PCG 2021/3EC - Compendium

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Australian Government
Australian Taxation Office

Public advice and guidance compendium – PCG 2021/3

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Practical Compliance Guideline PCG 2021/D1 *Determining if allowances or benefits provided to an employee relate to travelling on work or living at a location – ATO compliance approach*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	In order to qualify for the Practical Compliance Guideline (PCG) approach, employers must satisfy the circumstances listed at paragraph 10 of the draft Guideline, which includes, with respect to employees, two conditions. One condition is no more than 21 days at a time continuously. While the return of the '21-days rule' provides structure and certainty for employers in order to establish travel policies and record keeping, it is somewhat unclear if the 21-days rule is limited to the same work location. Considering the 89-day requirement specifies the threshold being applicable to the 'same work location', the lack of clarity may lead to confusion among taxpayers. On this basis, we request the ATO update the criteria to clearly establish that the 21-days rule is or is not limited to the one work location.	We have amended the third dot point of column two of the table in paragraph 12 of the final Guideline to address this issue. That dot point now requires that an employee is away at the same work location for no more than 21 calendar days at a time continuously.
2	Based on discussions with clients, the 21-days and 90-days rules may be too narrow for realistic application. In particular, the draft Guideline does not account for travel among upper-level management (for example,	Amendments have been made to simplify the fourth dot point of column two of the table in paragraph 12 of the final Guideline by replacing the requirement of an 'overall aggregate period of fewer than 90 days' with 'no more than 90 calendar days in total in an FBT year'.

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	executive leadership) whose roles may necessitate frequent overnight travel to national sites (often on a weekly basis). Assuming this happens throughout the course of a fringe benefits tax (FBT) year, they may be travelling for, for example, 104 days (based on single-night overnight travel) a year, and therefore breach the 90-days criteria. We question, therefore, whether marginally extending the 90-days aggregate could allow for capturing such scenarios, while preserving the integrity of the 'travelling on work' concept. Given the ongoing changes in the working environment, particularly over the last year, this recommendation could provide greater practical application as Australia continues to open up, particularly with respect to interstate travel, as roles are less confined to one jurisdiction. Considering the example raised in Issue 2 of this Compendium regarding weekly multi-site travel, we request the ATO increase the PCG factor in paragraph 4 of the draft Guideline to account for an aggregate period of fewer than 110 days (that is, the most being 109 work days, which would cover two days (one night) per week), in the same work location in an FBT year.	We are of the view that 'no more than 90 calendar days in total' is a reasonable safe harbour for travel by employees to the same location in an FBT year, noting that it is just one factor to consider when determining whether an employer can rely on the final Guideline. The other factors at paragraph 12 of the final Guideline must also be considered. The principles in the final Guideline apply to all employers. If an employer does not meet the criteria in paragraph 12 of the final Guideline and is therefore not eligible to rely on the final Guideline, they can still apply the relevant FBT provisions to determine if an FBT liability arises for the benefit provided. Example 4 of the final Guideline has been amended to explain that where the employer has more information about the facts and circumstances of the employee's travel (by analysing the factors in paragraph 43 of Taxation Ruling TR 2021/4 *Income tax and fringe benefits tax: employees: accommodation and food and drink expenses, travel allowances, and living-away-from-home allowances*, the employee may be considered to be travelling on work even though the overall period they are away at the one location is more than 90 calendar days in total in the FBT year.
3	We request that the ATO adds a further example to the draft Guideline to cover the situation where the employee is travelling for ten days at one location, and then moves directly to another location for 20 days before returning home (that is, multiple work locations on a single trip).	Example 3 has been inserted into the final Guideline to explain the outcome under the Guideline where an employee has two consecutive trips of less than 21 days to different work locations.
4	We request that the ATO adds a further example to the draft Guideline to clarify whether extending a 20-days period away for an additional weekend (that is, 22 days total away) would qualify for the criteria to be deemed 'travelling on work' (that is, does the draft Guideline disregard private extensions that are employee-funded?).	Amendments have been made to Example 1 of the final Guideline to address this issue.

