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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

REFORM OF THE LIVING-AWAY-FROM-HOME ALLOWANCE AND BENEFIT
RULES

EXPLANATORY MATERIALS

(Circulated by the authority of the
Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP)

Table of contents

General outline and financial impact.....	5
Chapter 1 Statement of Compatibility with Human Rights	7
Chapter 2 Reform of the living-away-from-home allowance and benefit rules.....	9

General outline and financial impact

Reform of the living-away-from-home allowance and benefit rules

This Bill amends the *Fringe Benefit Tax Assessment Act 1986* and the *Income Tax Assessment Act 1997* to reform the taxation treatment of living-away-from-home allowances (LAFHA) and benefits to:

- treat LAFHA as part of an employee's assessable income rather than as fringe benefits;
- better target the concessional treatment by allowing an income tax deduction:
 - to employees who maintain a home in Australia for their own personal use and enjoyment at all times while required to live away from home for their work;
 - for reasonable expenses incurred and substantiated for accommodation and food beyond a statutory amount;
 - for a maximum period of 12 months in respect of an individual employee for a particular work location.;
- employers will be taxed on LAFH fringe benefits (direct provision of accommodation and food) provided to employees who would not be eligible to claim an income tax deduction had they incurred the expenses directly.

Date of effect: The reforms will apply from 1 July 2012.

Transitional rules apply to permanent residents who have employment arrangements for LAFH allowances and benefits in place prior to 7.30 pm (AEST) on 8 May 2012. These employees will not be required to maintain a home in Australia and the concession will not be limited to a maximum of 12 months until the earlier of 1 July 2014 or the date a new employment contract is entered into.

Transitional rules also apply to temporary residents who are maintaining a home in Australia and have employment arrangements for living-away-from-home allowances and benefits in place prior to 7.30 pm (AEST) on 8 May 2012.

Proposal announced: 2011-12 Mid-Year Economic and Fiscal Outlook (MYEFO) and the 2012-13 Budget.

Financial impact: The reforms have the following fiscal impact over the forward estimates:

<i>2011-12</i>	<i>2012-13</i>	<i>2013-14</i>	<i>2014-15</i>	<i>2015-16</i>
-\$0.5m	\$261.2m	\$432.9m	\$590.6m	\$661.4m

Chapter 1

Statement of Compatibility with Human Rights

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

Reform of the living-away-from-home allowance and benefit rules

1.1 This Bill 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

1.2 This Bill reforms the living-away-from-home allowance and benefit rules.

Human rights implications

1.3 This Bill does not engage any of the applicable rights or freedoms.

Conclusion

1.4 This Bill is compatible with human rights as it does not raise any human rights issues.

The Hon Wayne Swan MP, Deputy Prime Minister and Treasurer

Chapter 2

Reform of the living-away-from-home allowance and benefit rules

Outline of chapter

2.1 This Bill amends the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) and the *Income Tax Assessment Act 1997* (ITAA 1997) to reform the LAFH allowance and benefit provisions to:

- treat LAFHA as assessable income of an employee; and
- allow an income tax deduction:
 - to employees who maintain a home in Australia for their personal use and enjoyment at all times that they are required to live away from for work;
 - for reasonable expenses incurred and substantiated for accommodation and food beyond a statutory amount; and
 - for a maximum period of 12 months in respect of an individual employee for any particular work location.

2.2 Employers will be taxed on LAFH fringe benefits (direct provision of accommodation and food) provided to employees who would not be eligible to claim an income tax deduction had they incurred the expenses directly.

2.3 Subject to transitional rules, these amendments will apply from 1 July 2012.

Context of amendments

2.4 The payment of a LAFHA is a fringe benefit. This differs from most allowances paid to an employee, which are assessable income to the employee.

