

# **EXPLANATORY STATEMENT**

## **Select Legislative Instrument 2013 No. 55**

### **Issued by authority of the Assistant Treasurer**

*Fringe Benefits Tax Assessment Act 1986*

*Fringe Benefits Tax Amendment Regulation 2013 (No. 1)*

Section 135 of the *Fringe Benefits Tax Assessment Act 1986* (the Act) provides that the Governor-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed; or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Paragraph 5E(3)(i) of the Act provides that an excluded fringe benefit is a fringe benefit that is prescribed by the regulations for the purposes of this paragraph.

The purpose of this Regulation is to exclude living-away-from-home (LAFH) allowances and benefits, including certain expense payment benefits and residual benefits, from being reportable fringe benefits for Commonwealth employees posted both overseas and domestically.

Reportable fringe benefits are not included in an employee's assessable income, however, they are included in a number of income tests relating to government benefits and obligations, for example, the Medicare levy surcharge.

The 2011-12 Mid-Year Economic and Fiscal Outlook (MYEFO) included reforms to the LAFH allowances and benefits, which came into effect on 1 October 2012, subject to transitional rules. The reforms removed the concessional tax treatment for employers who provide LAFH allowances and benefits to employees unless those employees maintain a home in Australia for their personal use and enjoyment at all times that they are required to live away for work, and limit the concession to a maximum period of 12 months in respect of an individual employee for any particular work location.

A number of Commonwealth departments and agencies have employees in receipt of LAFH allowances and benefits, including certain expense payment benefits and residual benefits, both in Australia (including in an external territory) and overseas. Many Commonwealth employees, due to the unique nature of their deployment, will not meet the new requirements, meaning that, without amendment to the *Fringe Benefits Tax Regulations 1992* (FBT Regulations), taxable LAFH allowances or benefits would be reported on the employees' payment summaries as reportable fringe benefits.

This amendment to the FBT Regulations treats LAFH fringe benefits, including certain expense payment benefits and residual benefits, as excluded fringe benefits for Commonwealth employees, where those employees are required to live away from their normal residence in order to undertake their official duties of employment.

The Regulation ensures that the unique nature of Commonwealth deployments, such as Defence and Foreign Affairs deployments, do not result in unintended and inequitable outcomes for those employees, such as exceeding income thresholds

relating to government benefits. The amendments apply in relation to benefits provided on or after 1 October 2012, to align with the MYEFO amendments to LAFH allowances and benefits.

A new Regulation 9 is inserted to provide that a benefit that is provided in relation to a Commonwealth employee on or after 1 October 2012 is a benefit that is excluded from being a reportable fringe benefit if the benefit is any of the following:

- a) a living-away-from-home allowance, dealt with under Division 7 of Part III of Act; or
- b) an expense payment benefit which is not exempt under section 21 of the Act; and relates to accommodation that is required solely because the duties of the person's employment require the person to live away from the person's normal residence; or
- c) a residual benefit that is not exempt under subsection 47(5) of the Act; and relates to accommodation that is required solely because the duties of the person's employment require the person to live away from the person's normal residence.

These amendments reflect that the unique nature of Commonwealth postings requires these duties, such as law enforcement duties or foreign service, to be carried out by individuals employed by the Commonwealth, at particular locations, utilising particular accommodation, subject to strict safety and regulatory procedures, and the duties cannot be outsourced to non-Commonwealth employees. For example, law enforcement roles are generally filled by Australian Commonwealth officials due to the risks to safety and the risks of fraud or corruption that may be present if the Commonwealth was to engage local employees or contractors.

Given the nature of domestic and overseas postings of Commonwealth employees, and the fact that they are often required to live away from home for periods longer than 12 months to carry out their official duties, the Government has amended the FBT Regulations so that the LAFH allowance, expense payment benefits and residual benefits are not included on their payment summaries as reportable fringe benefits.

The Regulation uses the definition of "Commonwealth employee" provided by subsection 3(1) of the *Fringe Benefits Tax (Application to the Commonwealth) Act 1986* which provides that "Commonwealth employee" means an employee of the Commonwealth and includes defence force members and police officers.

Further, to improve the readability of the Regulation, amendments are made to the headings of the existing excluded benefits. The sections are also renumbered so that they run sequentially.

The Regulation also repeals Regulation 3F and replaces it with a new Regulation 8 which is rewritten to improve readability. There is no change to the policy intent or operation of this section.

The Regulation repeals the existing Regulation 6 and the related clauses in Schedule 3 to the FBT Regulations because they are inoperable and are no longer necessary following legislative amendments in 2011.

The Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on the day after it is registered. Regulation 9 applies to benefits provided on or after 1 October 2012.

The Government carried out public consultation on the 2011-12 Mid-Year Economic and Fiscal Outlook measure which amended the LAFH allowances and benefits.

Consultation on this Regulation was undertaken with Government agencies and departments affected by the amendments.

## **Statement of Compatibility with Human Rights**

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

### ***Fringe Benefits Tax Amendment Regulation 2013 (No. 1)***

This Legislative Instrument 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 of the Legislative Instrument**

The *Fringe Benefits Tax Amendment Regulation 2013 (No. 1)* amends the *Fringe Benefits Tax Regulations 1992* to treat living-away-from-home fringe benefits, including certain expense payment benefits and residual benefits, as excluded fringe benefits for Commonwealth employees, where those employees are required to live away from their normal residence in order to undertake their official duties of employment.

The Regulation also makes amendments to renumber the existing excluded benefits in the *Fringe Benefits Tax Regulations 1992* to improve readability, and so that the numbers run sequentially.

The amendments apply to benefits provided on or after 1 October 2012, and are therefore retrospective, however, the amendments are beneficial to taxpayers.

#### **Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.