2

Analysis of the Bill

Overview

2.1 This chapter focuses on Schedule 1 of the Tax Laws Amendment (2012 Measures No. 4) Bill 2012 (the Schedule and the Bill) which relates to changes to the taxation treatment of living-away-from-home (LAFH) allowances and benefits. The Bill contains three schedules which address separate matters. However, the committee only received evidence pertaining to Schedule 1 of the Bill. Schedule 1 brings LAFH allowances in line with other allowances by primarily treating it under the income tax system.[1] The 'ordinary weekly food and drink expenses' component will continue to be treated as a fringe benefit.[2]

2.2 The amendments to the taxation treatment of LAFH allowances and benefits seek to address concerns that the current concessions are being misused, resulting in a significant and growing cost to revenue. As the Explanatory Memorandum (EM) states:

> The current law is being interpreted broadly and the concession is being used in a manner that is outside the original policy intent. Employees are using the concession to access tax-free amounts even though they are not incurring additional expenses, that is, the cost of maintaining two homes.[3]

2.3 Submitters were supportive of the broad intention of the Schedule to eradicate the exploitation and misuse of the tax concession for LAFH allowances and benefits.

---

1 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 9.

2 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 11.

3 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 9.

2.4 This chapter reviews the issues raised during the inquiry by submitters and, where appropriate, provides guidance about possible measures to improve the Schedule. The concerns of submitters to the inquiry were broadly focused on: the complications which would arise from the dual tax treatment of the allowance; the additional expenses and obligations which would result from the changes; and concerns about the effect on the transitional arrangements particularly for 457 visa holders.

2.5 The committee has made a range of recommendations which aim to simplify the application of the legislation and limit the exploitation of the tax concession for LAFH allowances and benefits. The committee strongly supports the single taxation treatment of LAFH allowances and believes that it may be prudent for it to continue to be treated under the fringe benefits regime. To inhibit the exploitation of the tax concession for LAFH allowances and benefits, the committee supports the introduction of tightened eligibility criteria. A small amendment has been recommended to exempt drive-in drive-out (DIDO) workers using their own transport from the 12 month time limit.

2.6 To further improve the Schedule the committee has recommended that where definitional ambiguity exists clarity must be provided to ensure individuals and industry know how any changes will impact on them.

Principals and definitions

2.7 LAFH allowances were first introduced into the income tax system in 1945. The EM described the application of a LAFH allowance, in its original incarnation, as being paid:

> ...to compensate the employee for the additional expenditure he is obliged to incur in providing board and accommodation for himself at his place of employment while, at the same time, maintaining his home elsewhere.[4]

2.8 In 1986 the treatment of LAFH allowances changed and it became a fringe benefit. Under these arrangements:

> An employee is regarded as living away from their usual place of residence if they would have continued to live at the former place if they did not have to work temporarily in a different locality. The residence does not have to be the employee's permanent place of residence...The general presumption is that a person's usual place

4 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 8.

> of residence will be close to where they are permanently employed. [5]

2.9 Currently no time restrictions are placed on how long an employer can claim tax relief on LAFH allowances and benefits provided to an eligible employee. The committee accepts the EM's rationale that LAFH allowances and benefits should not be claimed for 'extended periods of time'.[6]

2.10 The committee supports the move to limit, to 12 months, the amount of time LAFH allowances and benefits can be claimed per location.

2.11 The committee recognises the unique nature of remote construction sites which require large workforces for a discrete operational phase. Therefore, the committee supports the decision to exempt fly-in fly-out (FIFO) and DIDO workers from the 12 month limit. This measure recognises that FIFO and DIDO workers are a unique category of temporary workers. As outlined below, the committee recommends that the exemption be extended to include DIDO workers who use their own vehicles to access their place of work.

2.12 The committee is also supportive of the proposed stipulation that an employee must be maintaining a primary residence. However, it should be noted that the committee believes that the definition of an employee's 'usual place of residence' and 'ownership interest' must be broadly interpreted and clearly articulated.

2.13 As a general principle if employees are not incurring extra costs as a result of a temporary relocation, LAFH allowances and benefits essentially become a wage subsidy.

Eligibility

Background

2.14 Employees who are required to live away from their usual place of residence in Australia by their employer and continue to maintain that home for their personal use will be entitled to access the tax concession for LAFH allowances and benefits. The EM stipulates that:

> The employee's usual place of residence must be a residence in which the employee or the employee's spouse has an ownership

5 The Australian Taxation Office, Fringe benefits tax – a guide for employers, <http://www.ato.gov.au/businesses/content.aspx?doc=/content/52023.htm>, viewed 6 August 2012.

6 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 9.

> interest, that is it is either owned or leased by the employee or the employee's spouse.[7]

2.15 The residence must continue 'to be available for their immediate use and enjoyment at all times while they are living away from it'.[8] There are provisions for a tenant or boarder to reside in the house so long as they do not 'impinge of the availability of the residence'.[9] The house can also be occupied by a house-sitter, so long as they vacate the residence when the employee returns.[10]

2.16 Secondly, the tax concession for LAFH allowances and benefits will be limited to the first 12 months that an employee is required to live away from home. FIFO workers and DIDO workers are exempt from the 12 month limit.

2.17 The Schedule uses the criteria in the FBTA Act of eligible employees who are provided with exempt transport benefits under Subsection 47(7) to define FIFO and DIDO workers. Under these criteria, only employees whose transport is provided by their employer are exempt.

2.18 Submitters argued that the new eligibility requirements represent a departure from the previous policy intent and would significantly reduce the number of workers who would be able to fulfil the eligibility requirements. In particular, they argued that the tightened eligibility requirements would significantly impact on 457 visa holders and the proponents of large regional projects reliant on temporary workforces.

