

EXPLANATORY STATEMENT

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

Taxation Administration Act 1953

Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Regulations 2018

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

Section 18 of the TAA 1953 provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Schedule 1 to the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Regulations 2018* (Regulations) amends the *Taxation Administration Regulations 2017* to prescribe the circumstances in which the Commissioner of Taxation (the Commissioner) is to make a determination that an individual has suffered a ‘financial hardship’ for the purposes of the First Home Super Saver Scheme (FHSSS).

The *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017* established the FHSSS. The scheme 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).

To be eligible to use the FHSSS, an individual must have never held an ownership or similar interest in Australian real property. However, an individual who has held such an interest can still qualify for the FHSSS if the Commissioner determines that they have suffered a ‘financial hardship’ (see subsection 138-10(2A) of Schedule 1 to the TAA 1953). Subsection 138-10(2B) of Schedule 1 to the TAA 1953 provides that the regulations may specify the circumstances in which the Commissioner is to determine that an individual has suffered a financial hardship.

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

The TAA 1953 does not specify any conditions that need to be satisfied before Regulations are made.

The Regulations were not subject to public consultation. This is appropriate as the Regulations is relatively minor and machinery in nature. However, the Australian Taxation Office (as the agency responsible for making the relevant determinations) was consulted throughout the development of the Regulations.

The Regulations commence on 1 July 2018, being the same as the time that the related amendments in the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017* are due to commence. However, if the Regulations are made after 1 July 2018, the Regulations commence the day after registration.

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. 2) Regulations 2018

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Legislative Instrument prescribes the circumstances in which the Commissioner of Taxation is to make a determination that an individual has suffered a ‘financial hardship’ for the purposes of the First Home Super Saver Scheme. Individuals who obtain such a determination are able to access the scheme despite having previously owned a property that would otherwise disqualify them.

Human rights implications

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

Conclusion

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

Details of the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Regulations 2018

Section 1 – Name of Regulations

This section provides that the title of the Regulations is the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Regulations 2018*.

Section 2 – Commencement

This section provides that the Regulations commence immediately after the commencement of Schedule 1 to the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017* (the Act). However, if the Regulations are made after 1 July 2018, the Regulations commence the day after they are registered.

While the Act has received the Royal Assent, Schedule 1 to the Act will commence on 1 July 2018. As a result of this deferred commencement, this instrument is to be made before the time the enabling provisions commence, in accordance with section 4 of the *Acts Interpretation Act 1901*. This approach is necessary to ensure that the Commissioner is able to make a determination that an individual has suffered a financial hardship from the time that such individuals are first able to access the scheme.

Such determinations can only begin to be made from the time that Schedule 1 to the Act commences. As such, even in the absence of subsection 4(4) of the *Acts Interpretation Act 1901*, the Regulations would not confer power or right or impose an obligation on a person before the time that Schedule 1 to the Act commences.

Section 3 – Authority

This section provides that the Regulations are made under the TAA 1953.

Section 4 – Schedule

This section provides that each instrument that is specified in the Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule, and any other item in the Schedule has effect according to its terms.

Schedule 1 – Financial Hardship

Item 1 – section 61A

Item 1 of the Regulations provides that the Commissioner is to determine that an individual has suffered financial hardship for the purposes of the FHSSS if, and only if:

- the individual requests that the Commissioner make a determination that they have suffered a financial hardship determination at the time they request a ‘first home super saver determination’; and
- the person had previously held one or more property interests of the kind specified in paragraph 138-10(2)(a) in Schedule 1 to the TAA 1953; and
- the Commissioner is satisfied that the individual a suffered financial hardship that resulted in them ceasing to hold any such property interest that were held at the time of the hardship; and
- the individual had not held any other such property interests during the period beginning from the time that the last interest was held and ending when the individual requested the determination.

Item 1 of the Regulations also provides that the Commissioner may have regard to the information provided by the individual and any other information that the Commissioner considers relevant to the determination (for example, land title information in respect of the acquisition or disposal of property interests).

Requesting a determination

The requirement that an individual request that the Commissioner determine that they have suffered a financial hardship at the time they request a first home super saver determination is based on the fact that, in certain circumstances, the determination about financial hardship forms part of the overall first home super saver determination process.

While the determination about financial hardship is a step in the process for successfully obtaining a first home super saver determination (as it overcomes the general requirement about having never held a property interest), it is expected that the Commissioner will make the determination about financial hardship through a separate administrative process.