2.5 Under the fringe benefits tax (FBT) law, LAFHA is an allowance paid by an employer to an employee to compensate for additional expenses incurred and any disadvantages suffered because the

employee is required to live away from their usual place of residence in order to perform their employment duties. The allowance is intended to cover reasonable and additional accommodation and food expenses. Additional expenses do not include expenses the employee would be entitled to claim as an income tax deduction. No FBT is payable on the exempt accommodation or exempt food components of a LAFHA.

2.6 The part of LAFHA that is taxed is usually minimal as the taxable part of the benefit is reduced by any reasonable amounts paid in compensation for accommodation and increased expenditure on food.

2.7 The FBTAA also provides concessional taxation treatment for LAFH benefits for accommodation and food provided either directly by the employer or as expense payment reimbursements.

2.8 The current law is being interpreted broadly and the concessions are now being widely exploited in a manner that is outside the original policy intent. Employees are using the concessions to access large tax-free amounts even though they are not incurring the cost of maintaining two homes. The amount of the allowance may be in excess of actual expenditure incurred on accommodation and food, and employees may be claiming the concessions for extended periods of time. This is resulting in a significant and growing cost to revenue that can no longer be justified on the basis of reducing compliance costs.

Summary of new law

2.9 The taxation treatment of LAFHA will return to the income tax system as it was prior to the introduction of the FBT law in 1986. Any allowance paid by an employer to an employee as compensation for being required to live away from home will be included in the assessable income of the employee.

2.10 Employees who maintain a home in Australia for their own use and who are required to live away from that home to perform the duties of their employment will be able to claim an income tax deduction for reasonable substantiated expenditure incurred on food and accommodation. The deduction will be limited to a period of 12 months (other than fly-in fly-out workers).

2.11 The LAFH benefit provisions in the FBT law which provide an FBT exemption or concession will be repealed. Employers who provide direct LAFH benefits will be able to apply the otherwise deductible rule to reduce the taxable value of LAFH benefits they provide to their employees.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>LAFHA will be assessable income of the employee.</p> <p>Employees who are living away from home for work purposes and maintain a home in Australia will be able to claim an income tax deduction for a period of 12 months for reasonable expenses that are substantiated for:</p> <ul style="list-style-type: none"> • accommodation; and • food beyond a statutory amount. 	<p>LAFHA is included in the FBTA as a fringe benefit assessable to an employer.</p> <p>The taxable value of the LAFHA benefit is the value of the benefit reduced by either or both of two components, the ‘exempt accommodation component’ and the ‘exempt food component’.</p> <p>An employer is exempt from FBT on LAFH accommodation benefits and for LAFH food benefits a reduced taxable value applies.</p>

Detailed explanation of new law

How will living-away-from-home allowances and benefits be taxed?

2.12 This Bill repeals Division 7 of Part III of the FBTA. As a result, LAFHA will no longer be treated as a fringe benefit and thus will no longer be non-assessable non-exempt income of the taxpayer under section 23L of the ITAA 1936. *[Item 4]*

2.13 Instead, LAFH allowances will be treated the same as other allowances, that is, as assessable income under the ITAA 1997. Allowances are included as assessable income of the recipient under either section 6-5 as ordinary income or under section 15-2.

2.14 This treatment will also apply to allowances paid to oil and gas rig workers as described in subsection 30(2) of the FBTA.

2.15 The LAFH benefits provisions in the FBTA will also be repealed. *[Items # and #]*

2.16 The taxable value of these benefits will be determined under the normal FBT rules in Division 5 for expense payments fringe benefits, in Division 11 for property fringe benefits and in Division 12 for residual fringe benefits. If an employee meets the conditions in the income tax law for claiming a deduction for living-away-from-home benefits (as described below), their employer can reduce the taxable value of the fringe benefits because of the operation of the otherwise deductible rule.

2.17 The otherwise deductible rule allows employers to reduce the taxable value of a benefit provided to an employee if the employee would be able to claim as a tax deduction had they incurred the expense of acquiring the benefit themselves.

