

30 September 2022

Director

Personal Deductions and Fringe Benefits Tax Unit
Personal and Indirect Tax, Charities & Housing Division
Treasury
Langton Cres
Parkes ACT 2600

By email to: FBTRecordkeeping@treasury.gov.au

Fringe benefits tax - record keeping exposure draft legislation

Treasury Laws Amendment (Measures for Consultation) Bill 2022: FBT record keeping

**Fringe Benefits Tax Assessment - Adequate Alternative Records (Travel Diaries)
Determination 2022**

**Fringe Benefits Tax Assessment - Adequate Alternative Records (Relocation Transport)
Determination 2022**

(the 'draft legislation')

Dear Director,

Tax & Super Australia (TSA) is a not-for-profit member organisation that has assisted tax and superannuation professionals for over 100 years. With a membership and subscriber base of over 15,000 practitioners, TSA is at the forefront of educating and advocating on behalf of independent tax, superannuation, and financial services professionals.

Please find in the comments below our response regarding the *Fringe Benefits Tax – record keeping exposure draft legislation* issued by Treasury on 9 September 2022.

We thank Treasury for the opportunity to comment.

We note that the intent of the draft legislation is to simplify the fringe benefits tax ('FBT') record keeping requirements, and thereby reduce compliance costs for employers and 'red tape' for business¹.

THE DRAFT LEGISLATION

TSA supports the proposed policy announced by the previous Government in the 2020-21 Budget and commends the new Government's willingness to adopt the initiative, thereby acknowledging the significant compliance burden (and the disparity between that burden and resulting revenue collection) that FBT places on Australian businesses.

However, TSA believes that the path taken in attempting to reduce the FBT burden may create barriers preventing the Government from achieving its desired policy outcomes.

¹ Explanatory Memorandum to Treasury Laws Amendment (Measures for Consultation) Bill 2022: FBT record keeping ('EM') paragraphs 1.1 and 1.2

We set out our concerns below regarding the proposed draft legislation, with our recommendations following:

1. The draft legislation aims to produce ‘*similar compliance outcomes with lower compliance costs*’², by effectively removing the requirement for statutory evidentiary documents, such as employee declarations, where adequate alternate records exist. The reduction in the compliance burden on employers, however, appears to be viewed from the limited perspective of reducing the number and form of records created to comply with FBT record keeping requirements.

Any such reduction will arguably be offset by the following:

- i) **Initial compliance costs:** Paragraph 1.7 of the EM states that providing the option of relying on adequate alternative records “*encourages businesses which initially may be unable to rely on adequate alternative records to establish and maintain robust corporate records for this purpose*”.

The proposed new law is optional and is to be implemented by way of legislative instrument (see further point three below). Each draft legislative instrument is two pages in length, and their accompanying Explanatory Statement approximately four pages. Paragraph 1.5 of the EM acknowledges there are over twenty approved employee declarations, two employer declarations and a travel diary requirement within the current FBT laws. If a legislative instrument is released for each (acknowledging that in paragraph 1.15 of the EM, this is not necessarily envisioned), it will result in a significant amount of legislative material for employers, and their advisors, to understand, assess and practically implement.

Before establishing or implementing changes to existing data collection systems, employers (or their advisors) can be expected to undertake a cost-benefit analysis, comparing the requirements of the draft legislation to their current systems.

Changing data collection systems can involve considerable time and cost, with that cost borne by business and their advisors. Where change is optional, and a cost-benefit analysis itself involves significant time and cost, change is unlikely to occur without clear or significant benefits. A policy dependent on business changing its systems voluntarily is less likely to achieve the desired policy outcome.

- ii) **Ongoing compliance costs:** An increased demand on tax, finance and administration staff can be expected under the proposed new law, both in time and skill, to identify, review and assess existing corporate records to ensure required information has been collected.

In respect of Example 1 in Explanatory Statement to *Fringe Benefits Tax Assessment - Adequate Alternative Records (Relocation Transport) Determination 2022*, a reduction in net or overall compliance costs is unlikely considering the Account Manager’s time required to review and assess the existing FBT documents. This is assuming they have the necessary technical skills to do so. For example, the follow up of the employee (twice), plus the filing and retaining the 3 separate documents in the company system is prohibitive. This highlights that the compliance cost burden does not only arise from the number, or form, of evidentiary documents required by law, but from the amount of legislatively prescribed information required and the various ways this information may be collected.

The draft legislation does not address, nor reduce this burden.