Analysis

Interpretation of 'residence'

2.19 Submitters felt that the Schedule redefined what constitutes a person's usual place of residence. As PricewaterhouseCoopers told the committee:

> ...do you need bricks and mortar to 'live away from'. Historically, you have not needed to have a house or a lease; it just had to be an intention to return to a region. But that is history.[11]

2.20 Similarly, the Institute of Chartered Accountants stated:

> In all that I can remember it is: are you living somewhere that is not where you would normally live? If you are on a relatively-

7 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 15.
8 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 13.
9 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 17.
10 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 18.
11 Ms Norah Seddon, PricewaterhouseCoopers, *Committee Hansard*, 26 July 2012, p. 20.

> short-term temporary assignment and you intend to go back then that has always been accepted as living away from home.[12]

2.21 According to the EM:

> The term 'usual place of residence' is not a defined term and is therefore understood according to its ordinary meaning. The customary meaning of the word 'reside' is to dwell permanently or for a considerable time. 'Residence' means the place, especially the house, in which one lives.[13]

2.22 The EM explicitly stated that the intent of LAFH allowances and benefits was to compensate for additional expenses associated with maintaining two homes.[14]

2.23 Consequently, a residence 'cannot be rented out or sub-let while [the employee] is living away from home'.[15] However, there was the caveat that:

> 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 availability for the individual's immediate and reasonable use and enjoyment.[16]

2.24 House-sitters are permitted but they must vacate a residence when the employee returns home.[17] The varied treatment of boarders and tenants (who do not impinge on an employee's use of a property) with house-sitters does appear to be anomalous. The stipulation that a house-sitter must vacate a premise once the employee returns home is a criterion that would be difficult to verify and unnecessary if the house-sitter does not impinge on the owner's use of the residence.

Impact on non-resident workers

2.25 The majority of submissions received by the committee from both industry and affected employees related to the eligibility requirement for employees to maintain a home within Australia at all times. In particular, it was argued that this requirement has a disproportionate impact on the

12 Mr Paul Ellis, Institute of Chartered Accountants, *Committee Hansard*, 26 July 2012, p. 16.
13 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 15.
14 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 9.
15 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 15.
16 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 17.
17 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 18.

eligibility of temporary and non-resident workers, particularly those on 457 visas.

2.26 Mr Gary Matthews, Tax Manager of Pitcher Partners, stated that temporary residents would commonly not maintain a second home in Australia:

> The requirement to maintain a home in Australia and live away from that somewhere else in Australia isn't what overseas employees will do.[18]

2.27 A number of foreign workers and temporary residents made submissions to the inquiry.[19] They posited that without the tax concession, employment opportunities in Australia would become less attractive, existing workers would leave earlier than intended, and employers would be forced to offer significant wage increases in the future to attract skilled migrants.

2.28 The committee was told that industries relying on foreign workers to fill areas of skill shortage would be negatively impacted. The Australian Constructors Association warned:

> This will also impact the relative attractiveness of Australia for resource sector investments and may result in projects being delayed or shelved because of the inability to attract appropriately qualified employees, or through the potentially significant increase in costs involved.[20]

2.29 Conversely, the Australian Manufacturing Workers' Union indicated that if access to LAFH allowances and benefits was restricted there could be an increase in 457 visa holders on remote worksites. According to the Australian Manufacturing Workers' Union:

> If you are down $200 or $300 a week at the 12-month mark in what you are bringing into the household budget, you may look at not finishing that project. You may end up with a decline in labour midway through the project or you may struggle to attract labour. All sorts of issues may arise from that. Normally the living away from home allowance covers what it actually costs to live away from home and then you get your income on top of that, but if you

---

18 Nassim Khadem, 'Tax change makes Australia less attractive to top talent', *BRW,* 12 July 2012, available at <http://www.brw.com.au/p/sections/professions/tax_change_makes_australia_less_LOFJs3lKsXxagj3tlug02M>

19 The committee received over twenty submissions from employees who believed they would be negatively affected by the proposed changes to the tax concession for LAFH allowances and benefits.

20 Australian Constructors Association, *Submission 31,* p. 3.

> have to eat into your wage to pay your expenses, some of those projects are not worth the effort. You will see people return to the capital cities or the larger towns around the area and choose not to do that work any longer than 12 months, which would probably have an effect on the economy eventually with the attraction of labour. It would probably open up the door for more opportunities for 457 workers to come in and do that type of work if there is a problem attracting labour.[21]

2.30 The University of Sydney, PricewaterhouseCoopers and the Australian Constructors Association stated that some foreign workers were already returning home or choosing not to come to Australia as a result of the proposed changes.[22]

12 month limit

2.31 A further point of contention was the 12 month limit which industry argued was arbitrary and inadequate for business requirements. In their submission to Treasury on the exposure draft, the Institute of Chartered Accountants argued that if enacted, this proposal 'may encourage skilled workers to leave the projects after 12 months or it may discourage them from living away from home in the first place'.[23]

2.32 As covered above, the committee was told by the Australian Manufacturing Workers' Union that the 12 month limit could lead to problems recruiting and retaining workers for projects in remote locations.[24]

2.33 The Institute of Chartered Accountants proposed a minimum three year threshold while PricewaterhouseCoopers suggested a two year period as being more appropriate for business requirements.[25]

2.34 Industry specific timeframes were also discussed. The Australian Manufacturing Workers' Union indicated that the construction of a new

---

21 Mr Daniel Wallace, Australian Manufacturing Workers' Union, *Committee Hansard*, 26 July 2012, p. 14.

22 Mr Piyush Bhatt, University of Sydney, *Committee Hansard*, 26 July 2012, p. 22; Ms Norah Seddon, PricewaterhouseCoopers, *Committee Hansard*, 26 July 2012, pp. 7, 22; Mr Adam James, Australian Constructors Association, *Committee Hansard*, 26 July 2012, p. 23.