Example 2.1

Jack reimburses the accommodation expenses of his employee, Michelle, who is required by Jack to live away from home in Australia to carry out her duties of employment for 12 months.

If Michelle had incurred the expense, she would be eligible to claim a deduction for the accommodation expenses for the period she is living away from home.

Jack's liability to FBT on the expense payment fringe benefit is nil. The otherwise deductible rule applies to reduce the taxable value of the benefit to zero because if Michelle had incurred the accommodation expense she would have been entitled to a deduction under the income tax law.

Jack requires a declaration from Michelle that the otherwise deductible rule applies.

Jack is required to meet the record keeping requirements under section 132 of the FBTAA.

Who will be able to claim a deduction for a living-away-from-home expenses?

2.18 An employee will be able to claim a deduction for accommodation and food and drink expenses incurred in living away from home when:

- they are required by their employer to live away from their usual place of residence in Australia to perform the duties of their employment; and
- their usual place of residence in Australia in which they have an ownership interest (or their spouse has an ownership interest) continues to be available for their use and enjoyment all times while they are living away from it; and
- the expense on accommodation or food or drink is for the employee or their spouse or child; and
- it is reasonable to expect that the employee will return to their usual place of residence upon completion of the job.

[Item 1, paragraphs 25-115(1)(a)-(d)]

2.19 The employer must require the employee to live away from their usual place of residence. An employee will not be able to move to a location and subsequently find employment and then claim to be living away from home. There must be requirements to live in another location placed on the employee by the employer.

Example 2.2

Viktor has lived in Melbourne for the past ten years with his family, where he owns a home.

He rents the home out and moves with his family to Sydney to look for a job.

He finds a job in Sydney. He will not be able to claim a LAFH deduction with respect to his house in Melbourne, because he moved to Sydney to find a job, rather than his new employer requiring him to move to Sydney.

2.20 The terms ‘spouse’ and ‘child’ are defined in subsection 995-1(1) of the ITAA 1997.

2.21 Spouse includes another individual with whom the employee is in a relationship with that is registered under a state or territory law, as well another individual who, although not legally married to the individual, lives with the individual on a genuine domestic basis in a relationship as a couple.

2.22 Child includes adopted children, stepchildren or ex-nuptial children, as well as children of the employee’s spouse.

2.23 The term ‘usual place of residence’ is not a defined term but it takes on its ordinary meaning. The customary meaning of the word ‘reside’ is to dwell permanently or for a considerable time, or to have one’s abode for a time. ‘Residence’ means the place, especially the house in which one resides.

2.24 An employee’s usual place of residence must be a residence in which the employee or the employee’s spouse has an ownership interest, that is, it is either owned or leased by the employee or the employee’s spouse. It could include a caravan if it were a permanent place of residence. For further information, ‘ownership interest’ is defined in section 118-130 of the ITAA 1997.

2.25 Adult children living in the family home do not have an ownership interest in the dwelling. Therefore, such an employee who

moves from the family home to work interstate is not entitled to a LAFH deduction.

2.26 There are numerous court decisions which have established principles for determining whether or not an employee can be regarded as living away from their usual place of residence. Some principles that have been developed by courts on whether a person is living away from home include:

- there is normally a choice for the employee between two places of residence;
- the employee has to change residence in order to work temporarily for his or her employer at another locality,
- if not for the employer requiring the employee to work at another locality, the employee would have continued to live at the former place;
- there is an intention or expectation of the employee returning to live at the former place of residence at the end of the assignment at the temporary job locality;
- the employee's usual place of residence is close to where an employee is permanently employed;
- the employee does not abandon their former place of residence when the employee moves;
- the employee does not have a life style of a transitory nature;
- a person's holiday home would not be their usual place of residence.

Example 2.3

Adrian is a geologist with a mining company has been required by his employer to leave his home in Perth for two years to work on a mining site in remote WA. Adrian and his family have lived in this home for a number of years. Adrian's spouse and children will continue to live in the Perth home while he is living away from home on the remote mining site. Adrian's home in Perth is his usual place of residence.

