



## First Home Saver Accounts (Further Provisions) Amendment Bill 2008

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Law and Bills Digest Section

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## First Home Saver Accounts (Further Provisions) Amendment Bill 2008

**Date introduced:** 4 September 2008

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** The formal provisions commence on Royal Assent; Schedules 1 and 2 commence on the day after the Act receives Royal Assent; Schedule 3 commences on 1 July 2009; and Schedule 4 commences on the day after Royal Assent, or the commencement of Schedule 1 to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (the De Facto Financial Matters Act, whichever occurs later).<sup>1</sup>

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

Primarily the Bill makes consequential amendments to a number of Acts following the passage of the *First Home Saver Accounts Act 2008* (the FHSA Act).

### Background

The First Home Savers Accounts (FHSA) initiative was a commitment made by the Australian Labor Party during the 2007 election campaign to assist first home buyers to save for a deposit for a home. The background to the initiative is set out in detail in the Bills Digest for the First Home Savers Accounts Bill 2008.<sup>2</sup> Following public consultation on the proposed arrangements for the accounts, the original Bill was introduced into the House of Representatives on 28 May 2008 and into the Senate on 16 June 2008. The

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1. The De Facto Financial Matters Bill 2008 is currently before the Parliament. Schedule 1 to that Bill/Act is to commence 6 months from the day of Royal Assent or earlier by Proclamation. However if Schedule 1 to the De Facto Financial Matters Act does not commence, then Schedule 4 to the current Bill does not commence at all.
  2. Matthew Thomas, Diane Spooner and Adrian Makeham-Kirchner, 'First Home Saver Accounts Bill 2008', *Bills Digest*, no. 138, Parliamentary Library, Canberra, 2007–08, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd138.pdf>, accessed on 8 September 2008.

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FHSA Act received Royal Assent on 25 June and commenced on 26 June 2008. The term 'FHSA' is defined in section 8 of the FHSA Act as follows:

An individual's account, life policy or beneficial interest in a trust is an *FHSA* (short for first home saver account) if:

- (a) it is described as an FHSA; and
- (b) it is opened or issued on or after 1 October 2008 (or a later day (if any) specified in the regulations); and
- (c) it is:
  - (i) an account to which an [Authorised Deposit-taking Institution] accepts, or has accepted, contributions; or
  - (ii) a life policy issued by a life insurance company; or
  - (iii) a beneficial interest in a trust constituted by a deed, the trustee of which holds an authorisation as an FHSA provider.

The Bill amends 12 Acts to insert reference to various matters related to FHSAs which are discussed in the **Main Provisions** section below. In summary, some amendments are of a fairly minor but technical, consequential nature, such as the updating of legislative references to include reference to provisions and concepts in the FHSA Act. Other amendments are more substantial, such as those which extend secrecy provisions to cover the sharing of information about FHSAs. **Schedule 3** to the Bill contains amendments which are consequential upon the passage of the First Home Saver Account Providers Supervisory Levy Imposition Bill 2008. That Bill was introduced at the same time as the current Bill. It is, however, the subject of a separate Bills Digest.<sup>3</sup>

The Bill also amends the FHSA Act itself (see the discussion of **items 2–3 of Schedule 1** and **items 4–37 of Schedule 2** to the Bill below). Some of these amendments are of a minor, consequential nature, but others contain new, substantive material, such as the insertion of **proposed Part 4A** of the FHSA Act, which deals with unclaimed money in FHSAs. Other amendments alter secrecy and disclosure provisions in various Acts, primarily to enable the sharing of information between Government agencies that perform functions in relation to FHSAs.

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3. See Morag Donaldson, 'First Home Saver Account Providers Supervisory Levy Imposition Bill 2008', *Bills Digest*, no. 22, Parliamentary Library, Canberra, 2008–09.

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## Committee consideration

On 4 September 2008, the Senate Selection of Bills Committee resolved to recommend that the current Bill should not be referred to any committee.<sup>4</sup> At the time of writing, the Bill has not been referred to any other committee for inquiry and report.

