

LI 2024/8 - Explanatory statement -



Explanatory Statement

Fringe Benefits Tax Assessment (Adequate Alternative Records – Temporary Accommodation Relating to Relocation) 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 respect of expense payment fringe benefits, housing fringe benefits or residual fringe benefits where:
 - (a) the employer seeks to reduce the taxable value of a benefit in respect of providing temporary accommodation or temporary hire of household goods to an employee and their family members (under section 61C of the FBTAA), and
 - (b) the temporary accommodation is required solely because the employee is required to change their usual place of residence in order to perform the duties of their employment.
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 subparagraph 61C(3)(b)(ii) of the FBTAA.
8. The instrument applies to the class of employers specified in subsection 5(2) – that is, employers reducing the taxable value of an expense payment fringe benefit, housing fringe benefit or residual fringe benefit described in section 61C of the FBTAA, in certain circumstances.
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 temporary accommodation,
- (c) the period during which the temporary accommodation was required,
- (d) the date the employee or an associate of the employee commenced sustained reasonable efforts to acquire a unit of accommodation intended to be a long-term place of residence,
- (e) if the employee or an associate of the employee did not hold a relevant proprietary interest in the employee's former usual place of residence, either:
 - (i) if the employee or associate entered into a contract for the occupation of long-term accommodation, the date the contract was entered into and the date the accommodation became occupied pursuant to the contract, or
 - (ii) if the employee or associate were unable to locate long-term accommodation within 6 months of the date the efforts described in paragraph 6(1)(d) commenced, confirmation that long-term accommodation could not be located, despite sustained reasonable efforts, within that period, and
- (f) if the employee or an associate of the employee held a relevant proprietary interest in the employee's former usual place of residence, the date the employee or associate entered into a contract for the sale of that interest and either:
 - (i) the date the employee commenced occupying long-term accommodation, or
 - (ii) confirmation that long-term accommodation could not be located, despite sustained reasonable efforts, within 12 months of the date the efforts described in paragraph 6(1)(d) commenced.

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

Andy is an employee of ABC Co, and resides in a rental property in Sydney, NSW. ABC Co offered Andy a promotion to manage a new warehouse in Perth, WA. Andy accepted the offer and moved to temporary accommodation located near the new warehouse in Perth. ABC Co agreed to reimburse Andy for the temporary accommodation, which constitutes an expense payment fringe benefit. Andy commenced his duties in Perth and began actively seeking and applying for a rental property that would provide him a long-term place of residence in Perth.

Andy sends ABC Co an email outlining the dates for which he will initially require temporary accommodation in Perth. He continues to update ABC Co monthly on his requirement for temporary accommodation and his progress in applying for long-term accommodation which included the date he commenced actively seeking long-term accommodation.

Andy submits a payroll expense reimbursement form for the cost of the temporary accommodation. ABC Co uses this information to reimburse Andy for the temporary accommodation.

After 5 months Andy finds suitable long-term accommodation and signs a long-term lease for the provision of accommodation. Andy sends ABC Co a copy of the lease which includes the date the lease contract was entered into and the date he will start occupying that accommodation.

ABC Co determines that under section 61C of the FBTA, ABC Co is entitled to reduce the taxable value of the expense payment fringe benefit. Instead of obtaining the declaration from Andy as required by subparagraph 61(3)(b)(iii), ABC Co seeks to rely on section 123AA of the FBTA.

In accordance with this legislative instrument, ABC 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 by ABC Co before the due date for lodgment of ABC Co's FBT return. The relevant records are as follows:

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

Required minimum information	Records held by ABC Co
<ul style="list-style-type: none"> The name of the employee who received the benefit 	Employer records such as payroll records
<ul style="list-style-type: none"> The address of the temporary accommodation The dates the temporary accommodation was required The date the employee began actively searching for long-term accommodation 	Emails sent by Andy Payroll expense reimbursement form
<ul style="list-style-type: none"> The date the long-term accommodation lease contract was entered into The date the employee started to occupy the long-term accommodation 	Copy of long-term lease contract

ABC Co can reduce the taxable value of the expense payment fringe benefit in accordance with section 61C of the FBTA. Due to the operation of subsection 123AA(1) of the FBTA, ABC Co is taken to have kept and retained the relevant declaration and accordingly has satisfied the requirement in subparagraph 61C(3)(b)(iii).

