

2 February 2012

The Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Sent via email: FBT@treasury.gov.au

Fringe Benefits Tax (FBT) Reform: Living Away From Home benefits

Dear Sir or Madam

Ernst & Young is pleased to provide this submission in response to the abovementioned Consultation Paper released on 29 November 2011.

We understand the objective of this Consultation Paper is to mitigate the perceived abuse of the living away from home provisions by temporary residents.

The focus of this submission is to highlight the issues with the proposed changes, including the impact on current arrangements and the economic impact on Australia. We also provide responses to the questions raised in the Consultation Paper and alternatives to the abolition of living away from home benefits for temporary residents.

In particular, the submission addresses the following areas:

- ▶ There are a number of alternative measures to address any potential abuse of concessions, without altogether abolishing living away from home benefits for temporary residents.
- ▶ There are several potential unintended adverse economic implications of the proposed changes on various sectors of Australia's economy, employers and temporary residents.
- ▶ Given the short time frame between legislation being introduced and the proposed effective date of 1 July 2012, it is critical to have appropriate transitional measures to assist employers and temporary residents with adapting to the proposed changes.

We provide our detailed comments at Appendix 1. We have provided at Appendix 2 a list of corporate supporters of the submission.

We support and want to assist Treasury in ensuring that this legislation achieves its objectives in mitigating any abuse of living away from home benefits for temporary residents. However, the proposed measures in their current form may result in adverse impacts on Australia's economy.

If you would like to discuss this submission please contact Tanya Ross Jones on 08 9429 2249 or Paul Ellis on 02 8295 6250.

Yours sincerely



Tanya Ross Jones
Partner - Human Capital



Paul Ellis
Partner - Human Capital

Appendix 1

Detailed comments on consultation paper

On 29 November 2011, the Minister for Financial Services and Superannuation, Bill Shorten, announced that the Government would introduce reforms to prevent individuals from being able to exploit the tax exemption for living away from home allowance ("LAFHA") and related benefits. It was stated the reforms will ensure that a level playing field exists between temporary residents and permanent residents, and that Australian taxpayers are not funding the unfair exploitation of concessions.

The proposed reforms would tax any living away from home benefits provided to temporary residents from 1 July 2012 and will apply to existing arrangements. Whilst the proposed reforms are intended to prevent perceived abuse of the living away from home provisions by high-level executives and labour hire companies, it will also adversely impact other sectors of Australia's population.

We agree that there is a perception that living away from home concessions have been exploited and abused. However, in our view, the proposed reforms go too far and will penalise employers who legitimately utilise these concessions. This will have unintended adverse consequences on employment arrangements and economic competitiveness.

We submit that there are alternative mechanisms that could be implemented to help prevent any abuse and exploitation of living away from home benefits, while maintaining the original policy intent behind the provision of these concessions. We have included these alternatives at section 1. We strongly recommend that these, or other appropriate actions, be considered by the Treasury. In our view they provide an equally effective way to address the primary concern, being the abuse of the concessions, without creating as adverse an economic impact or burden on business.

At a minimum, we urge the Treasury to consider a deferred or staged implementation. The very short time frame between the release of legislation and the effective date provides little opportunity to deal with the impact on contracts at either an individual or business level. Most such contracts cannot readily be renegotiated and span a far longer period. Therefore, the proposed timetable is highly inequitable to affected businesses and individuals. Furthermore, in affecting businesses with global operations, the changes could be construed as posing "country" or sovereign risk that would not be desirable in a broader economic sense, particularly in the current sensitive economic times.

We have addressed from section 2 below the questions posed in the request for consultation, in the order raised.

1. Alternatives to mitigate perceived abuse of LAFHA

The perceived abuse of living away from home benefits can be addressed without creating the adverse consequences described below. The proposed changes go well beyond what is necessary to address these concerns.

The intention behind the proposed reforms is to prevent individuals from exploiting the living away from home concessions and exemptions. However, there are alternative measures that could be introduced to achieve the same result but without the unintended economic consequences discussed below. We submit consideration should be given to the following alternatives.

1.1 Introduction of time limits

Introducing a time limit on the number of years an individual could be considered living away from home would assist in ensuring that individuals could be considered to be living away from home and reduce the claimed exploitation of living away from home benefits by individuals who have remained in Australia for an extended period of time.

We note that in 1995, the Government attempted to introduce legislation specifying time limits for which a person could be living away from home. However, this legislation did not proceed due to concerns raised by business and industry groups. We consider these concerns remain valid.