Example 2.4

Diane who lives in Sydney is required by her employer to move to the branch office in Melbourne for a 2 year period. Diane does not sell her property as she wishes to return to it at the end of two years when she

returns to Sydney. Diane's home in Sydney is her usual place of residence.

2.27 It will be a question of fact whether a residence is the taxpayer's usual place of residence. However, Part IVA may apply to artificial arrangements designed to allow an employee to qualify for the concession.

2.28 To be eligible for the deduction, the employee's usual place of residence must continue to be available for their use and enjoyment at all times (or their spouse or child who would normally reside with them at that place) while they are living away from home. That is, the employee must incur the ongoing cost of maintaining this residence (such as mortgage or rental payments and rates), and it cannot be rented out or sub-let while they are living away from home.

2.29 The property cannot be rented or sub-let, even if the sub-let or rental amount does not cover the full cost of maintaining the home.

2.30 If an individual has a boarder or tenant staying with them in their usual place of residence when they are required to live away from home for their employment, they can continue to have that boarder or tenant, but the boarder's stay must not impinge on the individual's use and enjoyment of the dwelling. An individual cannot have a further boarder, and still continue to receive a LAFH deduction.

Example 2.5

Janelle owns a three bedroom house in Melbourne. She currently has a tenant living with her, who she has no personal relationship with who pays rent.

Janelle's employer requires her to work interstate for eight months to set up a new shop in Perth. Janelle moves to Perth for the period, while planning on returning to Melbourne in eight months' time. Her tenant stays in the house, and continues to pay rent.

Janelle would still be eligible for the deduction as her usual place of residence continues to be available for her use and enjoyment at all times.

However, Janelle would not be able to rent out a further bedroom and still be entitled to a LAFH deduction.

2.31 The employee's usual place of residence must be in Australia. For a temporary resident to be entitled to claim a LAFH deduction, they must maintain a residence which they are living away from home from in Australia.

2.32 The deduction is subject to a time limit (see paragraphs #.# to #.# below).

What expenses will be deductible and how much?

2.33 An employee who meets the requirements outlined above will be eligible to claim a deduction for food and drink, and accommodation expenses incurred while living away from their usual place of residence. The expenses can only be deductible to the extent they are reasonable.

Accommodation

2.34 An employee can deduct accommodation expenses incurred while living away from home, to the extent that the expense is reasonable. *[Item 1, subsection 25-115(2)]*

2.35 In determining what is a reasonable accommodation expense, the same principles as have been applied in the treatment of LAFHA for FBT purposes would also be applied for income tax purposes. For FBT purposes, it was expected that an employer would pay an allowance on the basis of a survey of accommodation and living costs at the employee's temporary work location, in order to compensate the employee for accommodation and additional living expenses that the employee might be expected to incur. The allowance may also contain a component to compensate for general disadvantages of the temporary location such as isolation, and harsh climatic conditions.

2.36 However, there may be circumstances where an employee would incur a higher level of expenditure on accommodation when living away from their usual place of residence. For example, the employee may move to an area where the price of accommodation for comparable properties to their usual place of residence is higher, or there is a shortage of accommodation which results in higher market values.

2.37 There may be other factors to consider in determining whether an accommodation allowance is reasonable such as the employee's income and usual standard of accommodation. For example, luxury accommodation provided to an employee that could not otherwise be sustained on their income would be unlikely to be reasonable.

2.38 In the case of shared accommodation, an employee's actual expenditure is their share of the accommodation costs only – not the full amount. If one employer is reimbursing accommodation expenses for two employees who are in a domestic relationship, the costs must be shared between both employees. That is, the deduction for each employer in shared accommodation is limited to their share of the accommodation expense. This will be the case for employees living in share

accommodation who are not in a domestic relationship with their housemate.

