
TREASURY LAWS AMENDMENT (REDUCING PRESSURE ON HOUSING
AFFORDABILITY) BILL 2017: FIRST HOME SUPER SAVER SCHEME &
CONTRIBUTING THE PROCEEDS OF DOWNSIZING TO SUPERANNUATION

FIRST HOME SUPER SAVER TAX BILL 2017

EXPOSURE DRAFT EXPLANATORY MATERIALS

Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
APRA	Australian Prudential Regulation Authority
Capital gains tax	CGT
Commissioner	Commissioner of Taxation
FHSSS	First Home Super Saver Scheme
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
NANE	Non-assessable non-exempt
RSAR 1997	<i>Retirement Savings Accounts Regulations 1997</i>
SISR 1994	<i>Superannuation Industry (Supervision) Regulations 1994</i>
TAA 1953	<i>Taxation Administration Act 1953</i>

Chapter 1

First Home Super Saver Scheme

Outline of chapter

- 1.1 Schedule 1 amends the superannuation and tax laws to establish the ‘First Home Super Saver Scheme’ (the FHSSS).
- 1.2 The FHSSS allows individuals who are saving for their first home to take advantage of the concessional taxation arrangements that apply to the superannuation system.
- 1.3 Under the scheme, first home savers who make voluntary contributions into the superannuation system can withdraw those contributions (up to certain limits) and an amount of associated earnings for the purposes of purchasing their first home. Concessional tax treatment applies to amounts that are withdrawn under the FHSSS.
- 1.4 All legislative references in this Chapter are to Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) unless otherwise stated.

Context of amendments

- 1.5 The FHSSS is one of several measures announced in the 2017-18 Budget as part of the Government’s package of reforms to reduce pressure on housing affordability.
- 1.6 Australians are entering the housing market later in life than previous generations. With house prices high, difficulty saving a deposit is a key barrier to getting into the market. The FHSSS will help Australians boost their savings for their first home by allowing them to build a deposit inside superannuation.
- 1.7 As the FHSSS involves the early release of amounts from superannuation, many of its features are based on the standard determination and release rules that apply in respect of excess concessional contributions and non-concessional contributions. The relevant features of these rules are outlined below.

Making contributions into superannuation

- 1.8 There are broadly two categories of contributions that are made into superannuation in respect of most individuals – concessional contributions and non-concessional contributions.

1.9 Division 291 of the *Income Tax Assessment Act 1997* (ITAA 1997) provides for concessional contributions and excess concessional contributions. Concessional contributions include personal deductible contributions and contributions (including salary sacrificed amounts) for which an employer claims a deduction.

1.10 Concessional contributions are included in the assessable income of the superannuation fund that receives them and are subject to tax at the fund rate of 15 per cent.

1.11 The concessional contributions cap establishes the upper limit on how many concessional contributions an individual can have without being subject to additional tax consequences. For the 2017-2018 financial year, the concessional contributions cap is \$25,000.

1.12 An individual has 'excess concessional contributions' for a financial year if their concessional contributions for a financial year exceed their concessional contributions cap. Excess concessional contributions are included in an individual's assessable income.

1.13 Division 292 of the ITAA 1997 relates to non-concessional contributions. Non-concessional contributions are generally contributions that are not included in the assessable income of the fund that receives them. Non-concessional contributions include any excess concessional contributions that were not released from superannuation and contributions for which a deduction was not claimed by the entity that made it. For the 2017-2018 financial year, the non-concessional contributions cap is generally \$100,000.

1.14 However, individuals have a non-concessional contributions cap of nil for a financial year if their total superannuation balance at the end of the previous year was equal to or greater than the general transfer balance cap (currently \$1.6 million). Individuals under the age of 65 can also access the three year 'bring forward' rules. These rules allow an individual to bring forward up to three years of non-concessional caps to the current year.

Superannuation determinations

1.15 Division 97 provides for excess concessional contributions determinations and excess non-concessional contributions determinations. The Commissioner of Taxation (Commissioner) must issue these determinations to an individual whose contributions for a financial year exceed the related contributions cap.

1.16 In making an excess concessional contributions determination, the Commissioner must specify the amount of the excess and any ‘excess concessional contributions charge’ that the individual is liable to pay.

1.17 For excess non-concessional contributions determinations, the Commissioner must specify the amount of the excess, the amount of ‘associated earnings’ for the excess, and a ‘total release amount’ (being the sum of the excess and 85 per cent of the associated earnings).

1.18 Individuals are permitted to object against both types of determinations in the manner set out in Part IVC.

Superannuation release authorities

1.19 Division 131 was inserted by Schedule 10 to the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016* and introduced a standardised set of rules for releasing money from superannuation.

1.20 These rules replace the separate rules that apply to excess concessional contributions determinations, excess non-concessional contributions determinations and notifications of assessment of amounts of Division 293 tax. The new rules apply to determinations and notifications issued on or after 1 July 2018.

1.21 An individual who is given one of these determinations or notices can request that the Commissioner issue a release authority in respect of their superannuation interests. To make a valid request, the individual must notify the Commissioner of the total amount to be released and identify the superannuation interest or interests from which the amount is to be released.

1.22 Individuals who receive excess concessional contributions determinations can request that up to 85 per cent of the excess contributions stated in the determination be released. Discounting the excess in this way reflects the 15 per cent tax that the fund paid on receiving the original contribution.

1.23 For excess non-concessional contributions determinations, individuals can request that the total release amount stated in the determination be released, or that no amount be released. Where an individual makes a valid request to release an amount, the Commissioner must issue a release authority to each superannuation provider that holds a superannuation interest identified in the request.

1.24 Superannuation providers that receive a release authority must generally comply with the authority. However, a superannuation provider is not required to comply with an authority that is issued in respect of a defined benefit interest (although in these cases, compliance by the provider is voluntary). In addition, providers are only required to comply

with a release authority to the extent they are able to do so. That is, they are only required to release the lesser of the amount stated in the release authority and the ‘maximum available release amount’ (being the total amount that can be paid out of the superannuation interest identified in the release authority).

1.25 Superannuation providers must also notify the Commissioner of a payment made in accordance with the release authority, or that they have chosen not to comply (where permitted).

1.26 In addition to the amendments that introduced Division 131, separate amendments to Schedule 1 to the *Superannuation Industry (Supervision) Regulations 1994* (SISR 1994) were made by the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulations 2017*. These amendments apply from 1 July 2018 and will replace the existing condition of release at item 111A of Schedule 1 to the SISR 1994 with a more general reference to release authorities issued under Division 131. These changes authorise a superannuation provider to pay the amount stated in the release authority out of the superannuation system.

Tax treatment of amounts released under a release authority

1.27 The general tax treatment of superannuation benefits (which include lump sums paid out of superannuation) is provided by Division 301 of the ITAA 1997. Ordinarily, the tax treatment of a superannuation benefit is determined by the status of the recipient and the ‘components’ of the benefit.

1.28 Despite this general approach, superannuation benefits are non-assessable non-exempt (NANE) if they are paid in response to a release authority issued in relation to an excess concessional contribution determination, excess non-concessional contribution determination, or a release entitlement in respect of Division 293 tax (see sections 303-15 to 303-20 of the ITAA 1997). From 1 July 2018, the rules that provide this NANE treatment will simply refer to release authorities issued under Division 131. The proportioning rule in section 307-125 of the ITAA 1997 does *not* apply to a payment that is required or permitted under Division 131.

1.29 For releases in relation to excess concessional contributions determinations, the benefit of the deduction that was initially claimed by the entity that made the contribution is already unwound by including the amount of the excess in the individual’s assessable income. As this occurs irrespective of whether the excess contributions are released, no additional tax applies to release amounts.

1.30 For releases in relation to non-concessional contributions determinations, an amount equal to the associated earnings identified in a determination for a financial year is specifically included in an individual's assessable income for the corresponding income year (see section 292-25 of the ITAA 1997). This assessment rule applies independently of the rules that provide for the taxation of superannuation benefits. Individuals are also entitled to a 15 per cent tax offset which reflects the tax that a fund pays on its earnings.

Summary of new law

1.31 The key features of the FHSSS are as follows:

- Individuals who have had eligible voluntary contributions into superannuation under the existing contribution rules and caps can withdraw certain amounts for the purpose of purchasing their first home.
- To initiate the release process, individuals must request a 'first home super saver determination' (FHSS determination) from the Commissioner.
 - In making a FHSS determination, the Commissioner must identify a 'maximum release amount' based on the individual's past contributions and associated earnings.
- Individuals who receive a FHSS determination can request that the Commissioner issue a release authority in respect of their superannuation interests.
 - The process for requesting and issuing release authorities utilises the general release rules in Division 131.
- Amounts released under the FHSSS are subject to concessional tax treatment and are paid by funds to the Commissioner, who withholds an amount for any tax payable before paying it to the individual.
- Individuals who do not purchase their first home within a specified period can either recontribute an amount into superannuation, or pay an amount of tax (the first home super saver tax) to unwind the concessional tax treatment that applied on release.

1.32 These features are explained in further detail below.

Detailed explanation of new law

1.33 The FHSSS applies to voluntary contributions that individuals make into superannuation. The eligibility criteria for contributions that can be released under the FHSSS are explained in further detail below as there are a number of rules that apply in calculating which contributions for a particular financial year are eligible to be released under the scheme.

1.34 However, in general terms the FHSSS applies to the concessional and non-concessional contributions that an individual voluntarily makes through either personal contributions or through salary sacrificing arrangements entered into with their employer, provided that those contributions are made within the existing contribution caps.

1.35 Individuals can already make such contributions using existing methods and no special exemptions from the contribution caps are proposed as part of the FHSSS. Specific changes are therefore not required to enable individuals to make the contributions that are eligible to be released under the FHSSS.

1.36 Individuals who have made voluntary contributions into superannuation can use the FHSSS to request the release of those contributions and an amount of associated earnings from superannuation.

Releasing amounts under the FHSSS

1.37 The FHSSS uses the standard release authority rules in Division 131 to facilitate the release of amounts from superannuation.

1.38 As noted above, Division 131 applies from 1 July 2018 and relies on determinations being issued in respect of excess concessional contributions, non-concessional contributions and assessments of Division 293 tax.

1.39 These amendments introduce a new type of determination (a first home super saver determination) that an individual can request from the Commissioner. A first home super saver determination (FHSS determination) specifies the maximum amount that can be released from superannuation under the FHSSS in respect of an individual.

1.40 Individuals who receive a determination can use Division 131 to request that the Commissioner issue a release authority in relation to their superannuation interests. [*Schedule 1, item 3, paragraph 131-5(1)(d)*]

1.41 As per the standard rules in Division 131, the Commissioner must issue a release authority where a valid request is made by an

individual (the requirements for making a valid request are set out in section 131-5).

1.42 In making a valid request, individuals can request that any amount up to the maximum release amount identified in a FHSS determination be released from one or more of their superannuation interests. *[Schedule 1, items 4 and 5, paragraph 131-10(1)(a) and item 4 in the table in subsection 131-10(1)]*

1.43 Specifying any amount up to the maximum release amount allows individuals to leave amounts in superannuation if they choose to do so. This approach is consistent with that taken in respect of excess concessional contributions determinations and assessments of Division 293 tax.