1.2 Introduction of accommodation value limits

As an alternative to abolishing living away from home benefits for temporary residents, consideration should be given to introducing accommodation value limits. Similar to the reasonable food component amounts, reasonable accommodation thresholds could be introduced based on family size. Under this alternative, temporary residents would only be able to receive accommodation assistance up to their actual costs or the reasonable accommodation threshold, whichever is less. Similar to the food component, any amount in addition to the reasonable accommodation threshold would be subject to FBT or income tax, depending on how living away from home allowances are governed in the future.

Alternatively, to take into consideration that accommodation expenditure differs at various income levels, the reasonable accommodation threshold could be based on a percentage of the temporary resident's total salary, up to an income threshold.

This will assist in achieving Treasury's objective of preventing the exploitation of living away from home benefits as there would be a cap on the amount that can be provided to temporary residents for assistance with accommodation and this cap would be set by Treasury or the Australian Taxation Office based on what it considers reasonable.

1.3 Foreign employees who are overseas when engaged

One of the main areas of perceived abuse is in situations where individuals do not genuinely relocate for work purposes. The consultation refers to an example, also referred to extensively in the Inspector-General's review of the Australian Taxation Office's management of living away from home cases, of backpackers on working holidays who may receive concessionally taxed remuneration. It is acknowledged that this situation is not within the intent of the law.

To address this situation, the existing living away from home provisions could be modified to make it clear that an employee from overseas can qualify as living away from home only if they relocate at the employer's instigation. Similar conditions are imposed in relation to the concessions for home sale and purchase costs. This would ensure that an individual who is already in Australia at their own instigation cannot obtain the benefit of the living away from home concessions. Furthermore, an individual who changes employer while working on a subclass 457 visa would cease to be eligible to be treated as living away from home after the employment for which they relocated has ceased.

The proposed changes could also include provisions excluding individuals working for labour hire agencies.

1.4 Temporary residents on fixed term assignments with same employer

As discussed above, international companies often transfer employees between operations in different countries. Due to the temporary nature of the assignment, employers will often be required to provide employees with compensation for the additional cost of living in the host location. In addition, any tax cost incurred by the employee in the host country is usually borne by the employer. The living away from home concessions assist employers in managing the cost of the international assignment.

Generally, international assignments are for fixed periods of time and once the employee has completed their time in Australia they will return home. As in this circumstance the individual is genuinely living away from home, it would be appropriate to consider allowing the living away from home concessions to apply to temporary residents in this situation.

The living away from home concessions could be structured to only apply to temporary residents who are on fixed term assignments, are working for the same group employer and will return to their home country at the end of the assignment. This will assist in ensuring that living away from home benefits are only provided to temporary residents who have an intention to return to their home location at the end of the assignment.

1.5 Exemption for additional expenses only

If a key concern is that additional expenses may not actually be incurred in some circumstances (for example, if an employee does not own or rent a home in their usual location, or if their owned home is rented out), the LAFH accommodation provisions could be changed to ensure that an exemption is available only for the portion of expenditure that exceeds either their own personal expenses in the home location, or reasonable expected expenses in the home location, which could be benchmarked annually.

This would address the concern that compensation is being provided in certain circumstances where individuals are not genuinely bearing additional costs as a result of their assignment. It would also be consistent with the proposed change in relation to temporary residents who continue to maintain a home that is available for their use in Australia. It appears inconsistent to accept that a temporary resident maintaining a home in Australia should be eligible for assistance while suggesting that an individual maintaining a home overseas is not.

We note that this alternative would impose a significant compliance burden, and accordingly additional costs to the employer. Therefore this approach would be less preferable than those outlined above.

1.6 Visa market salary rules

Concerns have been raised about temporary residents receiving higher net remuneration than their permanent resident counterparts. One of the reasons this has arisen is the introduction of market salary rates for temporary residents on subclass 457 visas.

For immigration purposes, the Department of Immigration and Citizenship requires that temporary residents are paid the same guaranteed annual earnings as an Australian in the same (or similar) position in the same location. A temporary resident's guaranteed annual earnings includes any LAFHA paid by an employer and is measured at the gross or before-tax level. Accordingly, a temporary resident and their Australian equivalent would typically be earning the same gross remuneration package. However, due to the concessional tax treatment of LAFHAs available to temporary residents, a temporary resident would receive a higher net or after tax amount than their Australian equivalent. Hence, the concerns about a level playing field.