23 Institute of Chartered Accountants, *Submission 29*, p. [5].

24 Mr Daniel Wallace, Australian Manufacturing Workers' Union, *Committee Hansard*, 26 July 2012, p. 14.

25 Institute of Chartered Accountants, *Submission 29*, p. 2; PricewaterhouseCoopers, *Submission 36*, p.7.

mine generally took two and half years while the University of Sydney indicated that research contracts usually ran for three to five years.[26]

2.35 The Schedule states that the 12 month time limit will pause if an employee temporarily resumes living in their usual place of residence. A number of questions were raised about the circumstances in which the pause will apply. For example, Ernst & Young argued that:

> … it is not necessary or reasonable to create a distinction between temporary absences taken at the employees' usual place of residence and an alternative destination. Furthermore, it would be difficult for the ATO to audit such absences in the event the employee makes a claim that the 12 month period was paused and therefore he/she is entitled to claim deductions for a period beyond 12 months.[27]

Eligibility of fly-in fly-out and drive-in drive-out workers

2.36 In its submission to the inquiry, the Minerals Council of Australia stated that while they welcomed the exemption of FIFO and DIDO workers from the 12 month limit, they were concerned about the ineligibility of DIDO workers who drove their own vehicles.[28]

2.37 Treasury confirmed that '[i]f it is their own vehicle, then they do not get that exemption'.[29]

2.38 The committee received evidence that employees, particularly in remote locations, could arrive at site in a variety of ways:

> In practice, there are lots of different examples of how people arrive at sites. Some people would have work vehicles; some people would take their own transport.[30]

2.39 Ernst & Young told the committee that the Bill as currently drafted would not achieve the Government's clear policy intent that FIFO arrangements will not be affected. They explained:

> It is not uncommon for Australian based FIFO employees to live in shared accommodation or live with family members during the off cycles. For these reasons, many FIFO employees will be unable to benefit from the concessional tax treatment outlined in the Bill as

26 Mr Daniel Wallace, Australian Manufacturing Workers' Union, *Committee Hansard*, 26 July 2012, p. 13; Mr Timothy Payne, University of Sydney, *Committee Hansard*, 26 July 2012, p. 13.

27 Ernst & Young, *Submission 30*, p. 17.

28 Minerals Council of Australia, *Submission 21,* pp. 1-2.

29 Ms Raylee O'Neill, Department of the Treasury, *Committee Hansard*, 26 July 2012, p. 12.

30 Mr Daniel Wallace, Australian Manufacturing Workers' Union, *Committee Hansard*, 26 July 2012, p. 12.

> they do not have an ownership interest in a residence that is maintained for their use and enjoyment. …
>
> In addition, FIFO 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. [31]

2.40 The Tax Institute also argued that:

> Temporary residents flying in and out of remote localities with their home bases outside of Australia should continue to be able to access LAFH concessions…This would appear consistent with the policy intent surrounding assistance for "fly-in fly-out" arrangements.[32]

Conclusion

2.41 The committee supports the Schedule's intent to compensate employees for the additional expenses associated with living-away-from-home at the request of their employer. However, it is noted that LAFH allowances and benefits were not designed to provide a wage subsidy for workers in certain industries.

2.42 The committee views the treatment of house-sitters as overly prescriptive and anticipates it will be difficult to enforce. If an employer accessing a LAFH allowance or benefit is not receiving any financial benefit from a house-sitter and the house-sitter does not impinge on their use of the house, then vacating during short visits should be a personal decision for the individuals involved. The committee recommends simplifying the requirements so that as long as the primary residence remains available to the employee for their personal use and enjoyment at all times, then the eligibility criterion has been met.

2.43 The committee noted industry's concern that the 12 month limit will not provide coverage for the duration of all projects. However, LAFH allowances and benefits are intended to be temporary and are not designed to support workers who have essentially moved residence to gain or retain employment.

2.44 The committee recognises that special conditions apply during the short-term construction phase of many large infrastructure projects, as found in mining regions where large numbers of workers move into sparsely inhabited regions for short periods, before a much smaller permanent

31 Ernst & Young, *Submission 30*, p. 13.

32 The Tax Institute, *Submission 28*, p. 9.

workforce take their place. The committee is aware that the Standing Committee on Regional Australia is undertaking an inquiry into FIFO/DIDO work practices and has received extensive evidence regarding the tax treatment of FIFO versus residential workers. The committee acknowledges that large temporary workforces represent a tremendous challenge for both regional areas and the social wellbeing of the workers themselves. Balancing the needs of employers and the local community is difficult to achieve and outside the scope of this inquiry. Therefore, the committee commends the Standing Committee on Regional Australia for its current inquiry and keenly awaits the outcome.

2.45 The Schedule makes provisions for regional areas by exempting FIFO and DIDO workers from the 12 month limit (where the employer provides the employee's transport to work). The committee believes that the exemption should be extended to DIDO workers who use their own vehicles (to drive in and drive out of their place of work while operating on the same rosters as other DIDO and FIFO workers). It is the committee's view that while in Western Australia the number of workers driving their own vehicles to mines is probably minimal, the circumstances in Queensland are different where the drive in for a several day roster may be quite achievable. Where possible, maximum flexibility should be allowed for employers and employees so that work arrangements suit the needs of workers. If an employee fulfils all the other eligibility requirements, the distinction between DIDO workers who use their own vehicles and are reimbursed, and those who use an employer provided vehicle to drive in and out, is substantively minimal.