1.44 As the release process for the FHSSS utilises the rules in Division 131, the standard requirements for superannuation providers about complying with release authorities and notifying the Commissioner apply.

1.45 In accordance with these rules, superannuation providers must pay released amounts to the Commissioner, who will then pay an amount to the individual that made the request. Although the Commissioner must withhold an amount from the payment to an individual, superannuation providers do not need to withhold an amount in respect of a payment of an amount that is released to the Commissioner.

1.46 Once an individual specifies the amount to be released, it is not possible for them to request the release of any additional amounts. However, if a superannuation provider does not release the requested amount, a further request can be made to a different superannuation fund for an unreleased amount. This could occur where a release authority was issued in respect of a defined benefit interest, or the amount specified in the release authority was more than the individual has in the fund.

First home super saver determinations

1.47 These amendments insert the rules about FHSS determinations into a new Division 138-A of Schedule 1 to the TAA 1953.

1.48 A FHSS determination is a written determination that states the maximum amount that an individual can request to have released under the FHSSS (the ‘FHSS maximum release amount’), as well as the various components that are calculated in working out that amount. *[Schedule 1, item 1, subsection 138-5(1)]*

1.49 These components of a FHSS determination are concessional contributions, non-concessional contributions and notional earnings that are associated with each contribution. *[Schedule 1, item 1, paragraph 138-5(1)(b)]*

1.50 In particular, the amount of the concessional contributions and associated earnings that are covered by a FHSS determination are relevant in determining the tax treatment that applies to the individual after amounts are released (this is treatment explained in further detail below). Because the character of particular contributions are relevant to a FHSS, an individual should have completed any notice of intent to deduct processes in respect of contributions that they intend to claim a deduction for prior to seeking a FHSS determination.

1.51 If an individual is dissatisfied with a FHSS determination made in relation to them, they can object against the determination in the manner set out in Part IVC. [*Schedule 1, item 1, section 138-10*]

1.52 These review rights are consistent with the rights that are available for excess concessional contributions determinations, excess non-concessional contributions determinations, and excess transfer balance determinations (see for example, section 97-10, section 97-35 and section 136-15).

1.53 An example of where an individual is dissatisfied with a FHSS determination is where they disagree with the FHSS maximum release amount identified by the Commissioner. In such cases, the individual would have the opportunity to object to the determination, and provide the Commissioner with any additional information evidencing why the determined amount was incorrect.

Requesting a FHSS determination

1.54 The FHSSS is designed to provide financial assistance to individuals who are genuinely saving for their first home.

1.55 To achieve this outcome, the only individuals who can request a FHSS determination are those who:

- have never held an interest in a CGT asset that is taxable Australian real property;
- are aged 18 years or older; and
- have not previously requested that a release authority be issued under Division 131 in relation to a FHSS determination.

[*Schedule 1, item 1, subsection 138-5(2)*]

1.56 To be a valid request, the request for the determination must be made in the approved form. [*Schedule 1, item 1, subsection 138-5(2)*]

1.57 Using the approved form process enables the Commissioner to require that the individual provide information that is relevant to determining whether they are eligible to request a determination, as well as any information that is relevant to the determination. As with any information that is required to be provided in the approved form, standard administrative penalties (and possibly criminal charges) can apply to an individual who makes false and misleading statements (for false and misleading statements, see Division 284).

1.58 Provided that the above conditions are satisfied, the Commissioner must make a FHSS determination in relation to the individual. [*Schedule 1, item 1, subsection 138-5(3)*]

Taxable Australian real property

1.59 The requirement about never having owned a CGT asset that is taxable Australian real property primarily ensures that individuals who have previously owned a home are unable to use the FHSSS.

1.60 The term ‘taxable Australian real property’ is defined in section 855-20 of the ITAA 1997. The definition covers any real property situated in Australia and includes a lease of land in Australia and certain mining rights.

1.61 Because of this scope, the restriction on owning taxable Australian real property is broader than simply having owned a home as it also covers an investment property or commercial property. However, the term is appropriate for determining eligibility to access the FHSSS because another interest in taxable Australian real property (or proceeds from an earlier sale of such property) can be used as security for a home deposit, and is an indicator that the individual does not require additional assistance for entry into the residential housing market.

18 years or older

1.62 The requirement that the individual be 18 years of age or older ensures that the parents of children do not use the FHSSS for themselves through their children.

1.63 Although children are permitted to open superannuation accounts and to own property, they are unlikely to be saving for a deposit or purchasing a home in their own right before they turn 18. The restriction on accessing the FHSSS only applies in respect of people who can request a determination – it does not prevent voluntarily contributions that an individual makes before they turn 18 from being eligible to be released after they turn 18.

Previous requests for release authorities

1.64 The requirement that the individual had not previously requested a release authority in respect of a FHSS determination ensures that individuals can only access the scheme once.

1.65 While the requirement that the individual had never owned taxable Australian real property prevents some individuals who have accessed the scheme from using it again, it would not prevent an individual seeking multiple determinations prior to purchasing their first home.

1.66 Basing the requirement on the fact of a previous request for release means that an individual can have had earlier FHSS determinations made in respect of them. This may occur over a period of time because an individual wishes to make further contributions after the Commissioner advises them of their FHSS maximum release amount.

1.67 However, after a request for a release authority has been made in relation to a determination, the individual will not be able to seek any further FHSS determinations. It is expected that once an individual requests a release authority (which is an irrevocable request), that they will have made all of the voluntary contributions they wish to have under the FHSS and resolved any issues about their determined release amount through the standard review processes available for determinations.

Determining the FHSS maximum release amount

1.68 As noted above, the maximum amount that an individual can request to be released under the FHSS must be identified by the Commissioner in making a FHSS determination.

1.69 This release amount is referred to as the ‘FHSS maximum release amount’ and comprises the amount representing the voluntary contributions that are eligible to be released (the ‘FHSS releasable contributions amount’) and the associated earnings related to those contributions. [*Schedule 1, item 1, section 138-20*]

1.70 The rules for identifying FHSS releasable contributions amounts and associated earnings are explained below.

1.71 Because the FHSS maximum release amount is identified in the determination that is made by the Commissioner, the Commissioner has a central role in identifying and calculating the relevant amounts.

1.72 It is envisaged that in the first instance, contribution data that is reported to the Commissioner by superannuation providers and through employer payment summaries will form the basis for identifying the

voluntary contributions that are eligible to be released under the FHSSS. Although any such information will provide evidence of voluntary contributions made in respect of the individual, the information that the Commissioner holds at a particular time can always be supplemented by any other information that the individual provides in respect of their contributions. The Commissioner may also request additional information when contribution data has not yet been received.

1.73 It is important to distinguish between the contributions and earnings that are relevant in determining the FHSS maximum release amount, and the superannuation interests from which amounts are actually released under the FHSSS.

1.74 In this respect, the contributions and earnings are only relevant insofar as they determine the amount that can be released from an individual's superannuation interests. There is no requirement that the contributions and earnings that are identified in a FHSS determination be traced and released from the same superannuation interests that the contributions were made to. This approach also reflects the fact that released amounts are initially treated as NANE income, with the relevant tax consequences dealt with through separate provisions (this process is explained in further detail below). This approach is consistent with that taken in releases for excess concessional contributions and excess non-concessional contributions determinations.

FHSS releasable contributions amount

1.75 An individual's FHSS releasable contributions amount comprises their FHSS eligible non-concessional contributions and 85 per cent of their FHSS eligible concessional contributions for 2017-2018 financial year, and any later financial years. [*Schedule 1, item 1, subsection 138-25(1)*]

1.76 The 2017-2018 financial year is the first financial year that commenced after the Government announcement of the FHSSS in the 2017-18 Budget. Although amounts can only be released from superannuation from 1 July 2018, permitting contributions to be eligible under the FHSSS from the previous financial year allows individuals to make voluntary contributions for the purposes of the scheme from an earlier time.

1.77 FHSS eligible concessional contributions are discounted by 15 per cent to account for the tax that is paid by a superannuation provider as a result of receiving the contribution. The discounting applies to the amount of eligible contributions that are identified – for example, if an individual had a concessional contribution of \$5,000, the amount of that contribution that would be included in their FHSS releasable contributions amount would be \$4,250.

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1.78 There is no need to discount FHSS eligible non-concessional contributions in this way as they are not included in the assessable income of the superannuation provider that receives them.

1.79 To be an ‘eligible’ contribution for an individual, the contribution must have been made:

- as ‘voluntary’ employer contributions (such as a salary sacrificed contribution) in respect of the individual or member contributions made by the individual;
- as a concessional or non-concessional contribution; and
- within the concessional contributions and non-concessional contributions caps.

[Schedule 1, item 1, paragraphs 138-30(2)(a) and (b) and subsections 138-30(3) and (4)]

1.80 In addition to these requirements:

- a \$15,000 limit applies to the contributions that can be eligible from any one financial year and a \$30,000 limit applies to the total contributions that can be eligible across all years;
 - additional rules are included to specify when certain contributions are eligible to be released where these limits are exceeded and to determine when certain contributions are made;
- excess concessional contributions are disregarded in working out an individual’s non-concessional contributions to avoid double-counting; and
- contributions in respect of defined benefit interests or to constitutionally protected funds cannot be eligible for release.

[Schedule 1, item 1, subsection 138-30(1) and paragraphs 138-30(2)(c) and (d)]

1.81 These conditions are explained below.

Limit on the maximum amount of eligible contributions

1.82 The maximum amount of contributions that can be counted towards release under the FHSSS are \$15,000 per financial year and \$30,000 in total. Contributions that exceed those limits are not eligible to be released. *[Schedule 1, item 1, subsection 138-30(1)]*

Contributions must be voluntary

1.83 The requirement that a contribution be made as ‘voluntary’ employer contributions or personal contributions ensures that any

mandatory employer contributions (such as superannuation guarantee amounts) and Government contributed amounts are not eligible to count towards an individual's FHSSS releasable contributions amount.

1.84 In this respect, any contributions that an individual's employer makes in relation to them that are *not* mandated employer contributions can be eligible to be released. [*Schedule 1, item 1, subparagraphs 138-30(2)(b)(i)*]

1.85 The definition of 'mandated employer contributions' is contained in regulation 5.01 of SISR 1994 and relates to contributions in respect of an employee that reduce an employer's potential liability for superannuation guarantee shortfall charge or that are required under an industrial agreement (such as an Enterprise Agreement) or award. Where an individual enters into a salary sacrifice arrangement with their employer, the contributions that the employer makes from the salary or wages that the individual has foregone are *not* mandated employer contributions.

1.86 In addition to employer contributions that are not mandated employer contributions, any member contributions that an individual makes for themselves can be eligible contributions for the purposes of the FHSSS. [*Schedule 1, item 1, subparagraphs 138-30(2)(b)(ii)*]

1.87 A member contribution is defined in regulation 5.01 of the SISR 1994 as a contribution made in respect of a member by that member. As individuals are never compelled to make contributions in respect of themselves, any such contributions can be treated as having been voluntarily made for the purposes of the FHSSS.