To address the concerns about a level playing field, the market salary provisions could be altered to apply at the net salary level. That is, the requirement should be that an overseas employee is guaranteed the same net annual earnings. This would address the perception that foreigners are advantaged by tax concessions, while ensuring that they are still appropriately compensated for additional living costs.

2. Unintended consequences of the proposed reforms

Economic Consequences

The perceived unfair advantage to temporary residents under the current rules is overstated and the economic consequences of the proposed reforms seeking to address this situation could be severe for Australia.

2.1 Global labour market competitiveness

The proposed reforms will have unintended adverse consequences on Australia's economy, including its global labour market competitiveness.

Australia already has an aging workforce and is currently experiencing a skills shortage which is only anticipated to become worse in the coming years due to the number of significant projects commencing. Businesses are seeking individuals with specific skills to meet their needs. Increasingly, given the specific nature of the skills required, there is a limited pool of Australian individuals who possess these abilities. Accordingly, employers are required to look to individuals from overseas to provide this expertise.

The reform proposals will increase the cost of attracting international labour to Australia. International experience suggests that if Australia is unable to respond to this to match the international pricing of labour, decreased international competitiveness and an associated productivity decline will result. This may manifest itself in a number of ways, some examples of which are discussed below.

The proposed reforms also appear inconsistent with the Government's intention of attracting skilled labour to Australia. The immigration legislation, administered by the Department of Immigration and Citizenship, recognises the need for employers to pay LAFHAs to employees to attract them to work in Australia through the inclusion of LAFHAs in the calculation of a subclass 457 visa holder's "guaranteed annual earnings". In granting an individual a temporary residence visa there is an assumption that the employee's presence in Australia is required as their skills are not otherwise available in Australia and that their presence will benefit the Australian economy as a result. Therefore, the LAFHA provisions are not a mechanism that alters the level playing field by providing foreign workers with an unfair competitive advantage that will take jobs from local workers. We wholeheartedly agree with the comment in the Foreword to the Consultation Paper that the visa approval process remains the appropriate mechanism to scrutinise this.

Due to the high cost of living in Australia compared to overseas locations, it can be difficult for employers to attract talent to Australia. The living away from home concessions assist employers in attracting employees to Australia as they provide a cost effective mechanism for employers to give employees compensation for the additional costs that they incur as a result of living in Australia. This is consistent with the intent behind the introduction of the living away from home concessions, being to promote labour market mobility and increase national productivity.

The proposed reforms will make it even more challenging for employers to attract talent to Australia as employees will either have to fund these additional costs from after-tax income or employers will have to pay increased remuneration. Either way, these increased costs may prove prohibitive to attracting skilled temporary residents to Australia.

The proposed changes will also impact on Australia's competitiveness in the global economy. Many of Australia's trading partners and neighbours including China, the United States of America, Canada, Malaysia and the United Kingdom have tax concessions for accommodation where an individual is on a temporary assignment in the location. Global companies operating in these locations would also be looking for individuals with specific expertise to meet their requirements. The proposed changes will make Australia less attractive to individuals if they have a choice between Australia and a location that does provide assistance for temporary residents. In addition, employers will be required to incur additional costs in order to attract talent, the implications of which are discussed at section 2.3 below.

Australia's ability to be a talent hub in the Asia Pacific region may be hampered by the proposed reforms as the ability to attract talent is hindered. Many of Australia's neighbours in the Asia Pacific region either provide tax concessions for cost of living assistance or have significantly lower personal income tax rates than Australia and much lower living costs. Accordingly, these locations are prima facie more attractive for individuals in comparison.

In addition, many global employers are responsible for the tax payable by their employees when they send them to work in overseas jurisdictions as a result of tax equalisation arrangements with employees. For example, a global employer sending employees to Australia would generally be responsible for any tax arising on the individual's Australian salary and fringe benefits, including LAFHAs. If the proposed reforms are implemented, global employers will likely be responsible for the additional tax cost on the LAFHA or accommodation assistance. As a result it may be more attractive for employers to establish operations in locations with lower tax rates or where there is concessional tax treatment of temporary assignees.

To the extent that individuals choose other jurisdictions over Australia and employers move their operations to overseas locations, this will result in flow-on effects to the economy, including less spending and investment in Australia. This may be detrimental to sectors of the economy, including real estate and retail, which are already experiencing difficulties.