Food

2.39 An employee may deduct food and drink expenses for a spouse or children that live with them. This includes food and drink expenses for a spouse or children that visit the employee while they are entitled to a LAFH deduction, provided the spouse or children are living with the employee while they are visiting, and not staying in separate accommodation.

2.40 An employee can deduct food and drink expenses to the extent the expenses are reasonable and exceed \$110 in relation to a seven day period for each individual of 12 years of age or older and \$55 in relation to a seven day period for each individual under the age of 12 years for the 2012-13 income year. *[Item 1, subsection 25-115(3)]*

2.41 If an employee shops for food and drink on a fortnightly basis, they would need to split the bill in two to work out the relevant expenses they have incurred for the 7 day period.

2.42 The amounts of \$110 and \$55 are the indexed amount of the LAFHA statutory food component used in 1986 which were set at \$42 per week for a person of 12 years of age or older, or otherwise \$21 per week. The food based CPI has been used to index these amounts to 2012 values.

2.43 The food and drink amounts of \$110 and \$55 are to be indexed, and rounded down to the nearest dollar. *[Item 1, subsection 25-115(4)]* The indexation rules in the income tax law are amended to provide for the annual indexation of these amounts. The indexation number is the food group of the CPI, being the weighted average of the eight capital cities, first published by the ABS for the quarter. *[Item 24, subsection 960-280(1)]*

Substantiation requirements

2.44 To be able to claim accommodation and food expenses, certain substantiation requirements need to be met. The expenditure on food and accommodation needs to be substantiated by the employee by obtaining written evidence in accordance with Subdivision 900-E of the ITAA 1997. *[Item 22, subsection 900-97(1)]*

2.45 The written evidence for accommodation expenses could include a lease agreement, mortgage document and receipts for accommodation. Written evidence for food and drink is the receipts for expenses actually incurred.

2.46 To minimise the cost of compliance for employees, substantiation will not be required for food expenses unless the expenses exceed an amount specified in a determination by the Commissioner of Taxation. *[Schedule #, item 22, paragraph 900-97(1)(b) and subsection 900-97(2)]*

2.47 If employees claim amounts in excess of the reasonable amount, the full amount must be substantiated.

Example 2.6

Ciara is asked by her employer to relocate for six months from Brisbane to Canberra. She is paid a LAFHA each week of her posting.

Ciara will have the LAFHA included in her assessable income. She can substantiate her accommodation expenses but is not required to substantiate her food expenses as these expenses do not exceed the amount specified by the Commissioner in a determination.

Ciara's employer does not have to withhold tax from the LAFHA because she indicates to him that she will be claiming a deduction.

2.48 The rules for retaining written evidence require that documentation has to be retained for 5 years. A taxpayer is not required to lodge this documentation with their income tax return but the Commissioner of Taxation can ask that the taxpayer provide it. The 5 year period can be extended where there is a dispute with the Commissioner. *[Item 22, section 900-98]*

Time limit for living away from home deduction

2.49 An employee can only claim deduction for accommodation or food expenses for the first 12 months that their employer requires them to live away from their usual place of residence in Australia for their employment. *[Item 1, subparagraph 25-115(1)(e)(i)]*

2.50 The 12 month period commences the first day the employee begins living away from home. *[Item 1, subparagraph 25-115(1)(e)(i)]*

2.51 The 12 month period pauses if the employee temporarily relocates to their usual place of residence. For example, the employee takes a month leave, and returns to their usual place of residence. *[Item 1, subsection 25-115(5)]*

2.52 The 12 month period restarts if the employee's work location changes, that is, the employee is required by their employer to move to another location to perform the duties of employment, and it would be unreasonable for the employer to require their employee to commute to

the new location from the earlier location. *[Item 1, paragraph 25-115(5)(b) & (c)]*

2.53 Other changes to the conditions of employment, such as a promotion to a management position, do not re-set the 12 month period.

