

EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister to the Treasurer, Parliamentary Secretary to the Treasurer

Retirement Savings Accounts Act 1997
Superannuation Industry (Supervision) Act 1993
Taxation Administration Act 1953

*Treasury Laws Amendment (Reducing Pressure on Housing Affordability
Measures No. 1) Regulations 2018*

The *Retirement Savings Accounts Act 1997* (RSA Act) provides for retirement savings accounts to be offered by certain financial institutions, the approval of entities that can offer such accounts and the supervision of those entities.

The *Superannuation Industry (Supervision) Act 1993* (SIS Act) provides for the prudent management of certain superannuation funds, approved deposit funds and pooled superannuation trusts, and for their supervision by Australian Prudential Regulation Authority, the Australian Securities and Investments Commission and the Commissioner of Taxation (the Commissioner).

The *Taxation Administration Act 1953* (TAA 1953) provides for the rules for the administration of the taxation system.

Section 200 of the RSA Act; section 353 of the SIS Act; and section 18 of the TAA provide that the Governor-General may make regulations prescribing matters that are required or permitted to be prescribed by the (respective) Act.

The *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017* established the 'First Home Super Saver Scheme' (FHSSS) which allows individuals who are saving for their first home to take advantage of the concessional taxation arrangements that apply to the superannuation system. These concessional arrangements include tax deductions for making concessional contributions, and having earnings on contributions taxed at the rate of 15 per cent at the superannuation fund level. After an individual has finished saving under the scheme, the contributed amounts and associated earnings are released from superannuation and are taxed in the hands of the individual on a concessional basis (broadly, at marginal rates with a 30 per cent tax offset).

The Act also introduced an exemption from the non-concessional contributions cap for individuals who make contributions from the proceeds of the sale of their home, provided that they or their spouse owned the home for at least 10 years prior to its sale. These contributions are generally referred to as 'downsizer contributions'.

The *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Regulations 2018* (the Amending Regulations) amend a number of regulations to support the measures introduced by the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017*.

Schedule 1 to the Amending Regulations amends the *Taxation Administration Regulations 2017* (TAR 2017) to prescribe the withholding amount for amounts paid to an individual under the First Home Super Saver Scheme.

Schedule 2 to the Amending Regulations amends the *Superannuation Industry (Supervision) Regulations 1994* (SISR 1994) and the *Retirement Savings Account Regulations 1997* (RSAR 1997) to ensure that superannuation entities are able to accept downsizer contributions.

Public consultation was undertaken on the Amending Regulations between 21 July 2017 and 4 August 2017. No issues were raised in respect of the draft regulations through the consultation process.

Details of the Amending Regulations are set out in the [Attachment](#).

The changes in the Amending Regulations commence at the same time as the related amendments in the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017* commenced.

The changes in Schedule 1 to the Amending Regulations commence on 1 July 2018, being the same as the time that related amendments in the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017* are due to commence.

The changes in Schedule 2 to the Amending Regulations commence the day after registration as the related amendments in the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017* commenced on 1 January 2018. However, Schedule 2 to the Amending Regulations do not have any practical application until 1 July 2018 as this is the first time from which downsizer contributions can be made.

Details of the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Regulations 2018

Schedule 1

Schedule 1 to the Amending Regulations amends the TAR 2017 to prescribe the amount that must be withheld from amounts released to an individual under the FHSSS.

The *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017* amended the superannuation and tax laws to establish the FHSSS. 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.

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. As the Commissioner is responsible for issuing release authorities, amounts that are withdrawn under the FHSSS are paid by superannuation entities to the Commissioner. The Commissioner then pays these amounts to the first home saver. An amount that is released to a first home saver under the scheme is an 'FHSS released amount' and any such amounts that are included in the first home saver's assessable income are referred to as an 'assessable FHSS released amount' (see subsection 995-1(1) of the ITAA 1997).

Concessional tax treatment applies to amounts that are withdrawn under the FHSSS. Amounts related to an individual's concessional contributions and total associated earnings are taxed at the individual's marginal rate, but with a tax offset of 30 per cent.

Division 15 of Schedule 1 to the TAA 1953 prescribes the amounts that must be withheld from certain payments. In most cases, the withholding entity uses the Commissioner's withholding schedules or the regulations. Section 12-460 imposes an obligation on the Commissioner to withhold an amount from the FHSS released amounts paid in respect of an individual. Additionally, section 15-10 allows for the regulations to prescribe what amount must be withheld for FHSS releasable amounts.

Schedule 1 to the Amending Regulations provides that the amount that must be withheld from FHSS released amounts paid in respect of an individual is the amount of tax the Commissioner estimates will be payable by the individual in relation to their assessable FHSS released amount. That is, the Commissioner will estimate what the individual's assessable income from the year is likely to be using the information available and withhold an amount from the released amount at the individual's expected marginal rate less 30 per cent offset.

The amendments allow the Commissioner to have regard to any information that is relevant in estimating the amount to withhold from the released amount for an individual.

It is expected that the Commissioner would have regard to any recent notices of assessment that have been given to the individual, pay-as-you-go withholding amounts that the Commissioner had received from the individual's employer and any additional information in relation to the individual about their expected income for the year (for example, information which shows that they will have a higher than average income for the year).

