- (b) the home is available for their immediate use and enjoyment at all times, and
- (c) the employee gives the employer a declaration that sets out certain information.

14. An ownership interest has the same meaning as in the *Income Tax Assessment Act 1997* and includes a legal or equitable interest, and a licence or right to occupy a dwelling.

15. As described in section 30 of the FBTAA, a LAFHA is an allowance paid wholly or partly to compensate an employee for additional expenses and other disadvantages suffered when the employee is 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 31(1)(c) of the FBTAA, the employer ordinarily needs to obtain a signed employee declaration in the approved form by the declaration date to reduce the taxable value. 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 FBTAA are met. In accordance with paragraph 21(e)(i) of the FBTAA, 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 FBTAA are met. In accordance with subparagraph 47(5)(d)(ii) of the FBTAA, 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

Income Tax Assessment Act 1997

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 lives away from their usual Australian home.

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.