The Senate Select Committee on Housing Affordability referred to FHSAs in its report titled ‘A good house is hard to find: Housing affordability in Australia’, published on 16 June 2008—the same day as the First Home Saver Accounts Bill 2008 was introduced into the Senate. Chapter 9 of that report is headed ‘Current and proposed schemes to increase home ownership’. The Senate Committee found (at paragraph 9.18) that some aspects of the FHSA scheme ‘are widely praised, such as the encouragement for households to save more and build a deposit’, adding that ‘[t]his may help build a culture of saving’.<sup>5</sup> However, the Senate Committee also noted three concerns about the scheme, ‘two of which have at least partly been addressed by the government’s modifications’ to the original FHSA Bill. The concerns are that the scheme is too complex; it is unfair; and it could lead to higher house prices.<sup>6</sup> In the event, the Committee made no recommendation in relation to the scheme.

## Financial implications

According to the Explanatory Memorandum for the Bill, the amendments contained in the current Bill ‘will not have a financial impact’.<sup>7</sup>

In relation to the impact of compliance costs, the Explanatory Memorandum states: ‘There are likely to be medium implementation costs for providers who choose to offer FHSAs. However, the design of the initiative as reflected in the law has sought to minimise compliance costs for account providers.’

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4. Selection of Bills Committee, Report No. 10 of 2008, 4 September 2008, p. 3, [http://www.aph.gov.au/senate/committee/selectionbills\\_ctte/reports/2008/rep1008.pdf](http://www.aph.gov.au/senate/committee/selectionbills_ctte/reports/2008/rep1008.pdf), accessed on 15 September 2008.
  5. Senate Select Committee on Housing Affordability, ‘A good house is hard to find: Housing affordability in Australia’, 16 June 2008, [9.18], [http://www.aph.gov.au/Senate/committee/hsaf\\_ctte/report/c09.htm](http://www.aph.gov.au/Senate/committee/hsaf_ctte/report/c09.htm), accessed on 8 September 2008.
  6. *ibid.*, [9.20]–[9.23].
  7. First Home Saver Accounts (Further Provisions) Amendment Bill 2008, Explanatory Memorandum, p. 9.

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## Main provisions

### Schedule 1

**Schedule 1** contains amendments that will apply from 1 October 2008, when FHSAs come into being.

#### *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

**Item 1 of Schedule 1** repeals the definition of ‘contribution’ in section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, and replaces it with a new definition. Currently, the definition provides:

“**contribution**”, in relation to an FHSA or [retirement savings account], has the same meaning as in the *Retirement Savings Accounts Act 1997*.

The content of the proposed definition is not different but it is clearer, because it no longer relies on the cross-referenced definition of ‘FHSA’ located elsewhere in section 5 (where a FHSA is defined by reference to the FHSA Act), and removes the possibility that a reader may look to the *Retirement Savings Account Act 1997* (Retirement Savings Account Act) for a definition of a FHSA.

#### *First Home Saver Accounts Act 2008*

**Item 2** amends subsection 31(1) of the FHSA Act to include **proposed paragraph 31(1)(h)**. Section 31 provides that a FHSA provider must not make a payment from the FHSA unless authorised by law. **Proposed paragraph 31(1)(h)** authorises the provider to ‘make a payment of an amount of tax’.

**Item 3** inserts **proposed section 126C** into the FHSA Act. (**Item 37 of Schedule 2** to the Bill inserts **proposed sections 126A and 126B**—see below.) Proposed section 126C protects a FHSA provider from liability for any loss or damage suffered by any person for a thing done (or not done) by the FHSA provider in good faith on reliance on either an application under **proposed section 126A** (see below) for information about the balance of a FHSA or a ‘family law obligation’. The term ‘family law obligation’ is defined in section 18 of the FHSA Act to mean:

- (a) a court order under the *Family Law Act 1975*; or
- (b) a financial agreement made under Part VIIIA of the *Family Law Act 1975* that is binding because of section 90G of that Act.<sup>8</sup>

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8. Section 90G of the *Family Law Act 1975* sets out when financial agreements are binding.