This will mean that, in practice, individuals who wish to know whether they are eligible to use the financial hardship determination exception must request it as the first step in the process of a first home super saver determination. If the Commissioner determines that they are eligible for hardship the individual can proceed with the second step in the determination process after making voluntary contributions, provided that they have not subsequently acquired a property interest.

This approach will provide individuals with certainty about their eligibility to access the scheme before making voluntary contributions into superannuation.

Previous property interests

The requirement that an individual had previously held one or more property interests of the kind specified in paragraph 138-10(2)(a) in Schedule 1 to the TAA 1953 reflects that the sole purpose of a determination about financial hardship is to overcome the fact that such interests would otherwise preclude the Commissioner from making a first home super saver determination.

A determination about financial hardship does not allow an individual who has previously used the FHSSS to access the scheme another time. Although a determination about financial hardship can assist individuals seeking a first home super saver determination who would otherwise fail the requirement about not having held any previous property interests, it is not intended to satisfy the separate requirement that an individual had not previously requested a release authority in relation to a first home super saver determination (see paragraph 138-10(2)(c) of Schedule 1 to the TAA 1953). This is the case even if the property that the individual acquired from the previous use of the scheme was lost because of a financial hardship.

The property interests that are covered by paragraph 138-10(2)(a) are freehold interests in real property in Australia, long-term leases covered by paragraph 104-115(1)(b) of the *Income Tax Assessment Act 1997* (which provide rights akin to ownership interest), and company title interests within the meaning of section 317 of the *Income Tax Assessment Act 1936* (which were a common way to hold interests in multi-storey properties prior to the introduction of strata-title).

Financial hardship

The concession in respect of the property ownership requirement allows individuals who are effectively in the same position as a first home saver as a result of suffering a financial hardship to access the FHSSS, despite the fact that they have previously owned property. It does not matter whether the circumstances that led to the financial hardship were outside of the individual's control or a result of their own actions.

The term 'financial hardship' is not defined by reference to particular events. Instead, the key requirement that must be satisfied in order for the Commissioner to determine that there has been a financial hardship is the fact that an event caused the individual to lose all the relevant property interests that they held at the time of the event. This requirement ensures that the individual is effectively returned to the same position as a first home saver.

In this respect, the test of whether an individual has suffered a financial hardship focusses on the *result* of a particular hardship event, rather than its form.

Notwithstanding this position, it is envisaged that the types of events that could result in an individual ceasing to hold their property interests include (but are not limited to) those that involve the individual:

- experiencing bankruptcy;
- being involved in a divorce, separation from a de-facto partner, or relationship breakdown;
- having a loss of employment;
- experiencing illness;
- being affected by a natural disaster; or
- being eligible for early access to superannuation.

Consistent with the above statements about the focus on the result of a particular event, the mere fact of any of the above events occurring is not sufficient for the Commissioner to determine that an individual suffered financial hardship. Rather, the Commissioner must be satisfied that the event, however described, led to the individual losing all relevant property interest they held at that time.

In working out whether an individual has suffered a financial hardship, the Commissioner is not required to assess their financial position at the time that the determination is requested. This approach is consistent with the approach generally under the FHSSS, under which an individual's prior property ownership, and not their financial position, is relevant. It also reflects that an individual who has previously suffered a financial hardship will only be in a position to save under the FHSSS and purchase a new home if their financial position had recovered to a certain extent.

No subsequent property interests

The requirement that an individual has not held any property interests since losing any such interests that were held at the time of the hardship ensures that individuals who have recovered from a historical hardship event and purchased property in the intervening period are not treated as being in the same position as a genuine first home saver.

If an individual acquires a property interest after they have sought a determination that they have suffered a financial hardship but before completing the process for obtaining a first home super saver determination, the earlier decision about financial hardship will no longer be valid. This is because the determination about financial hardship forms part of the general first home super saver, and the condition that no property interests had been acquired continues to apply until that more general determination has been made.

This can be distinguished from the above statement about the financial position of the individual being irrelevant, as an acquisition of property after the financial hardship is specifically intended to preclude an individual from accessing the FHSSS.

Review of decisions

Review rights in respect of first home super saver determinations are generally available under section 138-15 of Schedule 1 to the TAA 1953. That section makes specific provision in respect of a decision the Commissioner makes not to make a determination that an individual has suffered a financial hardship for the purposes of the FHSSS. Individuals may object to such a decision in the manner set out in Part IVC of the TAA 1953.