² EM paragraph 1.2

2. The draft legislation introduces an element of ambiguity and subjectivity in assessing whether alternative records contain the required information.

From Example 1 in the Explanatory Statement to *Fringe Benefits Tax Assessment – Adequate Alternative Records (Travel Diaries) Determination 2022*, the following issues could be raised by an employer:

- Should Company Ltd print and retain a copy of Samara’s electronic diary entries to meet the requirements?
- What consequences arise were Samara to subsequently change her diary entries unbeknownst to Company Ltd?
- Is there an expectation that Company Ltd’s staff monitor Samara’s calendar entries for the duration of her trip, and for a specified period thereafter?
- Should the inadvertent omission of one legislatively prescribed piece of information be sufficient to disqualify the use of the alternative records as adequate?

Ambiguity and subjectivity create uncertainty, and can lead to questions of interpretation, increasing risk for the employer. This risk is material in the context of FBT, where FBT is imposed at the top marginal rate, and could be levied should an employer’s alternative records be found to be inadequate on review by the Commissioner. This is especially so given the ease with which a failure to collect all required information may occur.

We believe risk and the disproportionality of consequence may limit the up-take and utility of the new law.

3. Para 1.12 of the EM states:

“It is appropriate to delegate power to the Commissioner to make legislative instruments for this purpose due to the technical nature of the instruments, which are tailored to cover a range of fringe benefits of varying complexity and different statutory evidentiary documents applicable for each fringe benefit. Enabling the Commissioner to determine, by way of legislative instrument, the kind of alternative documents or records which can be utilised for this purpose provides an efficient and flexible mechanism to enable employers to identify the kind of records that will meet their record keeping obligations. This gives employers certainty, supports the purpose of the amendment to reduce FBT record keeping obligations for employers and supports the operation of the FBT regime generally.”

We submit that legislative instruments, although arguably an efficient and flexible mechanism to implement laws, can be more complex for employers and their advisors to apply.

Additionally, the use of legislative instruments in this case may create an undue concentration of government power. It is always desirable that the Commissioner not be placed in a position of making the laws they are responsible for administering. We submit there are other options available to the Commissioner (such as Public Rulings, Law Companion Rulings or Practical Compliance Guidelines) that provide employers, and taxpayers more broadly, similar certainty, improved accessibility (i.e., ease of practical implementation), and greater protection.

SUGGESTED ALTERNATIVES

We consider the desired policy outcomes could be more efficiently and effectively achieved by:

1. Deferring further changes to the FBT legislation until a more full and complete review of the FBT system can be undertaken. We submit such a review could consider not only a reduction in the amount of legislatively prescribed information and documentary evidence required, but also address broader issues such as a reduction in the number of benefits subject to FBT, for example, by way of a de-minimis exemption per benefit type or per employee, or a partial or complete repeal of FBT.

Please refer to our previous submission to The Honourable Scott Morrison MP dated 3 March 2022 for further information in this regard.

2. Reliance on the following current provisions of the *Fringe Benefits Tax Assessment Act 1986* ('the FBTA'), with some comparatively minor amendments, could meet the stated intentions of the draft legislation without increasing the volume or complexity of current FBT laws:

- i) **Section 123B:** Section 123B provides the substantiation requirements will not apply in relation to a benefit where the Commissioner is satisfied, on the basis of the nature and quality of evidence available, that the taxable value of a benefit is not greater than the amount specified an employer's FBT return. Amending section 123B to not restrict its application to specified circumstances (subsection (3)) and by allowing its application to declarations (subsection (4)), section 123B could relieve employers from substantiation requirements where the Commissioner considers they have "adequate alternative records".

With minor amendments to the law, and a supporting Law Companion Ruling or Practical Compliance Guideline outlining the Commissioner's view of adequate alternative records (as per the current draft legislation), this may similarly achieve the policy outcomes, with less volume and complexity of law, and similar certainty and taxpayer protection.

- ii) **Part XIA:** The compliance burden can be reduced for a greater number of businesses by broadening access to the record keeping exemption arrangements ('RKEA') in Part XIA of the FBTA. This could be achieved by increasing the current exemption threshold (currently \$9,181). Up-take of the RKEA could be further encouraged by increasing (or removing altogether) the current variation permitted in aggregate FBT amounts (currently 20%) that can occur before the employer is ineligible to use the 'base year method' (subsection 135K(1)).

Should any of the foregoing be unclear or if you wish to discuss further, please do not hesitate to contact us.

Yours faithfully,



Phillip London
Head of Tax