2.2 Lost social dividend

In our view, the existing rules provide a significant social dividend that justifies their ongoing retention (albeit potentially in a modified form as discussed above).

The international labour market also brings intangible benefits to Australia as it provides Australia with the ability to up-skill its workforce and obtain knowledge from other jurisdictions which can ultimately benefit Australia's productivity. If the proposed reforms are implemented it would become increasingly difficult for Australian employers to attract talent. It follows that Australia may start to experience a decline in the intangible benefits it receives from international talent, including a decrease in the skilled labour base. In addition, Australian employees may be required to move overseas in order to receive training in desired skills.

2.3 Other flow-on impacts on the economy

The proposed reforms may also have other unintended impacts on the Australian economy. Apart from the flow-on effects resulting from fewer temporary residents coming to Australia and employers moving operations offshore, there may also be further implications for Australia's economy.

As discussed above, many employers bear the cost of a temporary resident's taxes in Australia. Employers may be required as a result of the proposed reforms to increase employees' remuneration packages to compensate them for the additional tax that would be payable on LAFHAs. This would increase the cost of business for many employers and result in an unintended consequence of employers decreasing their costs in other areas, including through decreased spending and redundancies.

The proposed reforms could also impact on employers who legitimately rely on the concessions in order to attract and engage foreign staff in a difficult market, especially small and medium sized companies. Organisations who rely on international talent may find it difficult to continue operating or may have to scale back on growth plans, due to the inability to find talent or the increased costs to attract talent to Australia that are required to be incurred as a result of compensating employees for increased tax and cost of living amounts.

Critical to the analysis is that the proposals will affect a subset of the labour market that is mobile and highly skilled. As a result, it is likely that the impact of the proposed changes will fall on the consumers of labour, without any offsetting productivity increase. Increased costs incurred by businesses as a result of the proposed reforms would likely ultimately increase costs for the end consumer. This effectively results in a deadweight loss to the economy.

Temporary residents have indicated they will reconsider working in Australia if the proposed reforms are implemented. It is possible that there will be numerous temporary residents departing Australia when the reforms are implemented. This would result in decreased spending which will flow on to the rest of the economy.

To the extent that temporary residents remain in Australia, the proposed reforms may also have an unintended consequence on the rental market. The provision of accommodation assistance to temporary residents has assisted in creating demand for medium to high end rental properties. Without this assistance, there may be a decrease in demand in that sector. This will potentially result in corresponding increase in demand for medium and low end rental properties. This would put increased pressure on a sector that is already struggling to meet demand. This may have flow-on effects to Australian citizens and permanent residents.

2.4 Impact on businesses

In addition to the above, the proposed reforms may have other significant unintended consequences on businesses.

Many businesses have entered into long term contracts and agreements with clients where the pricing has been determined based on employee cost at the time contracts or agreements were entered into. The proposed reforms will result in additional employee costs for many employers which will impact on their profitability. In many cases, these contracts are not able to be renegotiated. For some employers this could result in loss making contracts.

Alternatively, for businesses which have entered into contracts with suppliers on a reimbursable basis, there may be a significant unbudgeted increase in costs charged to them if their suppliers bear either additional FBT or additional costs of remuneration and on-charge those costs. Reimbursable contracts are prevalent in the resources industry. Given the short time frame to potential implementation, it is difficult to estimate, let alone negotiate, the impact of such costs.

Further, an employer may face increased tax costs in the form of superannuation guarantee and payroll tax. Currently an employer is not required to pay superannuation and payroll tax on LAFHAs or other living away from home benefits. These additional taxes may place further burdens on struggling businesses.

Businesses may also need to increase remuneration packages for their temporary resident employees to encourage them to continue working in Australia. Some businesses will not be able to increase remuneration packages and this may result in employees moving between employers, causing instability in the labour market.

For the reasons above, we submit it is important for Treasury to consider whether the proposed changes are merited, and at a minimum, transitional or grandfathering provisions should be introduced for existing arrangements.

2.5 Unfair advantage to temporary residents is overstated

The proposed reforms were introduced as there is a perception of unfair advantage and abuse by certain sectors of the economy, including highly paid executives. However, highly paid executives only account for a small proportion of temporary residents who are receiving living away from home benefits. The majority of temporary residents receiving living away from home benefits are individuals who legitimately require assistance with the increased cost of living as a result of coming to Australia.