2.46 The Committee supports an expansion of the definition of FIFO workers, as proposed by Ernst & Young in their submission as follows:

> … the 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. Furthermore, we propose a relaxation of the requirement for Australian based FIFO workers to maintain a home in which they have an ownership interest. In our view, a more practical position may be to stipulate that provided the FIFO worker is able to substantiate ongoing home accommodation costs (for example by way of bank statements), he/she would be entitled to claim a deduction for the additional accommodation costs incurred.[33]

33 Ernst & Young, *Submission 30*, p. 13.

Recommendation 1

2.47 **The committee recommends that the Department of the Treasury provide a clear definition as to what constitutes an 'ownership interest' and the satisfactory retention of an employee's usual place of residence. The committee believes that the definition of 'ownership interest' should take into account the varied living arrangements that effectively constitute a person's 'primary residence'.**

Recommendation 2

2.48 **The committee supports the introduction of the tightened eligibility criteria for the tax concession for living-away-from-home allowances and benefits as proposed in Schedule 1 of the Tax Laws Amendment (2012 Measures No. 4) Bill 2012 which ensures that a 12 month limit applies per location and the maintenance of a 'usual place of residence'.**

Recommendation 3

2.49 **The committee recommends that the treatment of drive-in drive-out workers who use their own vehicles be brought into line with drive-in drive-out workers who use employer provided transport. In effect all drive-in drive-out workers should be exempt from the 12 month time limit proposed in Schedule 1 of the Tax Laws Amendment (2012 Measures No. 4) Bill 2012.**

Recommendation 4

2.50 **The committee recommends that the definition of fly-in fly-out (FIFO) workers and drive-in-drive-out (DIDO) workers should include FIFO and DIDO workers who do not meet the test of maintaining a 'usual place of residence' within Australia, such as those who live with family members during off cycles or whose usual place of residence is in a country other than Australia.**

Recommendation 5

2.51 **The committee recommends that the Department of the Treasury clarifies the circumstances in which the 12 month time limit will be paused, with a view to providing the greatest level of simplicity and certainty while also achieving the policy intent of the time limit.**

Substantiation

Background

2.52 To access the tax concession for LAFH allowances and benefits, the claimant will be required to provide evidence of the costs they have incurred:

> The written evidence for accommodation expenses could include a lease agreement, credit card statements, bank statements or other receipts for accommodation. The written evidence for food and drink expenses is provided by the receipts for expenses actually incurred.[34]

2.53 All accommodation expenses will need to be substantiated with the Australian Taxation Office (ATO), while food and drink expenses will only need to be substantiated if they exceed the amount prescribed by the Commissioner.[35] The Commissioner is yet to issue this determination.

2.54 Any portion of the allowance which cannot be substantiated will be treated as income and will be subject to income tax. Employees are required to retain written evidence for five years for the purposes of substantiation if requested by the ATO.

Analysis

2.55 The proposed arrangements stipulate that substantiation of food and drink expenditure under the amount 'specified' by the Commissioner does not need to be lodged with the ATO. The Police Federation of Australia noted that the cost of living varies across Australia, making a single determination about what constitutes 'reasonable expenses' problematic.[36]

34 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 21.

35 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, pp. 19-20, 22.

36 Police Federation of Australia, *Submission 23*, p. 3.

It was argued that the Commissioner would need to consider the extraordinary circumstances of workers in different locations when determining the 'reasonable expenses' threshold.

2.56 The Australian Manufacturing Workers' Union explained the difficulties that the system could pose for its members:

> One of the other concerns for our members is that blue-collar workers are obviously just that; they are not exactly book keepers and accountants. Keeping meals and expenses receipts is going to be a very difficult task. One of the problems incurred is that you have breakfast and lunch and do not think you are going to have an expensive dinner so you do not keep your breakfast and lunch receipts. All of a sudden you have an expensive dinner and you need to keep that receipt but you have thrown out your breakfast and lunch receipts and have gone over the amount. So we have boilermakers and fitters running back to lunchbox shops in industrial estates wanting the receipts from their morning bacon and egg roll or can of Coke. It is going to be a real issue on some of our projects for construction workers. They are not really good book keepers.[37]

2.57 The Institute of Chartered Accountants noted that Section 25-115 of the Schedule identified the employee as the only person able to incur a deductible expense. It was recommended that this be amended so that the spouse or partner of an eligible employee could pay for food, drink or accommodation as a deductible expense.[38]

Conclusion

2.58 The committee can see how the implementation of the proposed changes will need to be accompanied by clear and accessible advice for both employers and employees. The committee would see value in the Government providing on-line, and where requested hard-copy, advice about how best to keep the documentation necessary for substantiating accommodation expenses, and food and drink expenses that exceed the 'specified' amount.

2.59 In addition, the committee believes that Treasury should investigate whether there are any substantive impediments to allowing partners or spouses to incur deductible expenses on behalf of an employee where all other eligibility requirements are met.

---

37 Mr Daniel Wallace, Australian Manufacturing Workers' Union, *Committee Hansard*, 26 July 2012, p. 10.

38 The Institute of Chartered Accountants, *Submission 29*, p. [6].

Recommendation 6

2.60 **The Department of the Treasury should investigate whether there are any substantive impediments to allowing partners or spouses to incur deductible expenses on behalf of an employee where all other eligibility requirements are met.**

Taxation treatment of LAFH allowances and benefits and compliance

Background

2.61 The Bill amends the *Income Tax Assessment Act 1997* (ITA Act) so that the majority of a LAFH allowance will be treated as the assessable income of the employee. At present LAFH allowances and benefits are treated in the *Fringe Benefits Tax Assessment Act 1986* (FBTA Act). The EM states that the proposed change 'is consistent with the income tax treatment of most allowances'.[39] Employers will be required to withhold tax under the Pay As You Go (PAYG) system [Withholding variation form].[40]

2.62 Under the amendments employees will be able to deduct reasonable expenses for food, drink and accommodation incurred while required by their employer to live away from their usual Australian residence. All accommodation expenses will need to be substantiated, while food and drink expenses will only need to be substantiated, and lodged, once they exceed the amount prescribed by the Commissioner.[41]

2.63 While the intention of the Schedule was to bring the majority of a LAFH allowance under the income tax arrangements, 'ordinary weekly food and drink expenses' are still treated as a fringe benefit to the employer. The 'LAFHA food and drink fringe benefit' was set at $42 for the employee per seven-day period.[42] This amount is increased further if the employee's spouse or children are living with them.