1.88 Focussing on member contributions made by a member means that contributions made by other entities in respect of a member will not be eligible to count towards release amounts. This scope is specifically intended to prevent Government contributed amounts from being eligible to be released under the FHSSS. While it also means that contributions made by an individual's spouse or parents on their behalf will not be eligible, any such amounts can be provided to the individual and contributed as a member contribution.

Identifying concessional and non-concessional contributions

1.89 The requirement that the contribution be a concessional or non-concessional contribution prevents any contributions that were not counted towards an individual's contribution caps from being eligible for release. [*Schedule 1, item 1, subsection 138-30(2)*]

1.90 Contributions that do not count towards an individual's cap include structured settlement contributions and small business CGT contributions (although individuals who contributed using the small business CGT exemption may be already precluded from using the

FHSSS if they personally owned the asset that was sold and that asset was real property).

1.91 The distinction also assists in identifying the correct amount of a contribution that is able to count towards an individual's FHSS releasable contributions amount, given the requirement to discount eligible concessional contributions. The process of discounting contributions will be undertaken by the Commissioner in making a determination. In practice, it is expected that the majority of voluntary contributions that are made by individuals under the FHSSS will be concessional contributions.

1.92 In identifying whether a particular contribution is a concessional contribution or a non-concessional contribution, whether or not the contribution was an employer contribution or a member contribution is relevant.

1.93 Employer contributions are generally concessional contributions as they are included in the assessable income of a superannuation fund. For member contributions, whether or not an individual lodges a valid notice of intent to claim a deduction for a contribution determines whether it is a concessional contribution or a non-concessional contribution.

1.94 For any contributions that have recently been made (for example, within the financial year in which the request for release occurs), it is expected that individuals will need to advise the Commissioner of any notices they have lodged and any acknowledgements of such notices they have received. Individuals will also be required to confirm that they will not claim further deductions in respect of their contributions, including any contributions that were assessed as being a non-concessional contribution in a determination. Information of this kind can be provided through the approved form processes that apply in requesting determinations and release authorities.

1.95 Requiring a statement of this kind reflects that individuals can make after-tax contributions at one time, but lodge a notice of intention to deduct for the contribution at a later time. Because the notice requirement is not applied strictly at the time the contribution is made, it would be possible for the contribution to be treated as a non-concessional contribution for the purposes of calculating an individual's FHSS maximum release amount, but then for the individual to later claim a deduction for it. This outcome is inappropriate because the contribution should be taxed on acceptance at 15 per cent and discounted for release under the FHSSS. If an individual were to claim a deduction in these circumstances, they may be subject to penalties for making false and misleading statement under Division 284.

Contribution must be made under the contribution caps

1.96 Requiring the contributions to have been made within the relevant contribution caps reflects that the FHSSS does not allow individuals to contribute more into superannuation than they would otherwise be able to. That is, there is not a special, additional cap for contributions that are made in respect of the FHSSS.

1.97 Where an individual has exceeded one of the contribution caps in a financial year, the amount of the excess is not eligible to count towards their FHSS releasable contributions amount.

1.98 However, as individuals may have a combination of contributions that are eligible to be released and that are not eligible to be released, any excess amounts are first treated as coming first from contributions that would not be eligible for release (for example, mandatory employer contributions).

1.99 This is achieved by first identifying the relevant amount of the excess (that is, either the individual's excess concessional contributions or the amount by which their non-concessional contributions exceeded their non-concessional contributions cap). The excess is then compared to the related contributions that are *not* eligible to be released (such as concessional contributions that are mandated employer contributions). If the ineligible contributions are *less* than the excess, the individual's other contributions are not eligible to be released to the extent of the difference. [*Schedule 1, item 1, subsections 138-30(3) and (4)*]

1.100 This approach avoids applying the tax consequences of having amounts released under the FHSSS in respect of contributions that were already subject to tax consequences for having exceeded one of the contribution caps. The issue arises as contribution caps are applied in an aggregate manner for a financial year, *specific* contributions are not identified as having exceeded the cap. This is because contributions for a year are simply compared against the relevant cap, rather than the 'last' contributions being treated specifically as excess.

1.101 The approach also lets individuals contribute within the FHSSS limits during the year when their total concessional contributions for the year are not known.

Example 1.1 - excess concessional contributions

Alex has a concessional contributions cap of \$25,000 for a financial year, mandated employer contributions of \$15,000 (ineligible contributions), and member contributions of \$15,000 for which a deduction was claimed (eligible FHSS concessional contributions).

Although Alex has excess concessional contributions of \$5,000, her eligible FHSS concessional contribution are not reduced because the amount of her excess is less than her ineligible contributions.

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However, if Alex's mandated employer contributions were instead \$3,000 and her member contributions were \$27,000, then \$2,000 of her member contributions would not be eligible to be released.

The \$2,000 represents the amount by which Alex's excess concessional contributions were greater than her ineligible contributions.

Note - of the remaining \$25,000, only \$15,000 are eligible to be released because of the annual \$15,000 limit.

Non-concessional contributions do not include excess concessional contributions

1.102 The above example also highlights that in some cases there will be an overlap between concessional contributions and non-concessional contributions.

1.103 Generally, if an individual had excess concessional contributions and did not elect to release the amount of the excess, the contribution is also treated as a non-concessional contribution because of paragraph 292-90(1)(b) of the ITAA 1997.

1.104 To avoid double counting such contributions for the purposes of identifying eligible contributions to be released under the FHSSS, excess concessional contributions are disregarded in working out an individual's FHSS eligible non-concessional contributions. [*Schedule 1, item 1, subsection 138-30(5)*]

1.105 This approach enables the contribution to continue to be treated as a concessional contribution for the purposes of identifying release amounts.

Order in which contributions are counted

1.106 As the above limits will cause some contributions to be ineligible, the FHSSS includes ordering rules to determine which contributions remain eligible. As associated earnings are also applied to eligible contributions, these ordering rules have implications for the way in which earnings are calculated.

1.107 These ordering rules are designed to broadly maximise the amount available to an individual to be released, without requiring them to make specific elections about which contributions should be eligible, or about how particular contributions must be characterised.

1.108 In working out which contributions are to be counted towards an individual's FHSS releasable contributions amount, contributions are counted in the order in which they were made (that is, from earliest to latest). [*Schedule 1, item 1, paragraph 138-25(2)(a)*]

1.109 This ordering rule means that contributions in an earlier financial year are counted before contributions in a later financial year, and that contributions that are made within a financial year are counted in the order that they are made.

1.110 For example, if an individual makes \$10,000 of member contributions a year over five years, the combination of the \$30,000 total cap and the ordering rule will mean that the contributions from the first three years will count towards their FHSS releasable contributions and the contributions from the last two years will not.

1.111 Prioritising earlier contributions will generally maximise the amount of associated earnings that are calculated in respect of an individual's contributions.

1.112 However, in the case of member contributions made by an individual within a financial year, FHSS eligible non-concessional contributions are treated as having been made before any FHSS eligible concessional contributions. [*Schedule 1, item 1, paragraph 138-25(2)(b)*]

1.113 This additional ordering means that if an individual has a combination of concessional contributions and non-concessional contributions within a financial year, the non-concessional contributions are always counted first (as they are treated as having been made first).

Example 1.2 – non-concessional contributions are counted first

Megan makes monthly member contributions of \$3,000 within a financial year (a total of \$36,000 of contributions for the year). These are the only contributions that are made in respect of Megan for the year.

At the end of the financial year, Megan claims a \$25,000 deduction for some of the contributions that she made during the financial year. As a result, her concessional contributions for the financial year are \$25,000 and her non-concessional contributions are \$11,000. All of these contributions are within her contributions caps.

In addition, the ordering rule for non-concessional contributions means that for the purposes of determining Megan's FHSS releasable contributions amount, the first three contributions that Megan made are non-concessional contributions, and \$2,000 of the fourth contribution is a non-concessional contribution. These contributions are all eligible to be counted towards Megan's FHSS releasable contributions amount for the year as FHSS eligible non-concessional contributions because they are less than \$15,000 in total.

Under the \$15,000 annual cap, \$4,000 of Megan's concessional contributions can still be counted.

Of Megan's \$25,000 of concessional contributions, the remaining \$1,000 from her fourth contribution and the entire amount of her fifth contribution are therefore FHSS eligible concessional contributions. In

adding these contributions to Megan's FHSS releasable contributions amount, the concessional contributions are both reduced by 15 per cent.

Megan is entitled to release \$14,400 (plus associated earnings), which is comprised of \$11,000 of non-concessional contributions and \$3,400 of concessional contributions (being 85 per cent of \$4,000)

1.114 This approach maximises an individual's FHSS maximum release amount because their non-concessional contributions are not discounted. It also addresses the fact there can be issues with identifying whether a particular contribution made by an individual in a financial year is a concessional contribution or a non-concessional contribution.

1.115 This issue arises because concessional contributions and non-concessional contributions are generally determined in aggregate terms for a financial year, and the fact that deductions for contributions (which determine concessional contributions for the year) are claimed for the year.

1.116 For example, if an individual makes monthly member contributions throughout a financial year, but claims deductions for only part of those contributions, it is not clear which of the contributions are concessional contributions and which are non-concessional.

Defined benefit interests and constitutionally protected funds

1.117 Contributions that are made in respect of defined benefit interest are not eligible to be released. [*Schedule 1, item 1, paragraph 138-30(2)(c)*]

1.118 Releases from defined benefit interests are voluntary at the discretion of the provider in order to protect the way those interests are funded. Excluding voluntary contributions in respect of defined benefit interests is intended to ensure that individuals do not inadvertently make contributions under the FHSS that are unlikely to be released.

1.119 The term 'defined benefit interest' is defined by section 291-175 of the ITAA 1997, and relates to an interest in respect of which an individual's entitlement to superannuation benefits is determined by reference to their salary over a period of time or some specified amount. The definition is interest specific, meaning that an individual could have a superannuation interest with a provider that is a defined benefit interest, and a separate interest that is not. In such cases, the limitation for eligible contributions only applies to those contributions that are made in respect of the defined benefit interest.

1.120 Any contributions that are made in respect of a constitutionally protected fund are excluded from being eligible. [*Schedule 1, item 1, paragraph 138-30(2)(d)*]

1.121 This exclusion is appropriate because of the general differences between the treatment of constitutionally protected funds and other superannuation providers. Contributions to a constitutionally protected fund and the associated earnings are not taxed, meaning that the general parameters about discounting concessional contributions and including certain released amounts in assessable income are not appropriate for releases from constitutionally protected funds.