The proposed changes could severely impact these individuals who have entered into their current living arrangements based on a certain remuneration package and expected after tax earnings. If the reforms are implemented, many temporary residents could find themselves living beyond their means and in financial difficulties. This is particularly relevant to accommodation arrangements, many of which are long-term in nature and involve substantial penalties for early termination.

Whilst a temporary resident in receipt of a tax-free LAFHA may receive higher after-tax remuneration than an equivalent permanent resident, they also incur expenses that a permanent resident does not incur. As well as the costs of accommodation, which may be in addition to the cost of maintaining a residence in their home location, there are a range of costs that arise purely as a consequence of their assignment. Temporary residents are discouraged from purchasing residential homes as they are required to sell the property within a certain time period once they depart Australia.

Furthermore a temporary resident is not afforded the same degree of State assistance as a permanent resident. For example, most temporary residents are either not entitled to use or have only limited access to the Medicare system. Accordingly, they are required to pay medical costs in addition to those paid by permanent residents either by bearing all actual health costs incurred or through higher health insurance premiums. Temporary residents are also not entitled to receive many of the rebates and government assistance for which permanent residents are eligible, for example, child care rebate and baby bonus.

Temporary residents also incur high education costs for their children in both the private and public school system and potentially for tertiary education. Even in the public school system, temporary residents are required to pay substantial fees that are not levied on ordinary Australian residents.

These burdens are emphasised as usually only one member of the family is employed whilst in Australia. The additional after tax remuneration received by temporary residents as a result of the treatment of LAFHAs helps to offset these additional costs.

Tax Technical Consequences

Further clarification is required on the proposed exception for fly-in-fly-out arrangements.

2.6 Fly-in-fly-out exception

It is proposed that temporary residents who maintain a home in Australia will be eligible for concessional living away from home benefits, for example, benefits provided on-site in connection with fly-in-fly-out arrangements. It is submitted that this exception is not broad enough and could significantly penalise the resources sector, the strength of which currently underpins Australia's exports and broader economy.

Fly-in-fly-out arrangements often extend to overseas employees. In many circumstances, it is more cost effective to fly an individual directly in and out of their overseas home location, as opposed to accommodating them in an Australian city during "off" cycles. There are also many circumstances where fly-in-fly-out arrangements are not centred around locations that qualify as remote areas for tax purposes, despite having many disadvantages and hardships akin to those experienced in remote areas. Removing the living away from home concessions places projects of this nature at a significant competitive disadvantage.

It is therefore considered that at a minimum, the proposed exception for temporary residents who maintain a residence should not be limited to those who maintain a home in Australia, but should include those who maintain a residence anywhere in the world.

3. Practical aspects to consider

There is a short time period to the proposed effective date of 1 July 2012 for businesses to adjust to the changes. There should be a deferral of the effective date or a longer transition period allowed.

3.1 Implementation timing

The current LAFHA provisions are utilised by most employers who have temporary resident employees. With submissions due on 3 February 2012 the time frame between the potential release of legislation and the effective date of 1 July 2012 will be very short and may not provide employers and temporary residents with sufficient time to effectively manage the change.

Employers would need to review the remuneration packages for temporary resident employees and determine whether there are going to be changes to the remuneration packages.

We submit that it is inequitable to impose what will effectively be a retrospective change, if it applies to existing employment contracts that cannot readily be altered due to their nature and the time frame involved. There are also different tax implications as a result of the proposed changes depending on how the living away from home benefit is structured, that is, LAFHAs will be taxable to temporary residents and the reimbursement or provision of accommodation would be subject to FBT and affect employers.

In most instances where there is a significant change in law, there is scope for contracts entered into prior to any announcement of change to be quarantined from the impact. At a minimum, contracts which were negotiated prior to the announcement of the proposals should be outside the scope of the new provisions.

The short time period until 1 July 2012 may also provide difficulties for temporary residents as many would be locked into lease agreements which they may no longer be able to afford from 1 July 2012.

3.2 Interaction with immigration requirements

Employers are required to notify the Department of Immigration and Citizenship of any changes to the guaranteed annual earnings of an employee on a subclass 457 visa. LAFHAs are included in the calculation of guaranteed annual earnings for subclass 457 visa purposes.

As a result of the proposed reforms, employers will need to review the remuneration packages for employees. If an employee's remuneration package is altered by the removal of a LAFHA, the employer would be required to submit to the immigration department a new visa nomination application for that employee. This may result in numerous applications to the immigration department with the consequent associated costs. Accordingly, we submit consideration should be given to how to streamline visa application processes for employers who are required to submit new position nomination applications as a result of the proposed changes.