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5	In addition to assessing 'travelling on work' versus 'living at a location', employers also often grapple with determining 'relocation' from temporarily 'living at a location' scenarios. This is particularly the case where the move is not permanent but is instead a transfer, assignment or secondment for a set period (for example, two years interstate within Australia). Historically, as noted in the Australian Society of Certified Practising Accountants submission at the 1997 FBT Sub-Committee meeting of the National Tax Liaison Group, the general guideline used by taxpayers was two and four years for domestic and international arrangements, respectively. In this regard, we note that Example 8 in Draft Taxation Ruling TR 2021/D1 *Income tax and fringe benefits tax: employees: accommodation and food and drink expenses, travel allowances, and living-away-from-home allowances* was concluded to be a 'relocation' for a two-year interstate transfer and this is noted as being an 'extended length of time'. Given this conclusion and single example, we recommend that the draft Guideline is expanded to also include the 'relocation' assessment, including providing concrete 'length of time' outlines for domestic and international arrangements, noting in particular the importance being that different FBT concessions may apply to accommodation and food and drink costs.	The final Guideline outlines the ATO's compliance approach to determining if employees in certain circumstances are travelling on work or living at a location away from their normal residence (living at a location). Given the focus of the draft Guideline, we will not be expanding the scope of the final Guideline to include a discussion of relocation versus living at a location. The final Guideline should be read in conjunction with TR 2021/4 which provides guidance on when an employee can deduct accommodation and food and drink expenses under section 8-1 of the *Income Tax Assessment Act 1997*.
6	We would recommend that the final dot point in the employee column in the table in paragraph 10 of the draft Guideline be modified slightly. The draft Guideline contemplates that the employee: • must return to their normal residence when their period away ends. In the context of the table, it seems likely that the 'period away' is intended to refer to the period the employee is away from their normal residence for work purposes. In	Amendments have been made to the fifth dot point in column two of the table in paragraph 12 of the final Guideline to clarify that the employee must return to their normal residence as soon as practicable when their period away ends. Footnote 20 has also been inserted into the final Guideline to explain that an employee may take a small amount of additional time to undertake mandatory quarantine due to the COVID-19 pandemic; or to travel or take recreational leave after the end of their period away, and still return to their normal residence as soon as practicable.

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	other words, the draft Guideline appears to require that the employee would return to their normal residence immediately once the period of work travel ends. Depending on where the work travel has taken them, and subject to their own personal circumstances, an employee might not always return to their normal residence immediately once the period of work travel ends. Some employees might take the opportunity to have a short holiday at the end of a temporary assignment in a particular location and travel directly to the holiday location without first returning to their normal residence. Provided they return to their normal residence after the short holiday, there should be no adverse impact on the employees' status of travelling on work. The table in paragraph 10 of the draft Guideline should be modified to allow for a degree of flexibility as to when an employee is expected to return to their normal residence.	
7	With reference to paragraph 10 of the draft Guideline, could we clarify the term 'no more than 21 days at a time continuously'? Is this assuming 21 continuous calendar days, that is, meaning that returning home on weekends would break the continuity? Paragraph 11 of the draft Guideline allows for 'numerous short stints of travel…' which seems to contemplate this, as long as the aggregate period is less than 90 days.	Amendments have been made to the third dot point in column two of the table in paragraph 12 of the final Guideline to explain that the employee's period away from their normal residence for work purposes must be for no more than 21 calendar days at a time continuously.
8	With reference to paragraph 10 of the draft Guideline, is it correct that accommodation and meal costs would be deductible and not a living-away-from-home allowance (LAFHA) in circumstances where an employee travels to a work location for up to a three-month assignment period and returns home each weekend? That is, the employee is not staying away for a continuous period of more than 21 days – please refer to Example 2 of the draft Guideline.	In these circumstances, provided the other criteria in the table in paragraph 12 of the final Guideline are met, the accommodation and meal costs would be deductible and not a LAFHA.