1.122 Constitutionally protected funds are funds that are listed by regulations (see subsection 995-1(1)).

Calculating associated earnings

1.123 Once the contributions that are counted towards an individual's FHSS releasable contributions amount have been identified, earnings associated with those contributions are calculated for each of the contributions on a daily basis. The calculation of earnings will be done by the Commissioner as part of the determination process. [*Schedule 1, item 1, subsection 138-35*]

1.124 The earnings are calculated using a notional earnings rate. This approach is specifically designed to avoid identifying actual earnings in respect of particular contributions, and reflects that there are practical difficulties with tracking and reporting actual contributions that are eligible for release after they have been contributed into superannuation.

1.125 If separate contributions are made over a period of time, separate earnings calculations will be required for each contribution to reflect the different earnings periods. Furthermore, because earnings are calculated in respect of the contributions counted towards an individual's FHSS releasable contributions amount, any concessional contributions have already been discounted to account for the tax paid by the superannuation provider that received the contribution before earnings are applied. The time at which a contribution is made and the character of the contribution are therefore both relevant to the earnings calculation.

1.126 Because the ordering rules described above apply in determining the contributions that are counted towards an individual's FHSS releasable contributions amount, they are also relevant in working out when a contribution is made and the character of that contribution in calculating earnings. [*Schedule 1, item 1, subsection 138-25(2)*]

1.127 Associated earnings are calculated for every day in the period leading up to the time that the Commissioner makes a FHSS determination. Ending the period on the day that the Commissioner makes the determination is necessary to crystallise the FHSS maximum release amount. [*Schedule 1, item 1, subsections 138-25(2) and (3)*]

1.128 For contributions made in the 2017-2018 financial year, earnings are calculated from the first day of the year. However, for contributions

made in later financial years, contributions are calculated from the first day of the month in which the contribution is made (or is taken to be made because of the ordering rule). [*Schedule 1, item 1, subsection 138-35(3)*]

1.129 These different earnings periods reflect a change to the frequency of reporting that the Commissioner is expected to make from the 2018-2019 financial year. This change will make it possible to identify the month in which particular contributions are made. However, for the 2017-2018 financial year, earnings are calculated on an annual basis, reflecting the annual reporting of contributions for that year.

1.130 To calculate notional earnings for a contribution on a particular day, the shortfall interest charge rate is applied to the sum of the amount of the contribution and any earnings amounts calculated for earlier days. [*Schedule 1, item 1, subsection 138-35(2)*]

1.131 This approach ensures that earnings are calculated on a compounding basis. The shortfall interest rate is identified in subsection 280-105(2) and is essentially the 90 day Bank Accepted Bill rate with an uplift factor of 3 per cent. For the final quarter of the 2016-2017 financial year, the annual rate was 4.78 per cent, and the daily rate was 0.01309589 per cent.

Other matters

1.132 The Commissioner is permitted to amend or revoke a FHSS determination at any time before a release authority is issued in relation to it. [*Schedule 1, item 1, subsection 138-5(4)*]

1.133 These administrative rules are consistent with those in the provisions for other determinations and enable the Commissioner to take the administrative actions necessary where a determination that was issued needs to be modified or withdrawn. An example of where this might occur is where the Commissioner becomes aware of information that an individual has had more eligible voluntary contributions than were specified in the original determination. In such cases it would be open to the Commissioner to amend the determination without the individual seeking a review.

1.134 Notice of a FHSS determination given by the Commissioner is also prima facie evidence of the matters stated in the notice. [*Schedule 1, item 1, subsection 138-5(5)*]

1.135 This ensures that the Commissioner does not need to provide a full copy of the determination whenever it is necessary for an entity to be aware that the determination was made.

Treatment of amounts released under the FHSSS

1.136 Schedule 1 to the Bill also provides for the specific tax treatment that applies to an individual when amounts are released from their superannuation interests in respect to a release authority issued in relation to a FHSS determination. *[Schedule 1, item 12, section 313-10 of the ITAA 1997]*

1.137 In general terms, any release amounts that were calculated by reference to an individual's FHSS eligible non-concessional contributions are treated as NANE. Any amounts related to the individual's FHSS eligible concessional contributions and the total associated earnings calculated in respect of any contributions are taxed at the individual's marginal rates, but with a tax offset of 30 per cent.

1.138 Because amounts can only be released under the FHSSS in response to a release authority issued by the Commissioner under Division 131, the amount of any superannuation lump sum paid by a superannuation provider to the Commissioner in complying with the release authority is already NANE because of section 303-15 of the ITAA 1997 (which applies to Division 131 from 1 July 2018). Because of this, additional rules to ensure that release amounts based on FHSS eligible non-concessional contributions are NANE are not required.

1.139 However, as section 303-15 of the ITAA 1997 applies to the entire amount of the lump sum paid in response to a release authority issued under Division 131, a specific rule is required to tax the amount that an individual receives based on their concessional contributions and their total associated earnings.

1.140 To achieve this, an amount equal to the concessional contributions and associated earnings that are identified in the FHSS determination is included in an individual's assessable income in the income year that corresponds with the financial year in which the request to release was made. *[Schedule 1, item 12, subsection 313-15(1) of the ITAA 1997]*

1.141 This amount is included in assessable income is referred to as an individual's 'assessable FHSS released amount'. *[Schedule 1, item 21, subsection 995-1(1) of the ITAA 1997]*

1.142 Assessable FHSS released amounts are calculated independent of the general tax treatment that applies to superannuation benefit. As noted above, section 131-75 means that the proportioning rule does not apply to amounts paid in response to release authorities issued under Division 131.

1.143 Including the amount in an individual's assessable income for the income year in which the request for the release occurred ensures that the inclusion of an amount in assessable income is based on a single and clear event that is initiated by the individual.

1.144 Using the amount specified in a FHSS determination works appropriately where the total amounts that are released from superannuation are equal to the FHSS maximum release amount specified in the determination. However, it is also possible for an individual to elect to have a lesser amount released or for the total amounts that are ultimately available to be released to be less than the amount they request.

1.145 To address this issue, the amount that is included in an individual's assessable income is reduced by any difference between the total amount that was actually released, and the FHSS maximum release amount specified in the relevant determination. [*Schedule 1, item 12, subsection 313-15(2)*]

1.146 This approach means that where an individual's FHSS maximum release amount included amounts related to non-concessional contributions, the difference between the FHSS maximum release amount and the actual release amount is first taken from the amounts that are included in assessable income.

Example 1.3 - actual release less than FHSS maximum release amount

Eric receives an FHSS determination from the Commissioner during the 2020-2021 financial year.

The FHSS maximum release amount identified in the determination is \$35,000 comprised of \$20,000 of non-concessional contributions, \$8,500 of concessional contributions, and \$6,500 of associated earnings.

Assuming Eric requested that the entire \$35,000 be released and the request occurred in the 2020-2021 financial year, Eric's assessable FHSS released amount would be \$15,000 for the 2020-2021 financial year.

However, if only \$30,000 was released, then Eric's assessable FHSS released amount would be reduced to \$10,000 - being the \$15,000 less the \$5,000 difference between Eric's FHSS maximum release amount and the total amount that was actually released.

Tax offset for amounts included in assessable income

1.147 The tax offset that an individual receives is equal to 30 per cent of an individual's assessable FHSS released amount. [*Schedule 1, item 12, section 313-20 of the ITAA 1997*]

1.148 In conjunction with including the amounts in an individual's assessable income, the 30 per cent tax offset ensures that an individual is taxed on assessable amounts released under the FHSS at their marginal tax rate *less* 30 per cent.

1.149 This treatment means that most individuals will receive an advantage from having utilised the FHSSS relative to the position they would have been in had they not contributed the amounts into superannuation.

1.150 The tax offset is neither refundable nor able to be carried forward.

Withholding on FHSSS amounts

1.151 The Commissioner of taxation is required to withhold an amount from FHSS released amounts that are paid in respect of an individual. [*Schedule 1, item 15, section 12-460*]

1.152 Withholding amounts from payments to an individual is designed to assist them in meeting any increased tax burden that they face as a result of having a potentially larger amount included in their assessable income for an income year as the result of the amount being released under the FHSSS.

1.153 Because the tax treatment of assessable FHSS release amounts is ultimately determined by an individual's marginal tax rates, the amount that is to be withheld is based on an estimate of the amount of tax that will be payable in relation to an individual's assessable FHSS released amount. This amount is provided for by regulations made in respect of FHSS released amounts.¹ [*Schedule 1, item 15, subsection 15-10(2)*]

1.154 The obligation to withhold is restricted to the Commissioner because it is the Commissioner that pays released amounts to individuals after they have been released by superannuation providers. As the estimate of tax is based on information about the individual's expected marginal tax rate that is more readily available to the Commissioner, it is appropriate that the Commissioner be the one to make the estimate of the amount that should be withheld. In making such estimates, it is expected that the Commissioner would have regard to any recent notices of assessment that had given to the individual, pay-as-you-go withholding amounts that the Commissioner had received from the individual's employer, and any additional information provided by the individual about their expected income for the year (for example, which shows that they will have a higher than average income for the year).

1.155 Having the Commissioner make this estimate facilitates accurate withholding estimates to maximise the amounts available for a first home deposit while minimising of tax liabilities that exceed the withheld amount. It also resolves issues with individual funds being required to

¹ The draft regulation is included in the exposure draft regulation and released in conjunction with the exposure draft for the principle legislation for the FHSSS.

estimate the amount to be withheld where they have only received a request to release a part of the total amount that is requested.

Obligations on individuals after amounts are released

1.156 The FHSSS is designed to assist individuals in saving for a deposit for their first home.

1.157 The FHSSS applies a post-release compliance approach to ensure that individuals have access to the amounts that they have saved under the FHSSS before they are required to pay their deposit. This means that instead of requiring individuals to provide evidence that they have entered into a contract prior to amounts being released (which would likely to give rise to substantial timing and liquidity issues), individuals are simply required to purchase their first home within a specified period after amounts are released.

1.158 If an individual fails to purchase their home within this period of time, they have the option of recontributing an amount back into their superannuation or paying an amount of tax that will broadly neutralise the tax concessions they received from accessing the FHSSS.

1.159 To facilitate this post-compliance model, individuals are required to notify the Commissioner that they have purchased their home. Individuals may also notify the Commissioner that they have recontributed the required amount into superannuation.

Purchase or construction of a home

1.160 Individuals can notify the Commissioner that they have satisfied the requirements of the scheme if the following conditions are met:

- The individual enters into a contract to purchase or construct a CGT asset that is a residential premises within 12 months of the time that their first amount is released under the FHSSS;
- The price for the purchase or construction of the premises is at least equal to the sum of the amounts that were released;
- The individual has occupied the premises, or intends to occupy it as soon as practicable; and
- The individual intends to occupy the premises for at least 6 of the first 12 months that it is practicable to occupy the premises.

[Schedule 1, item 12, subsection 313-25(1) of the ITAA 1997]

1.161 These requirements ensure that the property that the individual has entered into a contract to purchase or construct will genuinely be the individual's home.

1.162 The requirement that the price for the purchase or construction must be at least equal to the amount released ensures that the amounts released under the FHSSS are fully used to acquire the home. Given the caps that apply on contributions counting towards eligible release amounts, it is extremely unlikely that any arms-length transactions will be less than the amounts that an individual requests to have released under the FHSSS.