An employee's new remuneration package is not able to take effect until the new position nomination has been approved by the immigration department. Accordingly, the short time period between the release of legislation and 1 July 2012 may cause practical difficulties for employers who are trying to adjust remuneration packages for the proposed changes and disadvantage temporary resident employees whose position nominations submitted before, but not approved until after 30 June 2012.

A further issue to consider is the likelihood that many temporary residents may have a greater incentive to apply for permanent residence as a consequence of these changes. The living away from home requirements currently act as a moderating influence so that individuals who enter Australia on subclass 457 visas maintain ties with their home location and do not make more permanent arrangements such as purchasing a home. The sudden loss of the benefit of the living away from home concessions may lead to a surge in permanent residence visa applications that would require upward adjustment of immigration department program planning levels and processing staff. Without these adjustments service standards are likely to fall thereby with increased frustration for employers who are nominating highly skilled workers for permanent residence. Such a reduction in certainty of processing time-frames will be unhelpful to employers in workforce retention and planning.

4. Interactions with other areas of tax law

The Consultation Paper does not address how the proposed reforms will interact with other related tax laws. It is submitted that several related areas will require urgent clarification if the reforms are implemented as proposed.

4.1 Personal income tax and Pay As You Go ("PAYG") withholding

Under the proposed reforms, the tax treatment of LAFHAs will be governed by the income tax system rather than the FBT system. This will introduce new complexities as employers will be required to withhold tax to the extent the employee is not expected to incur deductible expenses.

In many areas, including remote sites where demand for accommodation is high and supply is limited, actual costs of both accommodation and food may significantly exceed the general thresholds that would be reasonable in more heavily populated areas. This is likely to result in an extensive need for substantiation of expenditure by Australian employees who continue to be eligible for living away from home concessions. This would be a fundamental change to existing arrangements, and may create considerable difficulty for many employees, including semi-skilled labourers, who are accustomed to receiving such assistance without the need to supply documentation. We submit that further consideration needs to be given to both the substantiation requirements and the setting of reasonable thresholds to cover a variety of situations and areas.

Guidance will need to be given to employers as to the documentation they would be required to obtain from employees to allow them to be satisfied that an employee will expend any LAFHA paid and therefore vary the amount of PAYG withheld. To the extent that individuals will be required to apply for a PAYG withholding variation before an employer is able to alter its withholding requirements, we submit that a process should be introduced which streamlines the PAYG withholding variation process to ensure individuals receive timely responses to requests. Alternatively, the Australian Taxation Office should release a legislative instrument clarifying the variation process or making a class order to overcome the need for a high volume of individual variation applications.

4.2 Superannuation guarantee

Currently employers are not required to make superannuation guarantee contributions in respect of LAFHAs as they constitute a fringe benefit. However, the position under the new proposals is unclear.

Generally an employer is required to make superannuation guarantee contributions on amounts paid to an employee, unless the amount is in respect of the employee working overtime hours. An employer is not required to make superannuation guarantee contributions to the extent an allowance is expected to be fully expended.

Under the proposed reforms, any LAFHAs paid will be taxable to the employee. However, the employee (other than temporary residents) would be able to claim an income tax deduction for the actual costs they have incurred, provided substantiation is available. Nonetheless, it is likely that the employer could be required to make superannuation guarantee contributions on LAFHAs paid to employees under the proposed reforms, unless the employer is aware that the employee will incur costs equal to the amount of the LAFHA. This could result in additional superannuation compliance and administration costs to employers.

Further, it is not clear how the superannuation guarantee concept of an allowance that is intended to be expended interacts with the income tax deductibility provisions. That is, it is not clear whether a non-deductible LAFHA paid to a temporary resident, which is expected to be expended, should still be classified as an expense allowance which would fall outside the scope of ordinary time earnings. It should be clarified whether LAFHAs provided by employers would constitute ordinary time earnings for employees, and any circumstances that affect this classification. This guidance would be required at the same time as any legislation amending the treatment of LAFHAs is introduced, as superannuation guarantee shortfalls may otherwise arise in unintended circumstances, creating further costs for employers.

4.3 Other living away from home benefits

Currently employers can provide temporary resident employees with assistance with education costs for children and home leave flights which are concessionally taxed for FBT purposes. It is unclear whether the proposed reforms will impact on the availability of these concessions.

