

EY Submission – FBT record keeping simplification draft legislation package

(received by email on 30/09/2022)

EY is pleased to have the opportunity to make a submission to the Treasury in relation to the Treasury Laws Amendment (Measures for consultation) Bill 2022: FBT record keeping exposure draft legislation and accompanying explanatory material in relation to modifying existing FBT record keeping obligations.

This proposal was originally announced in the 2020-2021 Budget. As set out in Budget Paper No 2 for that year, the measure was intended to allow employers — with what the Commissioner determines as adequate alternative records — to rely on existing corporate records, removing the need to complete additional records, the intention being to reduce compliance costs for employers, while maintaining the integrity of the FBT system. The draft legislation seeks to implement this proposal by empowering the Commissioner to allow employers, where it is appropriate to do so, to rely on adequate alternative records instead of obtaining statutory evidentiary documents, such as prescribed employee declarations and other prescribed records.

Comments in respect of ED legislation.

The legislation takes the fairly straightforward approach of providing the Commissioner of Taxation with the power to specify alternative records that will be deemed to satisfy the record keeping requirements currently spelt out in the existing FBT legislation and provides for the Commissioner to publish legislative instruments to that effect. However, the draft legislative instruments (LI's) that accompany the ED suggest that the ATO is currently reading this power too literally and conservatively, in that the approach taken in the LI's is just to list the existing requirements and then state that any other documents that satisfy the totality of the matters set out in the list will suffice, rather than taking a purposive approach of looking for alternative documents that will satisfy the purpose of the legislation, being to simplify record keeping without compromising revenue collection. Without such a purposive approach, it is unlikely that goal of reducing compliance costs for employers will be achieved.

In order to encourage the ATO to embrace a more purposive approach to the LI's, we would suggest that the legislation (or at least the EM) contain a clear purpose statement to the effect that the purpose of providing the alternative record keeping is to reduce the compliance burden for employers whilst still preserving the integrity of the FBT system. We would also suggest that the EM, in particular at paras 1.11 and 1.17, be amended to reflect this purpose, rather than suggesting, as those paras could currently be read, that this measure is simply designed to accommodate alternative records that still contain every item of detail currently specified in the existing legislation. In our commentary on the LI's below, we set out more detail as to how this may be practically achieved.

We also note that at present, there are only 2 LI's as part of the package and these do not address the areas of most pressing concern to employers. However, we understand that in due course, the ATO intends to publish additional LI's.

Comments in respect of accompanying Legislative Instruments (LI's)

Firstly, as a general observation, in our view the relief proposed in the draft LI's for travel diaries and relocation transport employee declarations appears to provide minimal practical benefits for employers and accordingly does not entirely achieve the policy intent of the measure. We consider that for employers to appreciably benefit from this measure, a more purposive approach needs to be adopted and more information and examples should be published either in the LI's or the explanatory statements to enable taxpayers and practitioners to fully understand the scope and implement the changes without risk of penalty. The LI's should also be written in a style that makes them easy to understand and to implement without any misunderstanding. The critical point to note is that, in order for these changes to be effective and beneficial, the records to be maintained must be different from and simpler than, the current requirements. This will not be achieved by an approach that simply specifies the same records are required, albeit in a different form.

The LI's, as currently drafted, take a somewhat formal and legalistic approach of restating all of the current legislative evidentiary requirements and then stating that any alternative records that contain all of the same pieces of information will be accepted to be adequate alternative records. This approach overlooks the purpose of the record keeping simplification proposals and as a result, will be difficult for many employers to understand and is unlikely to deliver any significant practical benefit. In our view, the LI's should focus on the above noted purpose and look to identify what are existing business records that may not necessarily contain all of the information specified in the existing evidentiary requirements, but are nonetheless sufficient to maintain the integrity of the FBT system, as they illustrate that the intention behind the evidentiary requirements has been met.

For example, in relation to the travel diary requirements, an employer policy that it will only reimburse legitimate business expenses, together with a conference program demonstrating business purpose, and/or a travel itinerary showing business meetings, and a relevant expense claim that sets out the amount of expenditure, should be accepted as adequate alternative records, even if not containing all the details set out at para 4(1) of the draft travel diary LI.

In relation to the relocation LI, in our view this will likely create more work for employers rather than less. At a practical level, it is difficult to see the need for information such as the make and model of the car, specific departure and arrival addresses and even the specific number of family members, as none of these items impacts the amount of the claim. City or town of arrival/departure and an employer relocation policy that specifies what an employee can claim, should be accepted as adequate alternative records, as this is sufficient to establish purpose and does not compromise the integrity of the FBT system.

We would also submit that the contemporaneity requirement set out in para 4(2) of the travel diary LI is not necessary to maintain the integrity of the FBT system. Under the existing requirements, employers are not required to collect travel diaries on a contemporaneous basis. Therefore, the requirement in para 4(2) would create an additional burden to employers. Given that the purpose is to allow employers to rely on alternative employer maintained records, we submit that the contemporaneity requirement is unnecessary.

More broadly, we also submit that a wider range of LI's will be required (which we understand will be done). In particular, LI's dealing with LAFHA declarations and Otherwise Deductible (ODR) declarations should be considered as a matter of priority. In looking at the ODR declaration requirements, employer policies that specify that the employer will only reimburse legitimate business expenses, together with an expense claim that identifies the quantum of the expense, should be accepted as adequate alternative records. This is particularly relevant to reimbursement

of phone costs for personal mobile phones, this being a practice that is becoming more prevalent in lieu of company provision of mobile phones, for which an FBT exemption applies.

We would also suggest that there is a need to focus on different requirements for large and small business, as the type of records maintained and depth of understanding of FBT is substantially different.

Should you have any questions or follow up, please feel free to contact Frank Klasic or myself.

Best regards



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