1.163 Starting the 12 month period from the time that the first amount is released recognises that there may be some delays between the time that an individual requests a release authority and the time at which the funds are actually available to the individual.

1.164 The time at which the relevant type of contract is entered into is an appropriate event for satisfying the requirement, as it is from this time that legally binding obligations about the purchase or construction are created. It also resolves the timing issues that would be associated with 'off the plan' property purchases which may take years to complete.

1.165 Extending the types of contracts that can be entered into so that they include contracts to *construct* a residential premises ensures that the FHSSS can apply to a variety of arrangements that an individual can enter into to acquire their first home. In some cases, individuals may purchase a vacant block of land and separately enter into a contract to construct their home on that land. In such cases, it is the contract to construct their home that must be entered into within the specified period.

1.166 The definition of 'residential premises' is provided by section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* and relates to land or a building that is occupied as a residence, or that is intended to be occupied. It does not include motorhomes or houseboats. As this definition also applies to properties that an individual rents out to others, the additional requirements about the individual occupying the premises ensure that the individual has acquired the property for the purposes of using it as their own home, rather than as an investment property.

1.167 Because some properties will not have been constructed or not be otherwise available for the individual to move into immediately following settlement, the rules enable an individual to notify the Commissioner that they intend to occupy the premises as soon as it is practicable to do so. What is 'practicable' will depend on the facts and circumstances of a particular case, but in all cases the individual's intention to occupy the premises for the requisite period of time must be genuine.

Extension of the period to enter into contracts

1.168 The Commissioner may extend the period for entering into a contract by up to 12 months. *[Schedule 1, item 12, subsection 313-25(2) of the ITAA 1997]*

1.169 Providing the Commissioner with the ability to extend the period in which an individual must enter into a contract ensures that the FHSSS has the flexibility to accommodate individuals who are genuinely trying to purchase their first home, but are unable to do so for one reason or another.

1.170 However, to ensure that the obligations under the FHSSS are clear, the period for entering into a contract cannot be longer than 24 months in total.

1.171 While individuals are free to proactively seek an extension from the Commissioner, extensions can also be granted by the Commissioner without any request. This approach provides the Commissioner with administrative flexibility in ensuring compliance with the period to enter into a contract.

1.172 Review rights in respect of decisions about extensions to the period are also available to individuals. These review rights explained separately below as they also apply in respect of extensions of the period to notify the Commissioner.

Notifying the Commissioner

1.173 Individuals who have satisfied the conditions about purchasing or constructing their first home must notify the Commissioner in the approved form that they have satisfied those conditions within 28 days after they enter into the contract. *[Schedule 1, item 12, subsection 313-30(2) of the ITAA 1997]*

1.174 As with the other notification requirements, the approved form process allows the Commissioner to specify the information that must be provided in the notice. Although the notification requirement requires the individual to notify the Commissioner of particular matters, these requirements do not limit the information that the Commissioner may request. *[Schedule 1, item 12, section 313-30 of the ITAA 1997]*

1.175 The period for making the notification can also be extended at the request of the individual, or where the Commissioner considers that it is appropriate to do so. *[Schedule 1, item 12, subsection 313-30(3) of the ITAA 1997]*

Recontributing amounts if no purchase

1.176 If an individual does not satisfy the above requirements about entering into a contract to purchase or construct their residential premises, they may instead notify the Commissioner that they have recontributed an amount into superannuation. *[Schedule 1, item 12, subsections 313-35(1) and (2) of the ITAA 1997]*

1.177 This notification can only be made if the individual makes one or more non-concessional contributions during the period that they had to enter into a contract. In addition, the total amount of their non-concessional contributions must be at least equal to their assessable FHSS released amount less any amounts that were withheld by the Commissioner. *[Schedule 1, item 12, paragraph 313-35(1)(b) of the ITAA 1997]*

1.178 Requiring that amounts be recontributed into superannuation ensures that an individual did not receive a benefit from the concessions provided by the FHSS where they did not ultimately acquire their first home. Basing the amount that needs to be recontributed on the individual's assessable FHSS released amount is appropriate because it is this amount that determined the original tax offset.

1.179 In contrast, amounts related to non-concessional contributions did not provide the individual with a deduction when they were contributed, and did not increase any tax offset that the individual received on amounts being released.

1.180 Reducing the amount that needs to be recontributed by any amounts that were withheld by the Commissioner recognises that for individuals who were required to pay tax on their assessable FHSS released amount, a retribution of the full assessable FHSS released amount would have to be partially funded from other sources. The individuals who will be affected in this way are those whose marginal tax rate was more than 30 per cent (being the amount of the tax offset).

1.181 Although the withholding amount will not always match the exact amount of tax that is payable in respect of an individual's assessable FHSS released amount, it will generally be closely aligned to the actual amount of tax. Furthermore, the amount that is withheld can be readily identified by individuals without having to perform a more complicated calculation about what their actual tax would have been had the relevant release amounts not been included in their assessable income.

1.182 Requiring that the retribution be done as a non-concessional contribution also ensures that individuals do not receive a further benefit from claiming another deduction in contributing the necessary amount back into superannuation. In addition, any such retribution as a non-concessional contribution must be done within an individual's non-concessional contribution cap.

Notifying the Commissioner

1.183 Any notification to the Commissioner about a re-contribution must be made in the approved form, and done within the period that the individual had to enter into a contract to purchase or construct their residential premises, including any extension to the period allowed by the Commissioner. *[Schedule 1, item 12, subsections 313-35(2) and (3) of the ITAA 1997]*

1.184 As with the other notification requirements, the approved form process allows the Commissioner to specify the information that must be provided in the notice. Although the notification requirement requires the individual to notify the Commissioner of particular matters, these requirements do not limit the information that the Commissioner may request. *[Schedule 1, item 12, subsection 313-35(3) of the ITAA 1997]*

1.185 The period for making the notification can also be extended at the request of the individual, or where the Commissioner considers that it is appropriate to do so. *[Schedule 1, item 12, subsection 313-35(2) of the ITAA 1997]*

FHSS re-contribution must not be a concessional contribution

1.186 Where an individual notifies the Commissioner that they have made non-concessional contributions instead of entering into a contract to purchase or construct their first home, the individual is not able to claim a deduction in respect of the non-concessional contributions to which the notification related. *[Schedule 1, item 10, section 290-168 of the ITAA 1997]*

1.187 Denying the deduction ensures that individuals cannot report a contribution as a non-concessional contribution, and later claim a deduction for it. This rule does not require the tracing of specific contributions and deductions. Instead, it can simply apply where an individual's non-concessional contributions for a financial year are less than the contributions that the Commissioner was notified of. In such circumstances, any deductions that the individual claimed for other contributions would be reduced to the extent of the difference.

Review rights for requests for extensions

1.188 As noted above, the Commissioner is able to extend the period in which a contract must be entered into, and the period in which an individual must notify the Commissioner about the contract or a re-contribution.

1.189 Standard review rights are available to individuals who are dissatisfied with a decision that the Commissioner makes about allowing a longer period, or with a decision that the Commissioner makes not to

allow a longer period. In such cases, an individual is able to object against the decision in the manner set out in Part IVC of the TAA 1953. [*Schedule 1, item 12, section 313-60 of the ITAA 1997*]

First home super saver tax

1.190 Individuals who do not notify the Commissioner that they have entered into a contract to purchase or construct their first home or that they have recontributed the required amount into superannuation are liable to pay ‘first home super saver tax’. [*Schedule 1, item 12, section 313-40 of the ITAA 1997*]

1.191 First home super saver tax is imposed by the *First Home Super Saver Tax [Act] 2017*,² and is equal to 20 per cent of an individual’s assessable FSSS released amounts. [*Clauses 3 and 4 of the First Home Super Saver [Act] 2017*]

1.192 As a flat rate of tax, the FHSSS tax is unrelated to the personal income tax system or an individual’s marginal tax rate.

1.193 Because an individual’s liability to first home super saver tax arises at the time that they fail to notify the Commissioner that they have entered into a contract or recontributed an amount, their liability to the tax can only crystallise after the period that they had to undertake the relevant actions and notify the Commissioner has passed. Because of this, any extensions to the relevant periods that the Commissioner allows will defer a potential liability to the tax.

1.194 Applying first home super saver tax to an individual who has not acquired their first home or recontributed an amount into superannuation ensures that such individuals do not obtain a benefit from accessing the FHSSS.

1.195 While the rate of the tax provides an incentive for individuals to take one of the actions necessary to avoid liability to the tax, it is not set at a rate that unfairly impacts individuals who are subject to the tax. This is because such individuals will have also received a tax offset equal to 30 per cent of their assessable FHSS released amounts and benefited from the concessions that apply in making concessional contributions, and to earnings within the superannuation system.

Assessments of first home super saver tax

1.196 The general assessment provisions in Division 155 are used to facilitate assessments of first home super saver tax. Division 155 contains standardised provisions for making, amending and reviewing assessments

² The draft bill for the First Home Super Saver Tax Act 2017 is included was released in conjunction with the exposure draft for the principle legislation for the FHSSS.

and are already used in respect of Division 293 tax and excess transfer balance tax.

1.197 To utilise the general assessment rules, these amendments include first home super saver tax to the list of ‘assessable amounts’ in Division 155. [*Schedule 1, item 17, paragraph 155-5(2)(k)*]

1.198 Listing an amount as an assessable amount obliges the Commissioner to provide a notice of assessment as soon as practicable after the assessment is made, and permits the Commissioner to provide the notice electronically (see section 155-10). The amendment and objection rules in Subdivisions 155-B and 155-C also rely on an amount being an assessable amount, and apply in the standard way to assessments of first home super saver tax.

1.199 As first home super saver tax is not able to be self-assessed, no changes are made to the rules about the self-assessment of certain taxes (see section 155-15). Subdivision 155-A also contains rules for part-year assessments and delays in making assessments (see sections 155-25 and 155-30). The part-period rules are unlikely to be relevant for FHSSS tax, as the period of assessment is less relevant than the event that leads to the assessment being required. The delay rules relate to actions that must be undertaken after a return has been provided.

1.200 As the FHSSS will not involve returns, these amendments also ensure that the delay rules do not apply to first home super saver tax. [*Schedule 1, item 19, paragraph 155-30(3)(c)*]

When first home super saver tax is payable and general interest charge

1.201 An individual’s assessed first home super saver tax is due and payable at the end of 21 days after the Commissioner gives the individual a notice of the assessment of the tax. [*Schedule 1, item 12, section 313-45 of the ITAA 1997*]

1.202 If the Commissioner amends an individual’s assessment, any extra assessed first home super saver tax is due and payable at the end of 21 days after the Commissioner gives the individual a notice of the amended assessment. [*Schedule 1, item 12, section 313-50 of the ITAA 1997*]

1.203 These timing rules are consistent with those that apply for other taxes, such as Division 293 tax and excess transfer balance tax under Division 294 of the ITAA 1997.