The Consultation Paper states that employees receiving FBT education expenses concessions for their children when they are living away from home for work will not be impacted. However, under the FBT Act the concessional treatment for these benefits are available where the employee is an overseas employee, that is:

- ▶ The employee's usual place of residence is in a particular country (home country)
- ▶ The employee performs duties of his or her employment outside their home country
- ▶ The employee is required to live outside the home country to perform their employment duties.

Accordingly, based on the information in the Consultation Paper, it would appear that a temporary resident will still be able to meet the above conditions. However, we note that the Consultation Paper does not specifically address whether these benefits could still be provided by employers without being fully subject to FBT.

We submit that these benefits should still retain their concessional FBT treatment, especially as temporary residents are required to pay higher school fees (whether for private or public schools) than permanent residents of Australia. In addition, the short time frame for implementation would result in significant disruption if expatriate families were required to change schools due to no longer being able to afford the fees. As this issue has not been clearly addressed in the consultation paper, it is critical in our view that at a minimum there is an extended transition for the introduction of any change.

5. Update of statutory food amount

The statutory food amount for determining the taxable value of the food component of a LAFHA should remain \$42 per adult per week and \$21 per child per week.

The statutory food amount is essentially an amount prescribed by legislation. It is used to determine an employer's FBT liability in relation to the food component of a LAFHA with reference to an employee's home consumption amount. The statutory food amount is intended to be a reflection of the employee's food costs in the home location as to the extent the employee's home food costs is equal to or greater than the statutory food amount and the employer has taken this into consideration in determining the amount of the food allowance,

On the understanding that the Australian Taxation Office will continue to release revised annual guidelines as to reasonable food allowances, the objective of ensuring the reasonableness of the potentially deductible amount being the difference between the reasonable food allowance and the statutory food amount, can be met by setting the reasonable food allowance at an appropriate level each year. There is therefore no need to disturb the existing statutory food amounts. Doing so would potentially require further amendments to employment contracts, resulting in further costs to employers.

6. Indexation of statutory food amount

Annual indexation would impose additional administration and costs.

We submit that the statutory food amount should not be indexed annually.

When employers provide employees with the food component of a LAFHA, it is often calculated with reference to the employee's deducted home consumption expenditure and the statutory food component. This allows the employer to understand the FBT liability that will arise over the period the food component of a living away from home allowance is provided. The resulting amount is then usually paid to the employee for the period they are living away from home. Indexing the statutory food amount each year would change the FBT cost to the employer each year. In addition, the employer may need to revise the amounts paid to the employees annually, resulting in a greater administration and complexities for employers. Based on relatively small amounts of revenue at stake in connection with this issue, we submit the additional burden this change would impose would be disproportionate and unreasonable.

7. Transitional arrangements

Unlike other changes in tax legislation, the proposed reforms do not contain transitional provisions. Given the significant impact of the proposed changes on affected parties and the short time period to 1 July 2012, appropriate transitional arrangements should be introduced providing time to manage the change.

The proposed reforms do not contain any transitional provisions for existing arrangements. As discussed above, there are several implications of the proposed changes including, but not limited to:

- ▶ Review of remuneration packages to determine whether any changes will be made as a result of the proposed reforms
- ▶ Submission of visa nominations due to any changes in remuneration packages
- ▶ Increased costs for employers with fixed price contracts
- ▶ Employees facing financial difficulties due to the cessation of accommodation assistance.

With any changes in tax legislation there are usually transitional arrangements to allow affected entities to adapt and plan for the change. For example, the recent change to the statutory formula valuation method for cars for fringe benefits tax purposes had a four year transition period for arrangements entered into after the reforms were announced and grandfathering of any existing arrangements. Past superannuation guarantee changes, as well as changes to the tax treatment of termination payments, have also had lengthy transitional or time-to-implementation periods.

In our view, the Consultation Paper does not give sufficient consideration to transitional issues and the need for broad transitional provisions in order to allow affected employers and employees to manage the change. The majority of affected temporary residents would have employment contracts with a duration well beyond the proposed introduction date of 1 July 2012. Having the proposed reforms take effect from 1 July 2012 does not provide sufficient time to allow employers and individuals to plan and manage the changes, especially as submissions on the Consultation Paper do not close until 3 February 2012 and draft legislation has yet to be released.