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*Fringe Benefits Tax Assessment Act 1986*

**Item 4** expands the definition of ‘fringe benefit’ in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBT Assessment Act) to include reference in **proposed paragraph 136(1)(hd)** to a benefit that is ‘constituted by the making of a contribution to an FHSA’ (as defined in the FHSA Act and quoted above in the **Background** section above) or is an ‘expense payment benefit’ in relation to such a contribution.

The term ‘expense payment benefit’ is defined in subsection 136(1) to mean ‘a benefit referred to in section 20’ of the FBT Assessment Act. Section 20 deals specifically with ‘expense payment benefits’ and provides:

Where a person (in this section referred to as the *provider*):

- (a) makes a payment in discharge, in whole or in part, of an obligation of another person (in this section referred to as the *recipient*) to pay an amount to a third person in respect of expenditure incurred by the recipient; or
- (b) reimburses another person (in this section also referred to as the recipient), in whole or in part, in respect of an amount of expenditure incurred by the recipient;

the making of the payment referred to in paragraph (a), or the reimbursement referred to in paragraph (b), shall be taken to constitute the provision of a benefit by the provider to the recipient.

*Income Tax Assessment Act 1936*

**Item 5 of Schedule 1** inserts a definition of ‘FHSA’ into subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936), which is the interpretation provision in that Act.

**Item 6** amends subsection 159J(6) of the ITAA 1936 by inserting **proposed paragraphs 159J(6)(aae) and (aaf)** to expand the definition of the term ‘separate net income’ (in relation to a dependant) to exclude ‘an amount of earnings or other return credited to an FHSA’ and a ‘Government FHSA contribution’. The term ‘Government FHSA contribution’ is defined in section 11 of the FHSA Act as a ‘contribution to an FHSA or other payment by the Commissioner [of Taxation] that is payable under Part 4 of this Act for a person’.<sup>9</sup>

**Items 7–9** amend the definitions of the terms ‘interest-bearing account’, ‘interest-bearing deposit’ and ‘unit trust’ in section 202A of the ITAA 1936 to make clear that a FHSA does not fall within the scope of those terms. Section 202A is the interpretation section for Part IVA of that Act, which deals with schemes to reduce income tax.

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9. Part 4 of the FHSA Act deals with Government FSHA contributions.

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*Income Tax Assessment Act 1997*

**Items 10–11** insert reference to provisions in the *Income Tax Assessment Act 1997* (ITAA 1997) that deal with FHSAs into section 10-5 of the ITAA 1997, which contains a list of provisions about assessable income in the ITAA 1997. (The list makes it relatively easy to find provisions that deal with assessable income in various contexts.) **Item 12** inserts reference to ‘credits to and payments from’ FHSAs, and ‘tax paid by providers’ of FHSAs in section 11-55 of the ITAA Act 1997, which contains a list of non-assessable non-exempt income provisions in the ITAA Act 1997.

**Item 13** inserts **proposed section 15-80** at the end of Division 15 of Part 2-1 of Chapter 2 of the ITAA 1997. Division 15 deals with some items of assessable income. **Proposed section 15-80** deals with employer FSHA contributions. It provides that a person’s assessable income includes a contribution or expense payment benefit of a kind mentioned in **proposed paragraph (hd)** of the definition of ‘fringe benefit’ in subsection 136(1) of the FBT Assessment Act (see **item 4** of **Schedule 1** above) ‘that, but for that paragraph, would be a fringe benefit’. In other words, employer FSHA contributions constitute assessable income.

**Item 14** amends section 205-15, which sets out a table showing when a credit (called a ‘franking credit’) arises in the franking account of an entity and the amount of the credit. **Proposed subsection 205-15(3)** provides that despite **items 1 or 2** in the table (which deal with an entity that pays a PAYG instalment or income tax), ‘no credit arises on that part of the payment that is attributable to a payment of income tax’ in relation to a FSHA component and/or a retirement savings account component. **Item 16** makes a similar amendment to section 205-30, which sets out a table showing when a debit (called a ‘franking debit’) arises in the franking account of an entity and the amount of the debit.