1.204 Individuals who fail to pay an amount of assessed first home super saver tax by the time that it is due and payable are liable to the general interest charge for each day in the period over which the amount is due but unpaid. [*Schedule 1, item 12, section 313-55 of the ITAA 1997*]

1.205 The general interest charge is worked out under Part IIA of the TAA 1953.

Consequential amendments

FHSSS amounts do not count for means testing purposes

1.206 There are a number of income tests across Australia's laws that are used to determine things like an individual's eligibility for Government payments, eligibility for certain tax offsets, liability to the Medicare levy surcharge, and liability to repay Government debts.

1.207 Many of these income tests are based on an individual's income, taxable income, or assessable income. Some of these tests use those concepts, or establish specific income definitions that add or subtract other amounts (for example, there are several definitions of 'adjusted taxable income').

1.208 In the absence of any further changes, the amount included in an individual's assessable income when amounts are released under the FHSSS will be reflected in their assessable income and taxable income, which has flow on consequences for those tests that use these concepts.

1.209 In addition, many of the tests that use these income concepts specifically add certain concessional contributions back to an individual's income. Depending on whether an income test focusses on taxable income or assessable income, 'reportable superannuation contributions' or 'reportable employer superannuation contributions' are generally added to an individual's income.

1.210 These amounts reflect different types of voluntary contributions that an individual can have made into superannuation. Reportable employer superannuation contributions are defined by section 16-182 and relate to the voluntary salary sacrificed contributions that an employer makes for an employee (that is, they do not include employer contributions that discharge their superannuation guarantee obligations). These contributions are generally added back to tests based on assessable income because other contributions that an individual receives a deduction for (like member contributions) do not reduce their overall amount of assessable income (that is, they only reduce their taxable income).

1.211 Reportable superannuation contributions are defined by subsection 995-1(1) of the ITAA 1997 as being the sum of an individual's reportable employer superannuation contributions and any deductions that are claimed in respect of their contributions. Reportable superannuation contributions therefore describe all voluntary concessional contributions made in respect of an individual and are generally added back to income

tests that are based on taxable income because the deduction that individuals receive also reduce their taxable income.

1.212 Because an individual's assessable FHSS released amounts reflect amounts that were voluntarily contributed into superannuation in respect of the individual, counting amounts when they are released from superannuation will result in double counting under any income tests that add back reportable employer superannuation contributions or reportable employer contributions.

1.213 To prevent such double counting from occurring, these amendments specifically disregard an individual's assessable FHSS released amount in determining their income under the following provisions:

<i>Test</i>	<i>Reference/s</i>	<i>Relevant for...</i>
<i>A New Tax System (Family Assistance) Act 1999</i>		
Adjusted taxable income	Paragraph 2(1)(a) of Schedule 3	Includes: - Family tax benefit A and B - Child care benefit - Seniors Health Care Card - Low income superannuation tax offset - Youth Allowance
<i>Child Support (Assessment Act) 1989</i>		
Adjusted taxable income	Paragraphs 43(1)(a) and 60(2)(a)	Parental income for child support purposes
<i>Higher Education Support Act 2003</i>		
Repayment income	Paragraph 154-5(1)(a)	Repayment threshold for HELP debts
<i>Income Tax Assessment Act 1936</i>		
Rebate income	Subsection 6(1)	Tax rebate for low income aged persons and pensioners
<i>Income Tax Assessment Act 1997</i>		
Income threshold	Subsection 35-10(2E)	Non-commercial loss rules
Income threshold	Subparagraph 61-580(1)(d)(v)	Tax offset for Medicare Levy Surcharge
Income threshold	Subparagraph 83A-35(2)(b)(iii)	Employee share schemes
Income threshold	Paragraph 290-230(2)(c)	Spouse tax offset
Income for surcharge purposes	Subsection 995-1(1)	Includes: - Medicare levy surcharge - Medicare levy surcharge on reportable fringe benefits - Division 293 tax - Private Health Insurance Act 2007 – premium reduction income tiers
<i>Social Security Act 1991</i>		
Repayment income	Subsection 1061ZZFA(1)(a)	Repayment threshold for Financial Supplement Debt
Combined parental income	Paragraph 1067G-F10(a)	Parental income test
Adjusted taxable income	Paragraph 1071-3(a)	Seniors Health Care Card
<i>Student Assistance Act 1973</i>		
Repayment income	Paragraph 12ZL(1)(a)	Repayment threshold for Financial Supplement Debt
<i>Superannuation (Government Co-contribution for Low Income Earners) Act 2003</i>		

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Total income	Paragraph 8(1)(a)	Government co-contribution
Veterans Entitlements Act 1986		
Adjusted taxable income	Paragraph 118ZZA-3(a)	Seniors Health Care Card

[Schedule 1, items 22 to 37]

Application and transitional provisions

1.214 The amendments commence immediately after the commencement of Part 1 of Schedule 10 to the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016*.

1.215 Schedule 10 introduced Division 131 and is to commence on 1 July 2018. Commencing these amendments immediately after the commencement of Schedule 10 reflects that Schedule 1 to this Bill amends certain provisions of Division 131.

1.216 FHSS determinations can also be made from any time after 1 July 2018, meaning that release authorities can be issued from the time that determinations are made.

1.217 The specific rules about which contributions are eligible to count towards an individual's FHSS releasable contributions amount ensures that the Commissioner can have regard to contributions that were made in respect of an individual on or after 1 July 2017. [Schedule 1, item 1, subsection 138-25(1)]

Chapter 2

Contributing the proceeds of downsizing to superannuation

Outline of chapter

2.1 Schedule 2 to the Bill allows an individual to use the proceeds in relation to one sale of their main residence to make contributions (downsizer contributions) of up to \$300,000 to their superannuation provider if they are 65 years of age or over. Downsizer contributions can be made regardless of the other contributions caps and restrictions that might apply to making voluntary contributions.

2.2 This measure applies to proceeds from contracts for the sale of a main residence entered into (exchanged) on or after 1 July 2018.

2.3 For the purposes of the exposure draft consultation, these explanatory materials explain the changes to both the legislation and the regulations needed to implement the policy.

2.4 All references in this Chapter are to the *Income Tax Assessment Act 1997* unless stated otherwise.

Context of amendments

2.5 The measure to allow the contributions of downsizing into superannuation measure is one of several measures announced in the 2017-18 Budget as part of the Government's package of reforms to reduce pressure on housing affordability.

2.6 There are current contribution restrictions and caps that prevent some older Australians from making downsizing contributions into superannuation. Being unable to invest the proceeds of selling their home into superannuation discourages some older people from downsizing homes that no longer meet their needs. This means many larger family homes sit occupied by only singles or couples.

2.7 This measure will provide greater flexibility to contribute those proceeds into superannuation. Downsizing should enable more effective use of the housing stock by freeing up larger homes for younger, growing families.

Operation of existing law

Making contributions into superannuation

2.8 There are two categories of superannuation contributions for taxation purposes: concessional and non-concessional. Concessional contributions generally include all employer contributions (including salary sacrificed amounts) and all personal contributions for which a deduction is claimed.

2.9 Non-concessional contributions are essentially contributions that are made from after-tax income and are subject to a maximum limit (cap) each year.

2.10 The annual non-concessional contributions cap for the 2017-2018 financial year is \$100,000. However, if an individual's total superannuation balance at the end of the previous year equals or exceeds the general transfer balance cap, their non-concessional contributions cap for the year is nil (paragraph 292-85(2)(b)). For the 2017-2018, the general transfer balance cap is \$1.6 million.

2.11 The Commissioner of Taxation (Commissioner) must make a determination if an individual's non-concessional contributions exceed their cap. The individual has the choice of releasing the excess amount plus 85 per cent of associated earnings. If the individual chooses not to release the amount, they are subject to excess non-concessional contributions tax of 47 per cent on the amount of the excess. Where the individual releases the money the associated earnings are included in their assessable income and taxed at their marginal tax rate.

2.12 Some contributions are excluded from being a non-concessional contribution, meaning that they do not count towards an individual's non-concessional contributions cap. Two of the main exclusions are contributions arising from structured settlements or orders for personal injuries (section 292-95) and contributions relating to some CGT small business concessions (section 292-100). If a contribution is not covered by an exclusion, the contribution is a non-concessional contribution and counts towards the individual's non-concessional contributions cap.

Rules about accepting contributions made into superannuation

2.13 *The Superannuation Industry (Supervision) Regulations 1994* (SISR 1994) and *Retirement Savings Accounts Regulations 1997* (RSAR 1997) set out certain rules about when a superannuation provider is allowed to accept certain contributions. For these purposes a contribution is either an employer contribution or a member contribution

(a contribution made by or on behalf of a member other than by an employer).

2.14 Generally a member contribution will be a non-concessional contribution unless the individual has claimed a deduction in respect of it or it is excluded from being a non-concessional contribution (292-80(2)(c)). Whether a superannuation provider can accept a contribution depends on the type of contribution, the member's age and their working status. These acceptance rules are contained in subregulation 7.04(1) of the SISR 1994 and subregulation 5.03(1) of the RSAR 1997.

2.15 Superannuation providers can accept employer contributions and member contributions in respect of a member who is 65 years or older, but under 70 years of age. For a fund to accept a member contribution in respect of such members, the member must satisfy a work test.

2.16 Superannuation providers can accept employer contributions in respect of a member, and member contributions made by the member for members who are 70 years or older but who are under 75 years of age. For a fund to accept a member contribution made by such members, the member must satisfy a work test. Requiring member contributions to have been made by the member means that contributions made by an entity that is not an employer (such as a spouse) cannot be accepted by a superannuation provider for a person who has reached age 70.

2.17 Superannuation providers can only accept mandated employer contributions for members aged 75 and over. This means that contributions made by a member who is aged 75 or over cannot be accepted by a superannuation provider.

2.18 If the superannuation provider receives a contribution that is inconsistent with the acceptance requirements, it must return the contribution within 30 days of becoming aware of the inconsistency. The provider may also return an amount that reflects investment outcomes (for example, gains or losses that provider made after the contribution was accepted) and that is net of administrative costs (subregulation 7.04(4) of the SISR 1994 and subregulation 5.03(4) of the RSAR 1997).

Dwelling that is your main residence

2.19 For capital gains tax (CGT) purposes, broadly, a capital gain or loss made on a dwelling that is an individual's main residence is disregarded (subsection 118-110(1)). 'Main residence' is not defined and takes its ordinary meaning. 'Dwelling' is defined and includes, broadly, a unit or house, the land directly under it (if a house), and also a caravan, houseboat or other mobile home (section 118-115). It also includes adjacent land such as a garden, up to 2 hectares (section 118-120). The

rules apply to individuals with an ownership interest, meaning a legal or equitable interest or right or licence to occupy a dwelling (section 118-130).

2.20 If a dwelling was only the main residence for part of an individual's ownership period, the capital gain or loss is only disregarded for the period it was their main residence (section 118-185).

2.21 Individuals can continue to treat a dwelling as their main residence if they are absent from their dwelling for periods of time (for example, to travel, work or move into a retirement village). If the dwelling is used for income producing periods, this absence is limited to six years. If not, there is no time limit on the absence (section 118-145).