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9	With reference to paragraph 10 of the draft Guideline, what would be the effect of one period of more than 21 days continuously (for example, 28 days) within the overall aggregate period of less than 90 days (for example, 88 days), and no other continuous period of more than 21 days? Would the 28 days be regarded as LAFHA, and the remaining as travelling on work and deductible? Or would the entire overall aggregate period of 88 days become LAFHA? For example, Ann lives and works in Brisbane and is required to relieve in Toowoomba for three months. She stays continuously for the first 28 days in Toowoomba and thereafter travels back to Brisbane to visit her family every weekend. In this situation we would treat the 28 days as LAFHA and the remainder as travelling on work. Is this correct?	The criteria in the table in paragraph 12 of the final Guideline should be considered for each period of time the employee is away from their home. As such, for the 28-day period, the employee is away at the same work location for more than 21 calendar days at a time continuously, and the employer will not be able to rely on the final Guideline as all of the criteria in the table in paragraph 12 of the final Guideline have not been met. Where an employer does not meet the criteria in the table in paragraph 12 of the final Guideline, they will need to apply the relevant interpretive principles in TR 2021/4 to establish if the employee is travelling on work or living at a location, to determine if a FBT liability arises for the benefit provided. For the subsequent periods that are each for less than 21 calendar days at a time continuously, each of the criteria in the table in paragraph 12 of the final Guideline have been met and the employer can rely on the final Guideline.
10	With reference to paragraph 10 of the draft Guideline, what does 'overall aggregate period' mean? We take it to mean the period of the total assignment in a location, meaning the 90 days are calendar days from start to finish including weekends and public holidays, rather than a count of working days.	Amendments have been made to simplify fourth dot point of column two of the table in paragraph 12 of the final Guideline by replacing the requirement of an 'overall aggregate period of fewer than 90 days' with 'no more than 90 calendar days in total in an FBT year'. Amendments have also been made to paragraph 13 of the final Guideline to explain that the number of days away includes the day of departure from the employee's normal residence and the day of departure from the work location that the employee has travelled to. As a result of these amendments, 90 calendar days means the total period of time an employee spends at a work location, including weekends and public holidays, rather than a count of working days.
11	With reference to paragraph 10 of the draft Guideline, the concept of overall aggregate period refers to fewer than 90 days in the same location in an FBT year. Does this reset each FBT year? Theoretically could up to 178 days in the same location spanning over two FBT years be	Amendments have been made to simplify fourth dot point of column two of the table in paragraph 12 of the final Guideline by replacing the requirement of an 'overall aggregate period of fewer than 90 days' with 'no more than 90 calendar days in total in an FBT year'. As such, the number of days that an employee is away from their normal residence for work purposes at the same work location resets each FBT year.

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	deductible? To partition each FBT year seems artificial. Could this be explained further?	
12	With reference to paragraph 10 of the draft Guideline which sets out 'return to their normal residence when their period away ends', is there an assumption the employee is returning to their usual place of work close to their usual place of residence? In Example 1 of the draft Guideline, if Kate doesn't return home between stints away and goes directly from one location away to another (for example, for 14 days each), does that change the nature of the travel from travelling on work to LAFHA as the time away from the normal residence is more than 21 days continuously? We would treat each location as separate, and in that example both locations would be travelling on work.	Example 3 has been inserted into the final Guideline to explain the outcome under the draft Guideline where an employee has two consecutive trips of less than 21 days to different work locations.
13	In the future, it is reasonable to expect that there will be employees whose circumstances are covered by TR 2021/D1 and whose usual place of residence is outside Australia. These employees may be subject to Australian income tax on their remuneration despite spending periods of less than 183 days in aggregate in Australia in a financial year. For logistical and cost reasons, these individuals' separate visits to Australia for work purposes may generally be longer than 21 days. This will particularly be the case if periods of quarantine continue to be required. These employees' activities are more likely to retain the character of 'travelling on work' during these longer periods. We therefore recommend that the ATO should consider modifying the safe harbour in respect of employees who usual place of residence in outside Australia. In our view the concept could be modified to allow an aggregate of no more than 89 days at the work location in a year of tax,	No change will be made to the third dot point of column two of the table in paragraph 12 of the final Guideline to remove the requirement that an employee is away from the same work location for no more than 21 calendar days at a time continuously. We are of the view that this criteria is a reasonable safe harbour for travel by employees, noting that it is just one factor to consider when determining whether an employer can rely on the final Guideline. The other factors in the table in paragraph 12 of the final Guideline must also be considered. The principles in the final Guideline apply to all employers. If an employer does not meet the criteria in the table in paragraph 12 and is therefore not eligible to rely on the final Guideline, they can still apply the relevant interpretive principles in TR 2021/4 to establish if the employee is travelling on work or living at a location, to determine if a FBT liability arises for the benefit provided.