**Items 20 and 21** amend section 295-615 of the ITAA 1997, which defines when a person has ‘quoted’ (for superannuation purposes) his/her tax file number, to include the situation where a person has provided the tax file number in connection with the FSHA Act.

**Item 22** inserts **proposed sections 345-25 and 345-30** into Division 345 of Part 3-45 of the ITAA 1997. Part 3-45 contains rules for particular industries and occupations. Division 345 deals with FHSAs. **Proposed section 345-25** states that a FSHA provider that is an approved deposit-taking institution (ADI) (other than a retirement savings account provider) cannot deduct anything for amounts credited to FHSAs. **Proposed section 345-30** states that an amount is not assessable income, and is not ‘exempt income’ of a FSHA provider if the amount is paid from a FSHA to the FSHA provider to enable the provider to make a payment of an amount of tax under paragraph 31(1)(h) of the FSHA Act (see **item 2** above) and the provider is an ADI.

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*Superannuation (Government Co-contribution for Low Income Earners) Act 2003*

**Item 23** removes reference to sections 22 and 34 of the FHSA Act from subparagraph 7(1)(c)(v) of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*. Section 7 of that Act deals with ‘eligible personal superannuation contributions’ that attract matching Government co-contributions. Currently subparagraph 7(1)(c)(v) states that the ‘a payment from an FHSA required under section 22 or 34 of the *First Home Saver Accounts Act 2008*’ is not such a contribution. The proposed amendment will mean that a payment from an FHSA under any section of the FHSA Act (and not just section 22 or 34) is not an ‘eligible personal superannuation contribution’.

*Taxation Administration Act 1953*

**Item 24** amends paragraph 12-1(3)(b) in Schedule 1 to the *Taxation Administration Act 1953* (Taxation Administration Act). Schedule 1 deals with the collection and recovery of income tax and other liabilities. Subsection 12-3(3) currently states that in working out how much to withhold from a payment under various provisions of that Act, one must disregard so much of the payment as (a) is an expense payment benefit, as defined by section 136 of the FBT Assessment Act; and (b) is not an exempt benefit under section 22 of that Act (which deals with reimbursement of an employee’s car expenses on the basis of distance travelled). The effect of the proposed amendment in **item 24** is that an ‘expense payment benefit’ in relation to a contribution to a FHSA will be treated in the same way as an exempt benefit under section 22 of the FBT Assessment Act.

**Item 25** replaces the reference to paragraph (g) in paragraph 391-5(1)(e) of Schedule 1 to the Tax Administration Act with a reference to paragraph ‘(g) or (h)’.<sup>10</sup> The amendment means that it will not be necessary for a FHSA provider to include certain FHSA payments in a statement to the Commissioner of Taxation. **Item 25** is consequential upon the amendment made by **item 2** (see above).

**Schedule 2**

The amendments in **Schedule 2** will occur on the day after Royal Assent. This Digest will deal first with the amendments relating to secrecy and disclosure provisions in various

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10. Section 391-5 appears in Division 391, which deals with FHSA reporting. Section 391-5 itself deals with FHSA ‘account activity statements’. Paragraph 391-5(1)(e) states that a FHSA provider must give the Commissioner of Taxation a statement in relation to payments made from each FHSA provided by that provider during a financial year, other than a voluntary transfer of balance of FHSA to another FHSA (under subparagraph 31(1)(b)(iii) of the FHSA Act), or the payment of an amount of fees owing to the FHSA provider for providing the FHSA (paragraph 31(1)(f) of the FHSA Act); or the payment of an amount owing to the Commonwealth in respect of overpayments of Government FHSA contributions (paragraph 31(1)(g) of the FHSA Act).

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Acts, and second with the amendments dealing with unclaimed money. It will then deal sequentially with other amendments.