2.64 The ordinary food and drink expenses amount is intended to represent the employee's stay-at-home food costs and ensure that an income tax

39 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 11.
40 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 25.
41 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 22.
42 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, pp. 11-12.

deduction is available only for the expenses exceeding this amount. For example, an employee receives a $250 weekly food and drink allowance from their employer. The employer is responsible for reporting the first $42 of this amount under the FBT regime. The employee may then deduct the remaining $208 under income tax provisions if the food and drink amount prescribed by the Commissioner is equal to or more than $250, or the employee can substantiate they actually spent $250 per week on food and drink.

2.65 The requirement effectively splits the responsibility for determining the tax treatment of a food allowance between the employer and the employee, where the food allowance exceeds the $42 per week limit. That is, the liability for the tax on, and the responsibility of reporting, the $42 component lies with the employer. The liability for the tax on, and the responsibility of reporting, the remainder of the food allowance lies with the employee in receipt of the allowance.

2.66 When an employer directly covers the additional costs incurred by an employee, the employer can claim a deduction under the normal fringe benefit tax (FBT) arrangements. This is known as the 'otherwise deductible rule'. To claim the concession, the employer must receive a signed declaration (in a form approved by the Commissioner) from their employee.[43] This is then lodged with the ATO.

Analysis

2.67 Industry was concerned that the reforms could have significant on-costs for employers in areas such as superannuation, workcover and payroll tax, and flow-on effects for employees in areas such as Family Tax Benefits and child support payments.[44] The Australian Industry Group submitted that the changes would have a number of unintended consequences for both employers and employees:

> These include flow-on costs to employers associated with payroll tax, superannuation contributions and workers' compensation premiums and the impacts on the entitlements of employees' families to payments such as the Family Tax Benefits.[45]

2.68 Treasury told the committee that it had:

> ...not undertaken any explicit modelling of such flow-on costs [i.e. payroll tax and workers compensation]. We are aware that there

43 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 25.

44 Minerals Council of Australia, *Submission 21,* p. 2; Tax Institute, *Submission 28*, p. 4; Ms Norah Seddon, PricewaterhouseCoopers, *Committee Hansard*, 26 July 2012, p. 6.

45 Australian Industry Group, Submission 33, p. 1.

> would be potential flow-ons for things like family tax benefit, for example, as people's reportable fringe benefits are incorporated into the income definition, but we have not been able to quantify those.[46]

2.69 The committee heard evidence about the additional costs that might be incurred by employees. Treasury told the committee:

> If there are means-tested impacts, then they will flow through. So if you have PAYG allowance it will increase their taxable income. If they are entitled to a deduction for those expenses, under the new system there will be no impact. To the extent that they are not entitled to these deductions because they do not maintain a residence or it is outside the 12-month period, then there is an increase in their taxable income and that may have flow-on impacts for other government benefits that are calculated on the basis of taxable income.[47]

2.70 In relation to the 'otherwise deductible rule', submitters were concerned that the proposed process made employers responsible and liable for the compliance of their employees. The Australian Industry Group queried the extent to which employers would have to check the veracity of an employee's declaration:

> So for our 1,600 people, monitoring when they moved into accommodation, when they moved out for the 12 months, asking them if they are maintaining their own home, whether they are renting it out to someone—don't you think that is a slight invasion of privacy? And how are we going to prove that?[48]

2.71 Treasury stated that there were penalties for employees who provide a false declaration and that the employer does not need to verify the veracity of the declaration:

> All the employer needs to get from the employee is a declaration that it is otherwise deductible to the employee, in line with the otherwise deductible rule as it applies throughout the entire FBT system. So long as the employer has that declaration in their hands, the employer has done all they have to do and it is exempt from FBT.[49]

---

46 Mr Marty Robinson, Department of the Treasury, *Committee Hansard*, 26 July 2012, p. 25

47 Mr Chris Leggett, Department of the Treasury, *Committee Hansard*, 26 July 2012, p. 28.

48 Ms Carolyn Cleaver, Australian Constructors Association, *Committee Hansard*, 26 July 2012, p. 30.

49 Mr Chris Leggett, Department of the Treasury, *Committee Hansard*, 26 July 2012, p. 31.

2.72 The Australian Constructors Association also provided an example whereby employees of the John Holland Group had failed to sign declarations. The committee was told:

> Last year we paid half a million dollars to walk-out employees who did not give us a declaration. So we just bear the cost.[50]

2.73 When questioned, both Treasury and the ATO indicated that they had not received a large volume of complaints about employees failing to sign declarations. [51]

2.74 Overwhelmingly, submitters were concerned that the bifurcation in the Schedule between the FBT and income tax treatment for the food and drink provisions was unnecessarily complicated.[52] Ashurst submitted that operating within two tax systems increased the flow-on compliance costs for employers and employees.[53]

2.75 To minimise the compliance burden on employees and employers, it was proposed that the food and drink component of LAFH allowances be treated wholly within one tax regime.[54]

2.76 Submitters noted that Treasury's exposure draft legislation did not contain the bifurcation of the tax treatment for food and drink allowances.[55] During the public hearing Treasury indicated that there were no practical impediments, or apparent revenue implications, to treating the entitlement wholly within the FBT system or the income tax system.[56]

2.77 The Institute of Chartered Accountants told the committee:

> Allowances are ordinarily treated in the income tax system. Therefore it makes sense for the LAFHA allowance to be treated in the income tax system. The bifurcation just adds unnecessary complexity. [57]

2.78 The Institute of Chartered Accountants described how the single tax treatment could work:

---

50 Ms Carolyn Cleaver, Australian Constructors Association, *Committee Hansard*, 26 July 2012, p. 31.

51 Mr Christopher Bailey, Australian Taxation Office, *Committee Hansard*, 26 July 2012, pp. 31-32; Mr Martin Jacobs, Department of the Treasury, *Committee Hansard*, 26 July 2012, p. 32.