Example 2

Fiona is an employee of DDD Co, and lives in a house she owns in Brisbane. She is offered a promotion to work in a different branch of DDD Co, in Canberra. Fiona accepted the offer and moved to temporary accommodation near Civic, Canberra's city centre. DDD Co agrees to pay for the temporary accommodation on Fiona's behalf, which is an expense payment fringe benefit.

Fiona sends DDD Co an email outlining the dates she will initially require temporary accommodation in Canberra. Fiona and DDD Co work out a timeframe for Fiona to provide regular updates on her search for long-term accommodation.

Fiona completes a payroll form to have her temporary accommodation in Canberra paid for by DDD Co.

Fiona puts her house up for sale in Brisbane, commences her duties in Canberra, and begins actively searching for a house to buy in Canberra. Fiona’s house in Brisbane sells after 4 months and she advises DDD Co via email of the date her house was sold.

It quickly becomes clear to Fiona and DDD Co that the housing market in Canberra is very competitive and finding suitable long-term accommodation may take longer than initially thought. DDD Co agrees to continue paying for temporary accommodation until Fiona is able to purchase suitable long-term accommodation. It takes Fiona 13 months from the date she started actively searching to purchase suitable long-term accommodation.

As evidence of her continued search for suitable long-term accommodation over the 13 months, Fiona emails her employer with evidence of her securing finance, a list of properties she inspected and the dates of inspection, emails between Fiona and real estate agents about the type of home Fiona is looking for and houses that are for sale, follow up correspondence between Fiona and the real estate agents, and copies of emails of offers and negotiations.

DDD Co determines that under section 61C of the FBTA, it is entitled to reduce the taxable value of the expense payment fringe benefit. Instead of obtaining the declaration from Fiona as required by subparagraph 61(3)(b)(iii), DDD Co seeks to rely on section 123AA of the FBTA.

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

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

Required minimum information	Records held by DDD Co
<ul style="list-style-type: none"> The name of the employee who received the benefit 	Employer records such as payroll records
<ul style="list-style-type: none"> The address of the temporary accommodation The dates the temporary accommodation was required The date the employee began actively searching for long-term accommodation 	Emails sent by Fiona Payroll expense payment form
<ul style="list-style-type: none"> The date the house owned by the employee was sold 	Email sent by Fiona
<ul style="list-style-type: none"> Confirmation that long-term accommodation could not be found within 12 months from the date the employee began actively searching for long-term accommodation 	Email sent by Fiona with evidence of her sustained search for long-term accommodation

DDD Co can reduce the taxable value of the expense payment fringe benefit in accordance with section 61C of the FBTA. Due to the operation of subsection 123AA(1) of the FBTA, DDD Co is taken to have kept and retained the relevant declaration and accordingly has satisfied the requirement in subparagraph 61C(3)(b)(iii).

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: OIA23-06206).

Background

13. Section 61C of the FBTAA allows an employer to reduce the taxable value of certain expense payment fringe benefits, housing fringe benefits or residual fringe benefits that are provided in respect of providing temporary accommodation (including the costs of hiring household goods) to an employee and their family members. The reduction is available to the employer where:

- (a) the employer provided an employee with:
 - (i) an expense payment, housing or residual fringe benefit in respect of a lease or licence for the temporary accommodation of family members, or
 - (ii) an expense payment or residual fringe benefit in respect of a lease or licence for household goods for use in the temporary accommodation of family members,
- (b) the temporary accommodation is required solely because the employee is required to change their usual place of residence in order to perform the duties of their employment (being the specific employment which required the employee to change their usual place of residence),
- (c) the temporary accommodation is located at or near the employee's new place of employment,
- (d) the requirements in paragraph 61C(1)(d) of the FBTAA are met, and
- (e) the fringe benefit is not provided under a non-arm's length arrangement.

14. In accordance with paragraph 61C(3)(b) of the FBTAA, the employer ordinarily also needs to obtain a signed employee declaration in the approved form by the declaration date to reduce the taxable value where the employee has not started to live in a long-term unit of accommodation within 4 months of relocation. This instrument prescribes alternative records the employer can use instead of the employee declaration to reduce the taxable value for the relevant FBT year.

Consultation

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

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

17. 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.

18. As a result of feedback received during consultation, the explanatory statement was amended 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 for an expense payment fringe benefit, housing fringe benefit or residual fringe benefit in respect of providing temporary accommodation or temporary hire of household goods to an employee and their family members.

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.