Amendments relating to secrecy and disclosure provisions in various Acts

**Item 1** of **Schedule 2** to the Bill inserts **proposed subsection 127(1AA)** into the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to provide that subsection 127(1) does not apply to information given or produced in accordance with section 70 of the FHSA Act. Subsection 127(1) of the ASIC Act states that ASIC must take all reasonable measures to protect confidential information and ‘protected information’ (as defined in section 127 of that Act) from unauthorised use or disclosure. Similarly, section 70 of the FHSA Act deals with secrecy and sets out restrictions on the disclosure of this information. Particularly, section 70 of the FHSA Act creates an offence punishable by 2 years’ imprisonment that is committed if a person (including the Commissioner of Taxation and any public servant employed at the Australian Tax Office) (a) makes a record of protected information, or directly or indirectly divulges or communicates protected information about another person; and (b) the record is not made, or the information is not divulged or communicated, for the purposes of the FHSA Act (or its associated regulations).

The amendment in **item 1** is intended to prevent the situation where information is protected from disclosure under both the ASIC Act and the FHSA Act. The amendment will thus enable the sharing of information between agencies for the purposes of the FHSA Act. A person employed at ASIC who receives information that is given or produced under section 70 of the FHSA Act must comply with the restrictions on disclosure of that information contained in section 70.

**Item 13** amends the definition of ‘protected information’ in section 18 of the FHSA Act to exclude from the scope of the definition any protected document or protected information within the meaning of section 56 of the APRA Act, and information that is protected by section 127 of the ASIC Act.<sup>11</sup> While the amendment excludes information obtained directly by ASIC or APRA from the definition of ‘protected information’ in the FHSA Act, such protected document or protected information will continue to be covered (that is, protected from disclosure) by section 56 of the APRA Act and section 127 of the ASIC Act.

**Items 28–33** amend section 70 of the FHSA Act. **Item 28** amends subsection 70(1) (which sets out the persons covered by the section) to replace the reference to a person ‘otherwise appointed or employed by, or a provider of services for, the Commonwealth’ with a reference to a person ‘who, because of his or her employment, or in the course of that employment, has acquired protected information, other than an employee of the body to

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11. This amendment is the mirror image of the amendment contained in **item 1** of **Schedule 2**.

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which the information relates'. The amendment thus extends the range of persons to whom the section applies.

**Item 32** amends subsection 70(5), which protects a person to whom section 70 applies from divulging protected information or producing a protected document to a court except where necessary for the purposes of the FHSA Act or regulations. The amendment removes reference to a 'protected document'. According to the Explanatory Memorandum, such reference is 'superfluous'.<sup>12</sup> Presumably, this is because a 'protected document' would fall within the definition of 'protected information', which currently means information that '(a) concerns a person' and '(b) is disclosed to, or obtained by, a person to whom section 70 applies in the course of, or because of, the person's duties under or in relation to' the FHSA Act or the First Home Saver Account Regulations.<sup>13</sup>

**Item 33** inserts **proposed subsection 70(7A)** into the FHSA Act to authorise the Commissioner (and other persons) to divulge or communicate protected information to APRA and to ASIC for the purpose of allowing those entities to perform functions in relation to FHSAs.

**Item 38** amends subsection 16(4) of the ITAA 1936 to provide that the Commissioner of Taxation (and other persons) do not breach the secrecy provisions of the ITAA 1936 if he/she communicates any information to APRA or ASIC for the purposes of those bodies performing functions in relation to FHSAs.

**Items 41–42** amend section 13J of the Taxation Administration Act, which deals with the provision of Commonwealth taxation information to State taxation authorities. Subsection 13J(1) states:

(1) Notwithstanding anything in a secrecy provision of a taxation law, the Commissioner may communicate information disclosed or obtained under or for the purposes of a taxation law to a State taxation officer for the purposes of the administration of a State tax law if a State taxation officer is authorised by law to communicate similar information to the Commissioner.

**Item 41** replaces the reference to 'similar information' in the last line of that subsection with the phrase 'information obtained under the State tax law'. The amendment clarifies the existing provision, but also makes the section more readily applicable to the FHSA Act by virtue of the amendment contained in **item 42**. **Item 42** states that section 13J applies in relation to the FHSA Act 'as if references in this section to a State tax law' include references to the *First Home Owner Grant Scheme Act 2000* (NSW) and other similar legislation enacted by other States and Territories.