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	without the additional requirement for individual periods of presence to be of maximum 21 days.	
14	We recommend that the main text of the draft Guideline should include a description of the circumstance in which an employee would be fly-in fly-out or drive-in drive-out for the purposes of the Guideline. There are many employees who would regard themselves as fitting one of these categories, but who would not meet all of the requirements of section 31E of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).	Amendments have been made to paragraphs 8 and 9 of, as well as the insertion of footnote 14 into, the final Guideline to address this issue.
15	It would enhance the impact of the draft Guideline if the observation at footnote 17 could be moved to the main text. Employers will always be concerned about the level of evidence that they may be required to obtain in relation to an employee's personal circumstances.	Footnote 17 of the draft Guideline has been deleted and paragraph 4 has been inserted into the final Guideline to address this issue.
16	Where an employer pays an allowance for meals and accommodation that is within the ATO's specified rates, the employer is not required to report the allowances on the employee's payment summary and is not required to withhold income tax. It would assist employers if paragraph 10 of the draft Guideline could refer to this fact.	Footnote 16 has been inserted into the third dot point of column 1 of the table in paragraph 12 of the final Guideline to address this issue.
17	In reference to the proposed changes, a safe harbour provision of a range of days away from a usual place of residence is included, but is narrow, restrictive and limiting. Under general residency rules, 183 days is considered indicative of a change of residence. Other residency indicators are relevant and could be used in cases where 183 days was not determinative.	The final Guideline provides a 'safe harbour' which we are of the view is reasonable for employers to rely on. An employer is not bound to rely on the final Guideline. If an employer chooses not to rely on the final Guideline, or does not meet the criteria in paragraph 12 of the final Guideline, they will need to apply the relevant interpretive principles in TR 2021/4 to establish if the employee is travelling on work or living at a location, to determine if an FBT liability arises for the benefit provided. The test of residency is a wholly different statutory test and answers a very different interpretive question compared to determining whether or not an individual is 'travelling on work'.
18	The interpretation in its current format is detrimental to the Australian film and entertainment industry. Both Australian and State Governments support the film	It is unclear how the final Guideline is detrimental to the Australian film and entertainment industry as it simply provides a safe harbour in which certain employers will not need to establish as a matter of fact whether an employee

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	industry with various tax incentives and grants. This policy would actively discourage international film makers from bringing large-scale projects to Australia.	is travelling on work or living at a location. If an employer's arrangements do not meet the criteria in the table in paragraph 12 of the final Guideline, they can still apply the relevant interpretive principles in TR 2021/4 to establish if the employee is travelling on work or living at a location to determine if a FBT liability arises for the benefit provided. The ATO applies the laws enacted by Parliament. The principles outlined in the final Guideline apply to all employers, such that those in certain industries cannot be treated differently.
19	We note one of the key limitations of the draft Guideline relates to the inclusion of the requirement of the short-term period being no more than 21 days continuously. In our view, this is a significant limitation on the practical application of the draft Guideline for most employers, and not representative of business travel in the modern world. Further, the 21-days sub-limit is not in line with published ATO guidance in private binding rulings (PBRs) and even the examples contained in the recently-released Taxation Ruling TR 2021/1 *Income tax: when are deductions allowed for employees' transport expenses?* and recently-released draft Ruling TR 2021/D1. The ATO commentary in these does not have any concept of a sub-limit whatsoever. Practically, the reality of this type of business travel for employers is that there are business needs and considerations which necessitate the travel and the inclusion of this sub-limit would be difficult for employers to manage if an employee were required to never be away more than 21 continuous days. We would suggest the ATO consider adjusting that sub-limit or removing it altogether given the 90 days aggregate amount already included in the draft Guideline.	No change will be made to the third dot point of column two of the table in paragraph 12 of the final Guideline to remove the requirement that an employee is away from the same work location for no more than 21 calendar days at a time continuously. We are of the view that this criteria is a reasonable safe harbour for travel by employees, noting that it is just one factor to consider when determining whether an employer can rely on the final Guideline. The other factors at paragraph 12 of the final Guideline must also be considered. The principles in paragraph 12 of the final Guideline apply to all employers. If an employer does not meet the criteria as outlined in paragraph 12 and is therefore not eligible to rely on the Guideline, they can still apply the relevant interpretive principles in TR 2021/4 to establish if the employee is travelling on work or living at a location, to determine if a FBT liability arises for the benefit provided. PBRs can only be relied on by the taxpayer who applied for the ruling as the decision is based on their individual circumstances.
20	The draft Guideline notes that an employer must 'obtain and retain the relevant documentation to substantiate the fact that all of these circumstances are met'. We believe the draft Guideline should be more prescriptive in relation	The ATO cannot be too prescriptive as we do not want to limit employers in the use of their records.