2.22 Section 118-195 deals with the CGT treatment of dwellings acquired from a deceased estate. An individual who inherits a dwelling and uses that dwelling as their main residence, or sells the dwelling within two years, qualifies for the full main residence exemption if the deceased acquired the dwelling:

- before 20 September 1985; or
- on or after 20 September 1985, and immediately before their death it was their main residence and not used to produce assessable income.

2.23 If an individual inherits a dwelling that does not become their main residence and does not sell it within two years, a partial exemption is available (section 118-200). There are also special rules for a surviving joint tenant if their spouse dies (section 118-197).

2.24 Subdivision 118-B and other sections of Part 3-1 provide modifications to the basic main residence exemption including, amongst others, specific rules for relationship breakdown, when an individual can elect to treat a dwelling as a main residence and partial exemptions if the dwelling has been used to produce assessable income.

2.25 A CGT event for the disposal of an asset (including a main residence) generally occurs when the contract for the disposal is entered into (subsection 104-10(3)). However, the change of ownership generally occurs upon settlement of a contract.

Summary of new law

2.26 The amendments in this Schedule allow ‘downsizer contributions’ to be made in respect of a person who is aged 65 or over from the proceeds of the sale of a dwelling that was their main residence.

2.27 The amendments apply to the proceeds of contracts entered into on or after 1 July 2018. Downsizer contributions are not tax deductible and can be made for an individual in relation to one sale of a main residence. Further downsizer contributions cannot be made in the future in relation the sale of another main residence.

2.28 The total amount of contributions that can be treated as downsizer contributions in respect of an individual is the lesser of \$300,000 and the individual and their spouse’s share of the sale proceeds.

2.29 In line with the treatment for other kinds of contributions, if an amount is contributed to superannuation that does not meet the requirements of a downsizer contribution, the contributions will be counted against the relevant contribution cap unless the superannuation provider refunds the amount.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>If you are aged 65 or over, you may make downsizer contributions from the proceeds of the sale of your main residence.</p> <p>Downsizer contributions are not counted against your contributions caps.</p> <p>Your downsizer contributions must relate to the sale of a dwelling that was your main residence and which was owned by you or your spouse owned for at least 10 years up to the disposal.</p> <p>Your total downsizer contributions cannot exceed \$300,000.</p> <p>Downsizer contributions are not deductible and you can only make downsizer contributions in relation to the sale of your main residence once.</p>	<p>If you are aged 65 or over, any contributions that you can make in relation to the proceeds of the sale of your main residence are subject to your contributions caps.</p>

Detailed explanation of new law

A superannuation provider may accept a downsizer contribution

2.30 Downsizer contributions can be made in respect of any member who is 65 or over. Changes to the contribution acceptance rules in the SISR 1994 and RSAR 1997 are needed to effect this change. For the exposure draft consultation, the changes to the regulations are explained within these explanatory materials, but separate explanatory material will be required for those regulations.

2.31 Superannuation providers can accept downsizer contributions in respect of individuals who are aged 65 or over. *[Schedule 2, items 1, 2, 4 and 5, table items 2 to 4 in the table in subregulation 5.03(1) of the RSAR 1997 and table items 2 to 4 in the table in subregulation 7.04(1) of the SISR 1994]*

2.32 For the purposes of the regulations, the term ‘downsizer contribution’ takes its meaning from section 292-102 of the ITAA 1997 (which is introduced by these amendments). *[Schedule 2, items 3 and 6, subregulation 5.03(7) of the RSAR 1997 and subregulation 7.04(7) of the SISR 1994]*

2.33 The changes to the contribution acceptance rules allow downsizer contributions to be made in respect of individuals where they would otherwise not be able to be made because the individual does not satisfy the existing age and work tests.

2.34 In determining whether a contribution can be accepted as a downsizer contribution, superannuation provider must be satisfied that the contribution meets the conditions that are required for acceptance. However, in determining whether a contribution can be accepted as a downsizer contribution, funds are not expected to undertake verification processes that are any more onerous than those that currently apply in determining whether a member satisfies a particular age or work test. Further details are provided below about the processes that apply where the Commissioner identifies that a contribution that was accepted as a downsizer contribution did not satisfy the relevant criteria.

2.35 Although an individual under 65 is unable to make a downsizer contribution, they can continue to have member contributions made in respect of them under the general acceptance rules.

2.36 It is expected that the Commissioner will require superannuation providers to report downsizer contributions that they receive through the general reporting obligations for contributions under subsection 390-5(1) of Schedule 1 to the *Taxation Administration Act 1953*.

Downsizer contributions do not count towards the contribution caps

2.37 A downsizer contribution is excluded from being a non-concessional contribution. [*Schedule 2, item 3, subparagraph 292-90(2)(c)(iia)*]

2.38 The criteria for a contribution being a downsizer contribution are explained below.

2.39 Because a downsizer contribution is *not* a non-concessional contribution, it does not count towards an individual's non-concessional contributions cap. Given this, an individual's ability to make a downsizer contribution is unaffected by the total superannuation balance test, which is relevant in determining an individual's non-concessional contributions cap. However, if a downsizer contribution is made, it will increase an individual's total superannuation balance for the purposes of that test.

2.40 Individuals cannot claim a deduction for any contributions that they choose to treat as a downsizer contribution. [*Schedule 2, item 2, section 290-167*]

2.41 This restriction on deductions ensures that downsizer contributions are appropriately dealt with through the non-concessional contribution framework. However, the restriction does not apply to any other contributions that an individual can otherwise make in respect of the proceeds of selling their main residence.

Example 2.1 - downsizer contributions made with other contributions

Amy is 67 years old and works part-time. She receives \$500,000 from the proceeds of the sale of her home and chooses to make a downsizer contribution of \$300,000.

Amy also decides to make an additional \$100,000 of contributions from the remaining proceeds, which she is able to do because of her age and part-time work.

Amy decides to claim a deduction of \$15,000 in relation to the \$100,000 of contributions. She is not entitled to claim a deduction for her \$300,000 downsizer contribution.

Amy also has mandated employer contribution of \$5,000 for the year.

For the financial year in which the contributions are made, Amy has a downsizer contribution of \$300,000, \$20,000 of concessional contributions and \$85,000 of non-concessional contributions.

Features of a downsizer contribution

2.42 For a contribution to be a downsizer contribution in respect of an individual, the following conditions must be satisfied:

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- The individual must be aged 65 years or older at the time the contribution is made;
- The contribution must be in respect of the proceeds of the sale of a qualifying dwelling in Australia that either the individual or their spouse owned for at least 10 years up to the disposal;
- The disposal of the dwelling must have qualified (or would have qualified) for the main residence CGT exemption in whole or part;
- The contribution must be made within 90 days of the disposal of the dwelling, or such longer time as allowed by the Commissioner;
- The individual must choose to treat the contribution as a downsizer contribution, and notify their superannuation provider in the approved form of this choice at the time the contribution is made; and
- The individual cannot have had downsizer contributions in relation to an earlier disposal of a main residence.

[Schedule 2, item 4, paragraphs 292-102(1)(a) to (f)]

2.43 Downsizer contributions in respect of an individual can only be made from the sale of one dwelling, and the maximum amount of contributions that an individual can have in respect of that sale is the lesser of \$300,000 and the proceeds of the disposal of the dwelling. *[Schedule 2, item 4, paragraph 292-102(1)(i) and subsection 292-102(2)]*

2.44 To qualify as a downsizer contribution, the member contribution must be made in respect of the individual who is otherwise eligible. There are no specific requirements about who must actually make the contribution for that individual, although the individual must be the one who makes the choice to treat a contribution as a downsizer contribution. *[Schedule 2, item 4, paragraph 292-102(1)(a)]*

Proceeds from qualifying dwellings

2.45 The proceeds from the sale of an ownership interest in a dwelling that is located in Australia (section 960-505) can be used to make a downsizer contribution, provided that the dwelling is not a houseboat, caravan or other mobile home. *[Schedule 2, item 4, paragraph 292-102(1)(b) and (f)]*

2.46 For the purposes of the downsizer contribution rules, the definitions of ‘ownership interest’ and ‘dwelling’ that are contained in sections 118-115 and 118-130 apply.

2.47 However, as this definition includes houseboats, caravans and other mobile homes, those types of dwellings are specifically excluded. Restricting the downsizer contribution rules in this way is appropriate because the policy intent is to free up larger houses or units for younger, growing families.

2.48 Because the contributions must relate to the proceeds of the disposal of an ownership interest, the amount of the contribution cannot be more than the proceeds that were received from the disposal, up to a limit of \$300,000 (these limits are explained separately below).

2.49 In addition, downsizer contributions can be made in respect of an individual if they or their spouse held an ownership interest in the dwelling, whether that ownership interest was held solely, jointly or as tenants in common. *[Schedule 2, item 4, paragraphs 292-102(1)(c) and (i)]*

The 10 year ownership test

2.50 An individual or their spouse must have owned the dwelling for 10 or more years just prior to disposing of it. *[Schedule 2, item 4, paragraphs 292-102(1)(c) and (e)]*

2.51 The period of the 10 year ownership test is calculated from the day ownership of the dwelling commenced to the day it ceased. This ownership period would usually be from the settlement date of the original contract to purchase the dwelling to the settlement date of the later contract.

2.52 As a general rule, individuals must have disposed of their ownership interest in a dwelling in order to make a downsizer contribution. The only exception to this is where only one spouse holds an ownership interest in the dwelling but the other spouse does not. In these circumstances it is sufficient that one spouse held the ownership interest, as long as the spouse who doesn’t hold an ownership interest continues to meet the other requirements for the contribution to be a downsizer contribution.

2.53 In certain cases, there may have been a change in ownership between two spouses over the 10 year period that preceded the sale of dwelling. Provided that either of the spouses held an ownership interest in the dwelling at all times during the period, downsizer contributions can be made in respect of the person who held the ownership interest just before disposal and in respect of another person who is their spouse at that time.

2.54 An example of where this may occur is where a spouse who held the ownership dies. In such case, the surviving spouse can count the

period of ownership of their deceased spouse (including the period the dwelling is held by the trustee of the deceased estate) towards the 10 year ownership test. The additional qualification about the period over which the dwelling was held by a trustee will generally only be relevant where it is the trustee that disposed of the ownership interest. Where ownership transfers to the surviving spouse, subsections 128-12(1) and (2) provide that if a CGT asset passes to beneficiary of a deceased estate, the beneficiary is taken to have acquired the asset on the day the former owner died.

Example 2.2 - transfer ownership interest between spouses

In 2015, Andrew and Tara are both 70 years old.

They have been married for 50 years, and have lived in their family home for the past 40 years. The title for their home is solely in Andrew's name.

Andrew passes away in mid-2015. He leaves the family home to Tara. On 1 December 2016 the title for the home formally passes to Tara.

After a few years, Tara decides to sell the home so that she can move into a retirement village. The contract for the sale of the home settles on 1 December 2019.