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12. First Home Saver Accounts (Further Provisions) Amendment Bill 2008, Explanatory Memorandum, p. 21 at [2.15].

13. Section 18, FHSA Act.

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Unclaimed money

**Items 2–3 of Schedule 2** to the Bill amends section 69 of the *Banking Act 1959* (Banking Act), which deals with unclaimed moneys. The term ‘unclaimed moneys’ is defined for the purposes of the section to mean:

all principal, interest, dividends, bonuses, profits and sums of money legally payable by an ADI but in respect of which the time within which proceedings may be taken for the recovery thereof has expired, and includes moneys to the credit of an account that has not been operated on either by deposit or withdrawal for a period of not less than 7 years.

**Item 2** inserts reference to FHSAs into subsection 69(3) of the Banking Act, with the effect that an ADI is not required to provide the Treasurer with an annual statement of all sums of unclaimed moneys held in a FHSA.

**Item 4** amends subsection 3(3) of the FHSA Act to provide that ASIC has general administration of Division 2 of Part 7 and Part 4A of the FHSA Act. Division 2 of Part 7 deals with the modified application of the *Superannuation Industry (Supervision) Act 1993* (the Superannuation Industry Supervision Act). Part 4A deals with unclaimed money and is to be inserted by **item 25 of Schedule 2** to the Bill (see below).

**Items 5–9, 19–20 and 22–23**, which also amend the FHSA Act, are largely consequential upon the introduction of **proposed sections 51B and 51C** (see **item 25** below), but some simplify the language used in the existing provisions.

**Item 12** inserts **proposed section 17A** into the FHSA Act, which defines ‘unclaimed money’ as the balance of a FHSA to which no contributions have been made, and from which no payments (other than a payment of the kind mentioned in paragraphs 31(1)(f), (g) and (h)) have been made for at least 7 years. The FHSA provider must be unable to contact the FHSA holder at the end of that period, despite making reasonable efforts to do so. Paragraphs 31(1)(f) and (g) authorise the FHSA provider to deduct an amount of fees owing to the FHSA provider for providing the FHSA, and to pay an amount owing to the Commonwealth in respect of overpayments of Government FHSA contributions. **Proposed paragraph 31(1)(h)** is contained in **item 2 of Schedule 1**.

**Item 14** inserts the term ‘unclaimed money’ into section 18 of the FHSA Act, and defines it by reference to section 17A (see **item 12** of **Schedule 2** above).

**Item 24** amends section 34 of the FHSA Act, which provides that where a FHSA provider has received a request from a FHSA holder, the FHSA provider must pay the balance of a FHSA as a contribution to the FHSA holder’s superannuation fund. The proposed amendment inserts the requirement that the FHSA provider must not have received a notice from the Commissioner under subsection 67(2), or if he/she has received such a notice, that it has been revoked. A notice under subsection 67(2) states that the

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Commissioner is not satisfied that the FHSA holder has a tax file number, and the action which the Commissioner proposes to take in relation to the FHSA.

**Item 25** inserts **proposed Part 4A—Unclaimed money** into the FHSA Act and contains **proposed sections 51A–51E**. As stated in the Explanatory Memorandum for the Bill, the ‘unclaimed money provisions will ensure that FHSA providers are not required to service small, inactive accounts’, thus easing the ‘compliance burden’ for providers.<sup>14</sup>

**Proposed section 51A** makes it an offence for a FHSA provider not to provide a statement to ASIC within 3 months after the end of a calendar year, if there is unclaimed money in a FHSA provided by it at the end of a calendar year. **Proposed subsection 51A(3)** authorises the FHSA to disclose in the statement to ASIC details such as the FHSA holder’s name, address, account number, and the balance of the account (ie the amount of unclaimed money). **Proposed subsection 51A(4)** provides that if the FHSA provider has made payments from the FHSA between the end of the calendar year and the date of the statement, the statement must contain information about those payments. A payment of the kind mentioned in paragraphs 31(1)(f), (g) or (h) is not a relevant payment for the purposes of this subsection (see above, particularly **item 2** of **Schedule 1** and **item 12** of **Schedule 2**).