2.54 If an employee takes up employment with a connected entity of their employer, the 12 month period will not recommence. That is, the employer will be treated as continuing to work for the same employer. *[Item 1, paragraph 25-115(5)(d)]*

2.55 The term ‘connected entity’ is defined in subsection 995-1(1) of the ITAA 1997.

2.56 The 12 month limitation does not apply to fly-in fly-out workers. *[Item 1, subparagraph 25-115(1)(e)(ii) & (iii)]*

Example 2.7

Max comes to Australia as a temporary resident to work in the mining sector in Western Australia. He rents a home in Perth. He gets a job with a mining company that requires him to work eight days on and six days off at a mine site in the Pilbara. The employer provides accommodation and food for its employees at the mine site.

Max’s home in Perth is available for his use at all times when he is working at the mine site.

Max’s employer does not have to pay FBT on the accommodation and food benefits provided to Max while he is living in Australia.

Application and transitional provisions

2.57 The reforms will apply from 1 July 2012. *[Item 26]*

2.58 Transitional rules apply to permanent residents who have employment arrangements for LAFH allowances and benefits in place prior to 7.30 pm (AEST) on 8 May 2012.

2.59 The conditions in the Budget:

- to maintain a home in Australia; and
- to limit the concessional treatment to a maximum of 12 months;

will not apply to these permanent residents until the earlier of 1 July 2014 or the date a new employment arrangement is entered into, but not so as to give anyone an additional 12 months after the transitional arrangements end. *[Item 27(1)]*

Example 2.8

Justin's five year employment contract expires, and he re-signs with his employer for a further six month period on 1 August 2013.

Until he re-signs, the previous LAFHA arrangements applied to Justin and his employer.

The new arrangements will apply to Justin and his employer from 1 August 2013.

2.60 The condition in the Budget to limit the concessional treatment to a maximum of 12 months will not apply to temporary residents or foreign residents maintaining a home in Australia until the earlier of 1 July 2014 or the date a new employment arrangement is entered into, but not so as to give anyone an additional 12 months after the transitional arrangements end. *[Schedule #, Item 27(2)]*

2.61 Employment arrangements include not only arrangements with an employee's employer but also a connected entity of the employee's employer.

2.62 Temporary resident means the same as the ITAA 1997.

Consequential amendments

2.63 As a result of the Bill repealing Division 7 of the FBTA to remove LAFHA from the fringe benefits tax law, a number of consequential amendments are required.

2.64 The Bill repeals definitions in subsection 136(1) of the FBTA associated with Division 7. These definitions are 'eligible family member', 'exempt accommodation component', 'exempt food component', 'food component', 'living-away-from-home allowance benefit', 'living-away-from-home allowance fringe benefit', 'living-away-from-home food fringe benefit', 'recipients allowance' and 'recipients allowance period', 'statutory food amount'. *[Items 9-18]*

2.65 This Bill also repeals sections 21, 63 and subsection 47(5) of the FBTA which provide an exemption or reduction in taxable value for accommodation and food living-away-from-home fringe benefits. *[Items 3,*

6 & 8] As outlined above, these provisions are redundant because of the operation of the otherwise deductible rule which reduces the taxable value of the benefits by the amount of the income tax deduction that is otherwise allowed to an employee under the ITAA 1997.

2.66 Other consequential amendments are made to the FBTA which reflect changes to the living-away-from-home allowance and benefit rules, including a change to the board fringe benefit rules to ensure the taxable value for board fringe benefits is calculated on an equivalent basis to deductible food expenses in the income tax law. *[Items 2, 5 and 7]*

2.67 Consequential amendments are made to the ITAA 1997 to reflect the insertion of new section 25-115 and related provisions. *[Items 19 to 21, 23]*

2.68 Subsection 12-1(2) in Schedule 1 to the *Taxation Administration Act 1953* is repealed as a result of the repeal of the LAFH provisions in the FBTA. *[Item 25]*