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	to the ATO's expectation of the documentation required. For example, would this extend to include declarations, travel diaries, which would add significant additional administrative burden to the process for employers? In our view, it would be helpful if the ATO provided some prescriptive comments on this aspect, while ensuring it is practical and easy for employers to manage.	Footnote 17 has been inserted into the fourth dot point of column one of the table in paragraph 12 of the final Guideline to provide some examples of an employer's normal business records that would be able to substantiate that the criteria in the first column of the table in paragraph 12 of the final Guideline are met.
21	We note that draft PCG 2021/D1 specifically excludes scenarios in respect of fly-in fly-out and drive-in drive-out arrangements. While we appreciate the difficulty of these scenarios, we believe it would be beneficial to extend the draft Guideline to include these arrangements, or at least consider including additional guidance on the ATOs view of these arrangements.	Paragraph 8 of the final Guideline excludes employers from relying on the Guideline where they provide benefits (referred to in paragraph 3 of the final Guideline) to employees who work on a fly-in fly-out and drive-in drive-out basis. Amendments have been made to paragraph 8 and footnote 14 has been inserted into the final Guideline to explain that fly-in fly-out and drive-in drive-out employees have their own concessional arrangements under the FBTAA. Sections 31A and 31E of the FBTAA outline the requirements of a fly-in fly-out or drive-in drive-out employee, which are also summarised in Chapter 11 of *Fringe benefits tax – a guide for employers*. Paragraph 9 has been inserted into the final Guideline to explain when an employee works on a fly-in fly-out or drive-in drive-out basis.
22	While 'no more than 21 days at a time continuously' and for no more than 89 days in the aggregate for one location test in an FBT year is a useful rule of thumb, it is of course not always appropriate in all work-related travel situations, hence the need for further information in such cases to make a full assessment. This is particularly the case for certain industries such as construction where employees with special skills could be called to assist on projects temporarily and suddenly be called off the projects (due to meeting milestone deadlines for example) and they can make frequent trips in a year (say ten days per trip), but the total number of days could exceed 89 days in an FBT year in the one location, thus creating an FBT impost if reliance is solely placed on the 'safe harbour' test.	Example 4 of the final Guideline has been amended to explain that the employer may, based on the facts and circumstances of the employee's travel (by analysing the factors in paragraph 43 of TR 2021/4), determine that the employee is travelling on work. The employer can reach this conclusion even though the overall period they are away at the one location is more than 90 calendar days in total in the FBT year.

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	Some members with remote and mobile regional workforces noted there may be practical difficulties in tracking where employees are working and for the length of time in which they are in a particular location. This is particularly the case where an employee may be required to move around the country for short-term projects and where employees may be called back to the same work location repeatedly throughout the FBT year due to the uncertain and changing demands of the project. It is quite possible that the aggregate period the employee ends up in the same work location will exceed 90 days, albeit individual 'stays' at the location may be short (that is, say ten days per trip for ten separate trips which on aggregate add up to more than 89 days). In such cases, employers are likely to choose not to rely on the Guideline (per paragraph 8 of the draft Guideline) and will be required to provide further information to support the position that the employee is travelling on work. To assist taxpayers in applying the 'additional information' requirement in the draft Guideline, we suggest the following amendment to paragraph 24: 24. Employer Co is not able to rely on this Guideline as the requirements in paragraph 10 of this Guideline are not satisfied. While each of the continuous periods Jeremy is away are less than 21 days, the overall period he is away at the one work location is more than 90 days for the FBT year. *Where Employer Co provides more information about the facts and circumstances of Jeremy's travel (for example, the nature of the work, evidence of industry practice, the type of accommodation provided, the distance from their normal residence, lack of accompanying family members, travelling home on weekends*) *the Commissioner may accept that Jeremy is travelling on work even though the period for which Jeremy is away*	