**Proposed subsection 51B(1)** makes it an offence for a FHSA provider to give a statement to ASIC under **proposed section 51A** if at the same time it does not pay to ASIC ‘an amount equal to the amount of unclaimed money worked out under subsection (2)’.

**Proposed subsection 51B(3)** states that subject to **proposed section 51C**, upon payment of the money to ASIC, the FHSA provider is ‘discharged from further liability in respect of that amount’.

**Proposed section 51C** deals with the situation where unclaimed money that a FHSA provider has paid to ASIC under **proposed section 51B** is later claimed by the FHSA holder (or the person’s legal personal representative). In that circumstance, the FHSA provider must seek the return of the money from ASIC. **Proposed subsection 51C(2)** creates an offence where the FHSA provider has not dealt with the money according to the FHSA holder’s wishes within 30 days of receiving the money back from ASIC. **Proposed subsection 51C(3)** deals with the situation where the FHSA provider has paid more than the balance of the FHSA to ASIC. **Proposed subsection 51C(4)** states that the Consolidated Revenue Fund is appropriated for the purposes of section 51C. **Proposed section 51D** authorises ASIC to publish the information given to it in a statement under subsection 51A(3) in an ‘unclaimed money statement’.

**Proposed section 51E** provides that **proposed sections 51A–51D** are intended to apply to the exclusion of any State or Territory law which requires a FHSA provider to pay

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14. First Home Saver Accounts (Further Provisions) Amendment Bill 2008, Explanatory Memorandum, p. 8.

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unclaimed money to a State or Territory (or to its authority) or to lodge a return relating to unclaimed money. Any relevant State or Territory law continues to exist (—the Commonwealth Parliament has no authority to repeal State or Territory legislation), but by dint of the operation of section 109 of the Commonwealth Constitution, such State or Territory laws would be invalid to the extent of any inconsistency with the proposed Commonwealth law.

Other amendments

**Items 26–27** make minor amendments to subparagraph 67(2)(c) of the FHSA Act, which deals with the invalid quotation of a tax file number. The amendments are consequential upon the passage of other items in the Bill.

**Item 34** inserts **proposed subsection 114(2A)** into the FHSA Act to extend the modified application of the Superannuation Industry Supervision Act to cover unauthorised trusts and trustees.

**Item 36** of **Schedule 2** inserts **proposed section 123A**, which provides that a life insurance company or an ADI may by written notice to APRA revoke a notice given under section 123 of the FHSA Act if the company or ADI does not provide FHSAs or does not offer to provide FHSAs. Section 123 creates an offence that is committed if a life insurance company or ADI provides a FHSA or offers to provide a FHSA if it has ‘not previously informed APRA in writing of its intention’ to provide FHSAs. The offence attracts a penalty of 120 penalty units, which is high compared to other offences in the Bill (or indeed the FHSA Act) which attract a penalty of 50 penalty units.<sup>15</sup> **Item 35** replaces the word ‘informed’ in section 123 (quoted immediately above) with the word ‘notified’.

**Item 37** inserts **proposed section 126A** into the FHSA Act. **Proposed subsections 126A(1) and (2)** authorise a FHSA provider to provide information about the balance of a FHSA, where the spouse (or his/her legal personal representative) requests such information in an approved form. The spouse must require the information to assist him/her to enter into a financial agreement under Part VIIIA of the *Family Law Act 1975* (which deals with financial agreements) or to assist the applicant to obtain a court order under that Act (which would include an order made by consent).

**Proposed subsections 126A(3)–(5)** contain offences that may be committed by a FHSA provider. There is no fault element specified for any of the physical elements of the offences (being intention, knowledge, recklessness or negligence)—although they are not specified to be ‘strict liability’ offences. However, subsection 5.6(1) of the Criminal Code (which applies to offences under Commonwealth laws) provides that ‘if the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element’. Subsection 5.2(1) of the

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15. ‘Penalty unit’ is defined in section 4AA of the *Crimes Act 1914* as \$110.