52 Mrs Teresa Dyson, Ashurst, *Committee Hansard*, 26 July 2012, p. 3; Mr Paul Stacey, Institute of Chartered Accountants, *Committee Hansard*, 26 July 2012, p. 6; Mr Robert Jeremenko, *Committee Hansard*, 26 July 2012, p. 6.

53 Ashurst, *Submission 27*, p. 1.

54 Mr Robert Jeremenko, *Committee Hansard*, 26 July 2012, p. 6; Ashurst, *Submission 27*, p. 4.

55 Mrs Teresa Dyson, Ashurst, *Committee Hansard*, 26 July 2012, p. 8.

56 Mr Martin Jacobs, Department of the Treasury, *Committee Hansard*, 26 July 2012, p. 8.

57 Mr Paul Stacey, Institute of Chartered Accountants, *Committee Hansard*, 26 July 2012, p. 9.

> This could be achieved by removing the ordinary food amount from the reasonable food amounts published by the ATO on an annual basis. That is, the ATO publishes only the amount which it considers are reasonable costs *over and above* the stay-at-home costs. Where the employer pays only the reasonable amount, there would be no need to consider the tax treatment of the first $42. Where the employer pays an allowance greater than the reasonable amount published by the ATO, the excess over the reasonable amount should be taxable, subject to the employee's eligibility to claim a tax deduction for substantiated expenses.[58]

2.79 PricewaterhouseCoopers supported removing the requirement for an employer to pay 'ordinary food and drink expenses' which would negate the need for the FBT provisions.[59] The Australian Constructors Association stated that currently:

> Most companies do not pay the first $42 home component to any employees anywhere so they are only giving them the top-up additional amount. Generally speaking, it is not subject to fringe benefits tax because it is not paid to the employee.[60]

2.80 The Institute of Chartered Accountants noted that:

> …when it comes to a decision as to which system that component should fall under, whether it should be wholly within the income tax system or wholly within the FBT system, that is a decision where reasonable minds might differ.[61]

2.81 Ernst & Young provided a comprehensive explanation of the issues which arise from moving LAFH allowances into the income tax system:

> It is prevalent in many industries including resources, engineering and construction, for a significant portion of the workforce to be engaged under industrial agreements or awards. These instruments typically contain provisions for LAFH allowances which cannot readily be changed or renegotiated. The Bill as currently drafted would have a significant and potentially highly adverse impact on individuals who are subject to such provisions.
>
> Under the current law, the tax consequences of a LAFH allowance are borne entirely by the employer. Therefore a recipient of a LAFH allowance receives the allowance without any tax being

58 Institute of Chartered Accountants, *Submission 29*, p. 2.

59 PricewaterhouseCoopers, *Submission 36*, p. 7.

60 Ms Carolyn Cleaver, Australian Constructors Association, *Committee Hansard*, 26 July 2012, p. 10.

61 Mr Paul Stacey, Institute of Chartered Accountants, *Committee Hansard*, 26 July 2012, p. 6.

deducted. The individual can then apply the entire allowance to meet the relevant expenses. The Bill proposes a fundamental change in this approach by shifting the taxation of LAFH allowances to the income tax regime.

Several circumstances may arise where an individual would no longer be entitled to receive the allowance free of PAYG withholding, including the following:

- Where the individual does not meet any element of the new requirements e.g. if they do not own or lease a home in Australia that continues to be available to them or do not meet the 12 month or fly-in fly-out tests;
- If no declaration is provided to their employer before the allowance is paid confirming that they meet the relevant requirements;
- If the predetermined food allowance to which they are entitled exceeds the reasonable food allowance to be stipulated by the ATO and the employee does not demonstrate to the employer that substantiation has or will be maintained in relation to the excess;
- Where the employer requires a PAYG variation to be undertaken by the employee but the individual does not undertake this process;
- Where the employee's expenditure on accommodation is less than the predetermined accommodation allowance amount, or if they do not maintain substantiation.

In our view there is little awareness among the affected parts of the workforce of the significance or practical impact of these changes. For those individuals who are not accustomed to maintaining significant tax documentation, it is highly likely that one or more of the above scenarios will arise. This will place the individuals at a significant cash flow disadvantage, in circumstances where their employer withholds tax as they are required by law to do, and the individual must wait until the year-end tax return process to claim deductions and recoup the tax withheld, should they be so entitled. In some cases, the tax cost will be fully borne by the individual. This will cause significant disruption as employers deal with the complaints and concerns of these individuals.