If the Commissioner is unable to make an estimate of an individual's marginal tax rate, 17 per cent of the individual's assessable FHSS released amount must be withheld. This default rate is based on the maximum amount of tax that an individual would be expected to pay on an FHSS released amount if they were on the top marginal rate and received the full benefit of the 30 per cent offset. In the event that an individual is not on the top marginal tax rate, the difference in the amount withheld and the actual tax liability will be refunded through the assessment process.

Schedule 2

Schedule 2 to the Amending Regulations ensures that, along with the other kinds of contributions superannuation providers can accept, providers can also accept downsizer contributions that are made in respect of a member who is 65 years or older.

The SISR 1994 and RSAR 1997 set out rules that superannuation providers must follow in deciding whether or not to accept different kinds of contributions. 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.

Schedule 2 to the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017* introduced an exemption from the non-concessional contributions cap for downsizer contributions.

If an individual who does not satisfy the requirements for making a downsizer contribution attempts to make such a contribution, the Commissioner must notify the superannuation provider that received the contribution. For example, a contribution is not a downsizer contribution if it is made in respect of a member who is under 65 years of age, or to the extent that an individual has already had downsizer contributions of \$300,000.

A superannuation provider that has been notified by the Commissioner is obliged to determine whether it could have accepted the contribution under any of the other acceptance rules. For example, a contribution may qualify as a member contribution if the member satisfies the relevant work test. However, if such a contribution causes a person to exceed their applicable contribution caps, the amount of the excess may be subject to the tax regimes that apply to excess contributions.

The contribution acceptance rules in the SISR 1994 and RSAR 1997 also require a superannuation provider to return a contribution within 30 days of becoming aware of that the contribution should not have been accepted (for example if a work test is not met and the individual in respect of whom the contribution was made was aged between 65 years and 75 years). The provider may also return an amount that reflects

investment outcomes (for example, gains or losses that the 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).

Schedule 2 to the Amending Regulations ensures that superannuation providers can accept downsizer contributions in respect of individuals who are aged 65 years or over.

The Amending Regulations do not affect whether or not a superannuation provider must accept a contribution (including a downsizer contribution). In this context, downsizer contributions are to be treated in the same way as other contributions that a provider is permitted to accept. As such, providers that generally have discretion are not obligated to accept an allowable downsizer contribution.

However, for individuals wishing to make a downsizer contribution into a MySuper product, superannuation providers must accept the contribution, in line with the requirement in paragraph 29TC(1)(f) of the *Superannuation Industry (Supervision) Act 1993*.

For the purposes of the Amending Regulations, the term ‘downsizer contribution’ takes its meaning from section 292-102 of the *Income Tax Assessment Act 1997*. That section contains the criteria that must be satisfied for a particular contribution to be a downsizer contribution.

Ineligible downsizer contributions

The SISR 1994 and RSAR 1997 require a superannuation provider to return any contribution that it has received that is inconsistent with the acceptance rules in subregulations 5.03(1) to (3) of the RSAR 1997 or subregulations 7.04(1) to (3) of the SISR 1994.

A superannuation provider may become aware that a contribution it has received is inconsistent with the definition of ‘downsizer contribution’ (for example, because they are notified by the Commissioner). Once aware, the superannuation provider must 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 applicable contributions caps. Superannuation providers should check for Australian Taxation Office guidance about any re-reporting requirements for contributions that are reclassified as not being downsizer contributions.

A contribution is only a downsizer contribution to the extent that it is from an individual’s share of the proceeds of the sale of a dwelling. The maximum amount that an individual can contribute from the proceeds of such a sale is \$300,000. This can be done as a single contribution or as multiple contributions. A superannuation provider may become aware that a contribution it has received is an ineligible downsizer contribution, in whole or in part, (for example, they are notified of that fact by the Commissioner, or it exceeds the \$300,000 limit). They must then 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 be allowed under those contribution acceptance rules, but will also count towards the individual's contributions caps, generally expected to be a non-concessional contribution. In such cases if the excess amount causes an individual to exceed their non-concessional contribution cap, the excess will need to be either released from superannuation or, if it is left in superannuation, the member may be subject to excess non-concessional contributions tax.

For example, if an individual makes a \$200,000 downsizer contribution to one superannuation provider and attempts to make an additional \$200,000 downsizer contribution to a separate superannuation provider, a total of \$400,000 has been contributed. This will result in \$100,000 of the second contribution being ineligible to be a downsizer contribution. In such cases, the Commissioner would notify one of the superannuation providers and that provider would assess whether the individual could have made that \$100,000 contribution as a member contribution anyway. If the individual was under 75 years old and met a work test under the items 2 or 3 in the table in subregulation 5.03(1) of the RSAR 1997 or subregulation 7.04(1) of the SISR 1994 and has cap space, the fund may be able to retain the contribution. Otherwise, it must refund the contribution to the individual under subregulation 5.03(4) of the RSAR 1997 or subregulation 7.04(4) of the SISR 1994.

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.

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).

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.

Statement of Compatibility with Human Rights

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

Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Regulations 2018

The Amending Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Amending Regulations make changes to prescribe the withholding amount applicable to FHSS released amounts and allow superannuation entities to accept downsizer contributions.

Human rights implications

The Amending Regulations do not engage any of the applicable rights or freedoms.

Conclusion

The Amending Regulations are compatible with human rights as they do not raise any human rights issues.