The Consultation Paper states the Government will examine the need for special transitional arrangements in specific cases to ensure there are no unintended consequences with the new arrangements. Accordingly, we submit that at a minimum there should be grandfathering of existing contracts or transitional provisions allowing an extended effective date for existing contracts. If a grandfathering approach is considered, a time limit could be imposed on the additional time that a temporary resident could receive living away from home benefits. For example, a four year time period from either the date of introduction or from when the temporary resident arrived in Australia could be used as a threshold.

Any temporary residents who have lodged position nomination applications and visa applications on or after 1 July 2012 could be subject to the proposed reforms. This is similar to the transitional rules provided for in the 2007 changes to eligible termination payments where if the employee had an employment contract containing termination payment clauses specifying certain information at the time the changes were announced, the existing tax treatment would apply up to certain thresholds. The tax implications of any contracts entered into after this date were subject to the new provisions.

Alternatively, the effective date for existing arrangements could be extended to 1 April 2013. This coincides with the start of the next FBT year after 1 July 2012 and should provide temporary residents and employers with the ability to manage the implications of the changes.

Appendix 2

Corporate Supporters

The following companies/groups of companies support the contents of this submission:

ACE Insurance Limited
Albidon Limited
Alcoa of Australia Limited
Alpine Electronics of Australia Pty Ltd
ALSTOM Limited
Ambition Pty Ltd
AMEC Minproc Limited
Ansaldo STS Australia Pty Ltd
Aurecon Group
Australian Paper Limited
Barrick (Australia Pacific) Limited
BIOTRONIK Australia Pty Ltd
Boart Longyear Limited
BT Australasia Pty Ltd
Bupa Australia Pty Ltd
Capgemini Australia Pty Ltd
CAPS Australia Pty Ltd
Charles Taylor Adjusting Ltd
Clough Limited
Cochlear Limited
Diversified Mining Services Limited
Downer Group
Elbit Systems of Australia Pty Ltd
Energy Metals Limited
Ernst & Young Services Pty Ltd
Fortescue Metals Group Ltd
Foster Wheeler Energy Limited
Fosters Group
Foxtel Management Pty Limited
Fugro-TSM Pty Ltd

Gate Gourmet Services Pty Ltd
GlaxoSmithKline Holdings Pty Ltd
HDR Inc
Hitachi Construction Machinery (Australia) Pty Ltd
Howden Australia Pty Ltd
IBM Australia Ltd
Industrea Limited
Inflight Logistic Services Pty Ltd
Infosys Pty Ltd
Janome Pty Ltd
Japan Airlines Company Ltd
John Holland Group
Jurlique International Pty Ltd
Kellogg Brown & Root Pty Ltd
KUFPEC Australia Pty Ltd
Learn Australia Org
Lend Lease Corporation Ltd
Macmahon Holdings Limited
MARUBENI Group
Matrix Composites & Engineering Ltd
Merlin Entertainments Group Australia
MG Kailis Pty Ltd
Mitsubishi Australia Limited
Motherson Elastomers Pty Ltd
MSD Corporation Pty Ltd
Multi Channel Network
MVM Rail Pty Ltd
Nestle Australia Ltd
Nippon Express (Australia) Pty Ltd
Nissan Motor Co (Australia) Pty Ltd
Norske Skog Paper Mills (Australia)
Norton Rose Australia Holdings Pty Ltd
Orica Group
Osmoflo Pty Ltd
PaperlinX Limited

Parsons Brinckerhoff Australia Pty Limited
Petronas Australia Pty Ltd
Pourshins Australia Pty Ltd
Qantas Group
QGC Pty Ltd - A BG Group Business
Quickstep Technologies Pty Ltd
RugbyWA Pty Ltd
Samvardhana Motherson Group
Savanna Energy Services Pty Ltd
Smith & Nephew Pty Ltd
SMR Australia Limited
SMS Management & Technology Ltd
Sompo Japan Insurance Inc. Ltd
Subsea 7 Australia Contracting Pty Ltd
Sundance Resources Limited
Swift Australia Pty Ltd
Tetra Pak Marketing Pty Ltd
The Griffin Coal Mining Company Pty Ltd
The South Australian Health & Medical Research Institute Limited
Thunderhead Pty Ltd
Transfield Services Limited
TRUenergy Pty Ltd
URS Australia Pty Ltd
Vale Australia Pty Ltd
Wood Group
ZF Lemforder Australia Pty Limited