Affected individuals will also likely incur costs in obtaining tax advice and the assistance of a tax agent to lodge their tax returns as the complexity of the provisions is likely to be difficult for most individuals to handle directly. This is contrary to the objective of simplifying the individual income tax return process as previously announced by the Government. There also remains scope for individuals who are not entitled to claim

> deductions to do so in error, creating a significant risk management issue for the ATO. [62]

2.82 PricewaterhouseCoopers noted in its submission that:

> Moving the LAFH provisions from the FBTA Act will increase the compliance burden on individual employees in relation to complex provisions. Under the current provisions, this compliance burden sits with the employer who commonly has guidelines and policies on which advice has been sought to ensure compliance with the relevant provisions.[63]

2.83 Similarly, the Tax Institute said in its submission that moving LAFH allowances into the income tax system would result in:

> a greater compliance burden for employees who will now be required to determine themselves if they are "living away from home" with, in many situations, inadequate knowledge of the complex LAFH criteria (which has troubled tax advisers, the ATO and employers alike). [64]

2.84 The Australian Constructors Association told the committee:

> I think we all have to remember that employees have to determine in their own tax return when their deduction ceases...How can individual employees like the AMWU guys work out when their transitional arrangements ceased and their deductions ceased? [65]

2.85 The Institute of Chartered Accountants noted in their submission:

> 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.[66]

2.86 The Australian Mines & Metals Association noted in their submission that:

> Employees have built their acceptance to work away from home on resource projects based on certain salary arrangements that will no longer exist if the Bill in its current form becomes law. As is to be expected, this will upset many employees.

---

62 Ernst & Young, *Submission 30*, pp. 2-3.

63 PricewaterhouseCoopers, Submission

64 The Tax Institute, *Submission 28*, p. 3.

65 Ms Carolyn Cleaver, Australian Constructors Association, *Committee Hansard*, 26 July 2012, p. 29.

66 Institute of Chartered Accountants, *Submission 29*, p. 6.

> There will almost certainly be pressure on employers to make up the difference in pay. As to how employers deal with that pressure, it will be up to them to decide while taking into account their own unique and complex set of commercial considerations before making a decision.[67]

Conclusion

The taxation treatment of LAFH allowances and benefits

2.87 The committee does not support the current proposal to bifurcate the treatment of LAFH allowances. The committee believes that the bifurcation unnecessarily complicates the tax treatment of LAFH allowances and that the potential on-flow costs represent an undue and unquantified financial burden for employees and employers. It is the committee's view that LAFH allowances should be dealt with under a single tax regime.

2.88 The Tax Institute and the Institute of Chartered Accountants both cautioned against bifurcating the tax treatment of LAFH allowances. According to the Institute of Chartered Accountants '[t]he bifurcation just adds unnecessary complexity'. [68] The Tax Institute recommended:

> The tax treatment of LAFH allowances is determined either in the context of the income tax laws, or the FBT laws, but not both. [69]

2.89 While the Bill is designed to bring LAFH allowances into the income tax regime, in reality employers are left straddling both the income tax and FBT regimes. As the Bill stands employers will still be claiming LAFH benefits (reimbursement or the direct provision of accommodation and food and drink) and the 'ordinary food and drink component' of LAFH allowances under the FBT system. By treating LAFH allowances within the FBT system the issue of accounting for an employee's ordinary food and drink expenses (i.e. $42 per employee and spouse, and $21 per child) is simplified and in practise usually deducted before the employee receives their LAFH allowance.

2.90 There are significant advantages in keeping LAFH allowances within the FBT system. The committee received compelling evidence that treating LAFH allowances within the income tax system could cause a variety of anomalies and unintended consequences for employees. For employers, if the income of their employees increases there may be increased costs for

67 Australian Mines & Metals Association, *Submission 26*, p. 6.

68 Mr Paul Stacey, Institute of Chartered Accountants, *Committee Hansard*, 26 July 2012, p. 9.

69 The Tax Institute, Submission 28, p. 5.

them associated with superannuation, and potentially also workcover and payroll tax. Continuing to treat LAFH allowances as a fringe benefit will mitigate against some of the associated on-costs for employers and the flow-on effects for employees.

Recommendation 7

2.91 **The committee recommends that living-away-from-home allowances be treated within one taxation system.**

The committee supports retaining the taxation treatment of living-away-from-home allowances wholly within the fringe benefits tax system.

Declarations

2.92 Under the existing provisions in the FBTA Act, declarations are currently provided by an employee so that an employer can receive the tax concession for LAFH allowances and benefits. This process does not rely on the employer verifying the veracity of the employee's eligibility. It is however the responsibility of the employer to provide the declaration to the ATO if they wish to seek tax relief. The committee does not see any compelling reason to amend these arrangements.

Recommendation 8

2.93 **The committee recommends that prior to the implementation of any changes to living-away-from-home allowances and benefits the Government must provide clear and concise documentation outlining the new compliance obligations for employers and employees.**

Transitional provisions

Background

2.94 The reforms will generally apply from 1 October 2012.[70] However, there are some transitional provisions for employees who entered into employment arrangements, which afforded them LAFH allowances or benefits, prior to 8 May 2012.

2.95 Permanent residents who are currently receiving LAFH allowances or benefits but are not maintaining a primary home in Australia will be subject to transitional arrangements. They will not be subject to the requirement to maintain a home in Australia for their own use at all times and the 12 month time limit will not apply until 1 July 2014 or the date a new or altered employment contract is entered into.[71]

2.96 Temporary residents who are maintaining a primary residence in Australia from which they are required by their employer to live away from will be entitled to the same transitional arrangements as permanent residents.[72]

2.97 However, temporary residents who are not maintaining a primary residence in Australia will not be eligible for the transitional provisions. From 1 October 2012 any LAFH allowance or benefit they receive will not be eligible for the tax concession.

2.98 The committee received evidence from both industry and individuals (predominately foreign workers on 457 visas) about inadequacies in the transitional provisions.

Analysis

Length of proposed transitional provisions

2.99 Industry was particularly concerned about the potential cost increases associated with renegotiating contracts with employees and completing existing contracts to supply goods and services. The Australian Industry Group argued that:

> Transitional provisions should extend for the duration of existing employment arrangements so that bargains struck on the basis of the existing tax treatment (both between employers and

70 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 25

71 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 26.

72 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, pp. 25-26.