Tara satisfies the 10 year ownership test for the purposes of the downsizer rules because at all times over the period starting on 1 December 2009 and 1 December 2019, the ownership interest in the home was held by Andrew (for the first 7 years) or Tara (for the last 3 years).

2.55 Similarly, an individual person may gain title in respect of a dwelling following the breakdown of a relationship. In such cases, the person can count the period of ownership of their former spouse towards the 10 year ownership test.

Main residence

2.56 Where the proceeds that are being contributed are from the disposal of an ownership interest that the individual held in a dwelling, any capital gain or loss resulting from the disposal must have been exempt or partially exempt from CGT under the main residence exemption in Subdivision 118-B. [*Schedule 2, item 4, subparagraph 292-102(1)(d)(i)*]

2.57 Requiring the main residence CGT exemption to apply ensures downsizer contributions can only be made in circumstances where individuals are downsizing their home as opposed to the sale of solely investment properties.

2.58 It is recognised that over the period that an individual owns a dwelling, they may not always reside in that dwelling for certain reasons. For example, the residence status at a particular time may be affected by things like travel, moving house for unavoidable reasons (like a compulsory acquisition, or relationship breakdown), or use of a dwelling to also earn assessable income.

2.59 These kinds of individual circumstances should not prevent an individual from making a downsizer contribution if the individual meets all the other criteria. The meaning of ‘main residence’ for CGT purposes provides an exemption or partial exemption from CGT for circumstances of this kind (Subdivision 118-B).

2.60 The requirement that an individual received (or would have received) some part of the main residence CGT exemption for the capital gain or loss they made from selling their dwelling is an appropriate basis for assessing whether a dwelling was the individual’s ‘main residence’ for the purposes of making a downsizer contribution.

2.61 A downsizer contribution can also be made from the sale of dwelling that is not a CGT asset because it was acquired prior to 20 September 1985. For a sale of a pre-CGT asset, the individual can only have a downsizer contribution if they would have been entitled to a whole or partial CGT exemption under Subdivision 118-B if the dwelling had been a CGT asset. [*Schedule 2, item 4, subparagraph 292-102(1)(d)(i)*].

Example 2.3 - sale of pre-CGT asset

On 1 July 2020, Chris decides to sell his home. He has lived in this home at all times since he purchased it in 1975.

Chris does not have to pay CGT on the gains he makes from the disposal because he acquired his home before 20 September 1985.

However, had Chris’ home not been a pre-CGT asset, all of the gains he made on the sale of the home would have been exempt because of the main residence CGT exemption.

As such, Chris satisfies the main residence requirement for making a downsizer contribution in relation to the proceeds of the sale of his home.

2.62 Similarly, if an individual’s spouse was the sole holder of the ownership interest that was disposed of, downsizer contributions can only be made in respect of the individual from the proceeds of the disposal if they would have received a whole or partial CGT exemption under Subdivision 118-B had they had owned the interest when it was disposed of. [*Schedule 2, item 4, subparagraph 292-102(1)(d)(ii)*]

Example 2.4 – contribution for spouse that did not hold an ownership interest

Elizabeth has owned the dwelling that is her main residence since 2005. In 2015, her new spouse Jimi moves in with her. Jimi lives in the dwelling as his main residence from 2015, and he would therefore qualify for a CGT exemption on the sale of the dwelling if he was on the title.

Elizabeth turns 65 in 2019 and decides to sell the dwelling. Jimi is also 65 at that time.

The capital proceeds are \$500,000. Elizabeth chooses to make a downsizer contribution in respect of herself of \$300,000 and also in respect of Jimi of \$200,000.

The downsizer contributions in respect of Elizabeth and Jimi are both valid, assuming all the other criteria are also met.

2.63 In determining whether the CGT main residence exemption applies it is the characteristics of the individual in respect of whom the downsizer contribution has been made that are relevant. The requirements will be satisfied where the individual satisfies all the requirements to have qualified for a CGT main residence exemption but for the fact that it was their spouse who held the ownership interest in the dwelling (rather than the individual).

Cap on a downsizer contribution

2.64 The total amount of downsizer contributions that can be made in respect of an individual is the lesser of \$300,000 and the total proceeds that the individual and their spouse receive from disposing of their ownership interests in the dwelling. [*Schedule 2, item 4, subsection 292-102(2)*]

2.65 Where the cap on contributions is based on the total proceeds received by an individual or their spouse, the amount of the cap for a particular contribution is reduced by any earlier contributions in respect of those proceeds that have already been made by either spouse. [*Schedule 2, item 4, paragraph 292-102(2)(b)*]

2.66 Reductions for earlier contributions ensure that the total amount that is contributed between both spouses does not exceed the total proceeds that they received from the disposal of their ownership interests.

Making multiple contributions

2.67 Subject to the above caps, an individual can make as many downsizer contributions as they wish. However, the contributions can only ever be made from the proceeds of one sale of a dwelling. [*Schedule 2, item 4, paragraphs 292-102(1)(h) and (i), subsection 292-102(2)*]

2.68 However, the rules about downsizer contributions permit multiple contributions to be made from the same sale of a dwelling. This allows individuals to make contributions to different superannuation providers if they choose to do so. However, it does not extend to contributions from the proceeds of other properties, or of ownership interests in the same dwelling that are disposed of at a later time (for example, because of the sale of part of the ownership interests in a dwelling, or where there has been a sale and re-acquisition of the same dwelling).

2.69 While an individual can have contributions made from the proceeds of both their own interest and their spouse's ownership interest in a dwelling, any such ownership interests must have been disposed under the same contract. [*Schedule 2, item 4, paragraph 292-102(2)(b) and subsection 292-102(3)*]

Choosing to treat a contribution as a downsizer contribution

2.70 An individual must make a choice to treat a contribution as a downsizer contribution. This choice must be made in the approved form and given to the superannuation provider that accepts the contribution at the time the contribution is made. [*Schedule 2, item 4, paragraph 292-102(1)(h) and subsection 292-102(6)*]

2.71 Requiring a specific choice ensures that a contribution is only a downsizer contribution where the individual decides that it should be treated as such. Given that individuals can only make downsizer contributions in relation to the sale of a single dwelling, the choice enables individuals to choose between dwellings when they have more than one that would qualify under the downsizer rules.

2.72 The requirement to notify a superannuation provider of the choice at or before the time of the contribution enables superannuation providers to know that they are able to accept the contribution irrespective of whether the individual satisfies one of the other conditions (such as age or working status) for making member contributions into superannuation.

2.73 Having the notification made in the approved form also enables the Commissioner to specify any information that must be provided to determine that the contribution meets the requirements of a downsizer contribution.

2.74 The standard administrative penalties may apply to an individual who makes a false or misleading statement (for administrative penalties for false and misleading statements, see Division 284 of Schedule 1 to the *Taxation Administration Act 1953*).

2.75 It is expected that the Commissioner will require a superannuation provider to report a downsizer contribution it receives

through its normal contributions reporting process under subsection 390-5(1) of Schedule 1 to the *Taxation Administration Act 1953*.

Contribution must be made within 90 days

2.76 A contribution must be made within 90 days, or such longer time as the Commissioner allows, of the change in ownership that occurs as a result of the disposal of the relevant ownership interest. *[Schedule 2, item 4, paragraph 292-102(2)(g)]*

2.77 This requirement is consistent with the timing rule that also exists for making contributions from the proceeds of a structured settlement. The Commissioner can extend the period for making a contribution without a request from the individual, where it is appropriate to do so.

2.78 Individuals are also able to request a longer period for making a downsizer contribution, and can seek a review of any decision the Commissioner makes in allowing a longer period (for example, if they are dissatisfied with the length of the extension), or a decision the Commissioner makes not to allow a longer period. *[Schedule 2, item 4, subsection 292-102(4)]*

2.79 For the avoidance of doubt, and also to maintain consistency with similar review rights, amendments are also made to clarify:

- the right to object under section 175A of the *Income Tax Assessment Act 1936* or section 97-35 in Schedule 1 to the *Taxation Administration Act 1953*; and
- the application of the *Administrative Decisions (Judicial Review) Act 1977*.

[Schedule 2, item 4, subsection 292-102(5)]

Contribution found not to be a downsizer contribution

2.80 If the Commissioner becomes aware that a contribution that an individual has elected to treat as a downsizer contribution does not satisfy all the requirements to be a downsizer contribution, the Commissioner must notify the superannuation provider that received the downsizer contribution of this fact. *[Schedule 2, items 4 and 6, subsection 292-102(7) and item 11 in the table in subsection 355-65(3) in Schedule 1 of the Taxation Administration Act 1953]*

2.81 Once notified, the superannuation provider may assess whether they could otherwise have accepted the contribution from the member based on their age or their working status. Where a provider determines that the contribution could have been accepted for some other reason the contribution will continue to be allowed under the contribution acceptance rules, but will also count towards the individual's contributions caps, generally as a non-concessional contribution.

2.82 It is expected that the superannuation provider would be required to re-report or amend any previous report they had provided to the Commissioner indicating that they had previously accepted the contributions as a downsizer contribution. This information can be provided to the Commissioner through the provider's normal contributions reporting processes.

2.83 The superannuation provider may also decide that the contribution needs to be returned. Returning contributions is an existing responsibility that applies to superannuation providers that become aware of amounts that have been received that are inconsistent with the contribution acceptance standards (see subregulation 7.04(4) of the SISR 1994 or subregulation 5.03(4) of the RSAR 1997).

2.84 This could occur where the individual did not satisfy any other criteria for having member contributions at the time the contribution was made. If a contribution is returned to a member, it is also expected that the superannuation provider would be required to re-report or amend any previous report they had provided to the Commissioner indicating that they had previously accepted the contribution as a downsizer contribution.

2.85 The Commissioner may also send a copy of the notice to the Australian Prudential Regulation Authority (APRA). [*Schedule 2, item 4, subsection 292-102(7) of the ITAA 1997*]

2.86 APRA is the regulator that is responsible for compliance with contribution acceptance rules in respect of APRA regulated funds or retirement savings providers. The Commissioner would generally send a copy of the notice to APRA in respect of a provider that APRA regulates. In such circumstances, the question of whether contributions have been validly accepted is a matter for APRA and the superannuation provider.

2.87 It is also expected that if an APRA-regulated superannuation provider is aware that a downsizer contribution that it received does not meet the definition of a downsizer contribution in section 292-102, it must report this as a serious breach on its breach register.

2.88 However, as the Commissioner regulates self-managed superannuation funds, there is no need for a copy of a notification to be provided to APRA where the Commissioner assesses that a contribution made to an SMSF was not a downsizer contribution.

Application and transitional provisions

2.89 The measure starts on 1 July 2018 and applies to dwellings where the exchange of contracts for their sale occurs on or after that date. *[Schedule 2, item 7]*

2.90 Proceeds from properties where the exchange of contracts occur before 1 July 2018 will not be allowed to be made as a downsizer contribution. This is despite the potential that the settlement of these sales does not occur until 1 July 2018 or later. This applies whether or not the settlement date occurs on or after 1 July 2018.