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	at the one work location is more than 90 days in the FBT year.	
23	It would be useful if the draft Guideline made reference to the interaction with Taxation Determination TD 2020/5 *Income tax: what are the reasonable travel and overtime meal allowance expense amounts for the 2020-21 income year?* regarding reasonable travel and overtime meal allowance expenses and how that factors into a determination under the draft Guideline.	Footnote 16 has been inserted into the third dot point of column one of the table in paragraph 12 of the final Guideline to provide additional guidance.
24	The purpose of the draft Guideline is broadly to assist employers to classify an allowance as a LAFHA or a travel allowance. Is it the ATO's intention to allow the approach in the draft Guideline (for example, referred to below as the '21 days/90-days combined tests') to apply more broadly than for the purpose of categorising an employer allowance? For example, if an employee is required to be away from home overnight, for a period of time, for work purposes but they do not receive an allowance from their employer (that is, the employee pays for accommodation costs and is not reimbursed), could the employee use the 21-days/90-days combined tests in the draft Guideline to characterise the employee as 'travelling on work' or living at the location to which they travel? Or, in this case, would the employee need to refer to the factors in draft TR 2021/D1 and make an assessment on that basis? In the past, the ATO applied the '21-days test' in (withdrawn) Miscellaneous Taxation Ruling MT 2030 *Fringe benefits tax: living-away-from-home allowance benefits* more broadly than in the context of employer-provided allowances (which was the purpose of MT 2030). For example, this application was evident in a small number of PBRs.	The final Guideline outlines the ATO's compliance approach to determining if employees in certain circumstances are travelling on work or living at a location away from their normal residence (living at a location). It also provides practical guidance to assist in determining whether amounts reimbursed or paid by an employer would have been deductible to the employee had they purchased the goods or services (that is, it would be otherwise deductible under the FBTAA). An employer may choose to rely on the final Guideline when they meet the criteria in paragraph 12 of the final Guideline. Given the focus of the final Guideline, we will not be expanding the scope of the final Guideline to allow an employee to choose to rely on the final Guideline in order to determine whether the employee is travelling on work or living at a location. PBRs are based on individual circumstances of the applicant and, for that reason, can only be relied on by that taxpayer.

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25	In relation to the following scenario: • Employee A is required to work concurrently between the employer's Melbourne and Sydney offices. Typically, the employee must work three days in Melbourne each week (where their family home is located) and two days per week in Sydney (but this may change for some weeks, such as where the employee takes leave). This arrangement is ongoing year after year. • The employer provides Employee A with an allowance to cover the cost of accommodation and meals while the employee is away in Sydney each week. The employee stays in the same small serviced apartment when staying overnight in Sydney (the employee stays over one or two nights a week). Is the employer able to use the 21-days/90-days combined tests in the draft Guideline to characterise the employee as 'travelling on work' or living at the location to which they travel? Our concern here is that the arrangement is an ongoing one that could potentially be in place year after year. There does not appear to be anything in paragraph 10 of the draft Guideline that would prevent reliance on the Guideline to support that the employee is travelling on work (assuming the combined tests are satisfied).	The fourth dot point of column two of the table in paragraph 12 of the final Guideline provides that an employee 'is away at the same work location for no more than 90 calendar days in total in an FBT year'. As such, the number of days that an employee is away from their normal residence for work purposes at the same work location resets each FBT year.
26	In relation to the scenario raised at Issue 25 of this Compendium: If, in a particular week, the employee works in Sydney on Thursday and Friday and stays over for two nights, returning on Saturday, when applying the combined tests in draft Guideline for this period, is the employee away for two days or three days?	The employee is away for three calendar days.

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27	In relation to the scenario raised at Issue 26 of this Compendium: If, in a particular week, the employee works in Sydney on Thursday and Friday and stays over for one night, returning on Friday night, when applying the combined tests in draft Guideline for this period, is the employee away for one day or two days?	The employee is away for two calendar days.