> employees and between businesses) can run their course without disputation and/or renegotiation.[73]

'Material variation' to employment contracts

2.100 The committee heard that the definition of a 'material variation' to an employment contract which could end transitional arrangements was inadequate and may stifle normal workforce processes.[74] PricewaterhouseCooper stated that it 'may lead to dilemmas for employers that may face difficulties in being able to award or agree to a promotion'.[75]

2.101 PricewaterhouseCoopers further submitted that:

> ...a 'material variation' to an employment contract should only occur where there is a variation that changes the requirement for the employee to live away from home for the purposes of their employment.[76]

2.102 The Institute of Chartered Accountants told the committee that there needed to be clarification about what constitutes a material variation.[77] As the Institute of Chartered Accounts explained:

> ...the legislation does not actually use those words [material variation]. The legislation uses the words 'termination of a contract'. 'Material' is something that has been imported into it through the explanatory memorandum and even then the interpretation of what 'material' might be will mean that most people will not get the transition for very long. It is still a concern that, if you look strictly at the words in the legislation: any time and any variation, that is it; it is all over.[78]

2.103 During the public hearing, Treasury acknowledged that the terminology had created some confusion and confirmed that it would undertake additional work to provide further clarification as to what constitutes a material variation.[79]

---

73 Australian Industry Group, *Submission 33*, p. 5.

74 See the Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, p. 27, section 1.81.

75 PricewaterhouseCoopers, *Submission 36*, p. 5.

76 PricewaterhouseCoopers, *Submission 36*, p. 4.

77 Mr Paul Ellis, Institute of Chartered Accountants, *Committee Hansard*, 26 July 2012, p. 6.

78 Mr Paul Ellis, Institute of Chartered Accountants, *Committee Hansard*, 26 July 2012, p. 28.

79 Mr Martin Jacobs, Department of the Treasury, *Committee Hansard*, 26 July 2012, p. 29.

Transitional provisions for temporary workers, particularly those on 457 visas

2.104 Throughout the consultation period workers on 457 visas have been vocal about how they believe the proposed changes will adversely affect them. Indeed, the committee received over 20 submissions from 457 visa holders. It was argued consistently that the proposed changes will result in many skilled workers leaving Australia and that foreign workers are not being afforded the same rights as Australian workers.

2.105 The Department of Immigration and Citizenship has provided some advice in response to the issue of 457 visa holders. The department submitted that:

> Based on visa application and grant trends since the announcement of the changes to the tax treatment of living-away-from-home allowances and benefits, the Department does not anticipate a significant impact on the volume of 457 visa applications and grants. The 457 visa program is a demand driven program used by employers to fill vacancies that cannot be filled from Australia's labour market, and as such skill shortages and labour market conditions are the primary determinant of growth with the 457 program.[80]

2.106 Many submitters requested that transitional arrangements be expanded to include temporary and foreign workers.[81] Consult Australia argued that:

> ...doing this will provide employers with sufficient time to manage employee expectations, amend workforce development and recruitment plans, and enable existing employees who receive LAFHA to properly prepare for the reform.[82]

2.107 A group of professionals from the Australian Nuclear Science and Technology Organisation (ANSTO) on temporary visas submitted that the change to the eligibility of temporary residents was unfair as:

> Many temporary residents accepted jobs in Australia based on budgeted levels of income and expenses. They committed to lease arrangements and bank loans based on the same calculations. Hence, they are tied in to financial agreements that they will no longer be able to afford.[83]

2.108 Furthermore, some submitters argued that the differing transitional arrangements provided to permanent residents but not to temporary

80 Department of Immigration and Citizenship, Responses to 'Questions on Notice', provided 3 August 2012.

81 See for example: Mr Jason Ross, *Submission 8*, p. 1.

82 Consult Australia, *Submission 6*, p. 2.

83 Dr Marcus Hennig et al., *Submission 20*, p. 2.

residents was discriminatory and could breach non-discrimination provisions within Australia's double taxation agreements.[84]

2.109 The EM addressed the human rights implications. It explained that the different treatment the transitional rules provide to taxpayers, according to their residency status, is consistent with international law and practice in allowing the taxation laws of a state to differentiate between residents and non-residents. The EM concluded that:

> ...there is no basis to conclude that this different treatment amounts to discrimination on the basis of 'other status' under the international instruments listed in section 3 of the *Human Rights* (Parliamentary Scrutiny) Act 2011.[85]

2.110 During the public hearing Treasury confirmed that it considered both the Schedule and the ensuing transitional provisions as being compatible with Australia's human rights obligations and not in breach of any double-tax agreements.[86]

Conclusion

2.111 The committee urges the Government to clarify what constitutes a 'material variation' of a contract as a matter of urgency. It is the view of the committee that definitional clarity is necessary for both employers and employees adjusting to the new arrangements.

2.112 The committee notes the concerns of foreign workers who will not meet the new eligibility criteria. The committee has had to rely on the guidance of Treasury and its advice that the Schedule and the ensuing transitional provisions are compatible with Australia's human rights obligations and do not breach any double taxation agreements.[87]

84 Ms Norah Seddon, PricewaterhouseCoopers, *Committee Hansard*, 26 July 2012, p. 28; Mr Adrian Tillin, *Submission 7*, p. 1; Mr Tim Harrisson, *Submission 18*, p. 1.

85 Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 4) Bill 2012, pp. 29-30.

86 Mr Martin Jacobs and Mr Chris Leggett, Department of the Treasury, *Committee Hansard*, 26 July 2012, p. 28.

87 Mr Martin Jacobs and Mr Chris Leggett, Department of the Treasury, *Committee Hansard*, 26 July 2012, p. 28.

Recommendation 9

2.113 **The committee recommends that the Government provide as a matter of urgency a clear and inclusive definition of what constitutes a 'material variation' to a contract, as it relates to Schedule 1 of the Tax Laws Amendment (2012 Measure No. 4) Bill 2012.**

Julie Owens MP
Chair
13 August 2012