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Criminal Code states that a person ‘has intention with respect to conduct if he or she means to engage in that conduct’.

In June 2008, the Scrutiny of Bills Committee criticised the use of strict liability offences in the First Home Saver Accounts Bill 2008, particularly the lack of any explanation or justification for the imposition of strict liability offences.<sup>16</sup> The Explanatory Memorandum for the current Bill provides no such information in relation to the proposed amendments/offences.

**Proposed subsection 126A(3)** makes it an offence for a FHSA provider to ‘not comply’ with an application it has received from a spouse under section 126A. **Proposed subsection 126A(4)** makes it an offence for a FHSA provider, in response to an application made by a spouse for information about the balance of a FHSA, to provide ‘any address (including a postal address) of the FHSA holder’. **Proposed subsection 126A(5)** makes it an offence for a FHSA provider to inform the FHSA holder that the application has been made.

Under Commonwealth privacy law (such as Information Privacy Principle 11, which sets out the limits on disclosure of by a record-keeper of personal information held by the record-keeper), the FHSA holder would ordinarily be entitled to have access to records containing his/her personal information or to have a say in the manner in which it is disclosed. However, Information Privacy Principle 6 (set out in section 14 of the *Privacy Act 1988*) provides:

Where a record-keeper has possession or control of a record that contains personal information, the individual concerned shall be entitled to have access to that record, except to the extent that the record-keeper is required or authorised to refuse to provide the individual with access to that record under the applicable provisions of any law of the Commonwealth that provides for access by persons to documents.

The Explanatory Memorandum states that the prohibition on disclosure to a spouse of the FHSA holder, or the fact that an application has been made by the spouse, is necessary ‘to protect the privacy of the FHSA holder and their spouse’.<sup>17</sup>

**Proposed section 126B** prohibits certain uses of FHSAs. **Proposed subsection 126B(1)** states that a term of a contract or other agreement providing for a charge (including a mortgage) over a FHSA has no effect. **Proposed subsection 126B(2)** states that rights to payments from a FHSA ‘cannot be assigned’. **Proposed subsection 126B(3)** states that a FHSA provider must not recognise a charge over a FHSA or an assignment of rights to

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16. See Senate Standing Committee for the Scrutiny of Bills, Alert Digest, No. 4 of 2008, 4 June 2008, pp. 40–41, at <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2008/d04.pdf>, accessed on 15 September 2008.

17. First Home Saver Accounts (Further Provisions) Amendment Bill 2008, Explanatory Memorandum, p. 33 at [4.15].

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payments under a FHSA, with **proposed subsection 126B(4)** making it an offence for a person to do something that results in a contravention of **proposed subsection 126B(3)**.

**Items 39–40** amend section 216 of the *Life Insurance Act 1995*, which deals with unclaimed money held by a life company, so that FHSAs are treated in the same way as retirement savings accounts.

### Schedule 3

**Schedule 3** commences on 1 July 2009.

**Item 1** of **Schedule 3** inserts **proposed subsection 7(4A)** into the *Authorised Deposit-taking Institutions Supervisory Levy Imposition Act 1998* (ADI Levy Act). Section 7 of the ADI Levy Act contains the amount of levy payable by an ADI for a financial year. The effect of **proposed subsection 7(4A)** is that the Treasurer, in determining by legislative instrument under paragraph 7(3)(d) ‘how an ADI’s asset value is to be worked out’, ‘must exclude an amount equal to the total balances’ of all FHSAs provided by the ADI.

**Items 2–5** of **Schedule 3** amends sections 7 and 8 of the *Financial Institutions Supervisory Levies Collection Act 1998* to include reference to a ‘leviable FHSA body’ in the definitions of ‘leviable body’ and ‘levy’.

**Item 6** inserts **proposed subsection 7(4A)** into the *Life Insurance Supervisory Levy Imposition Act 1998* (Life Insurance Levy Act). Section 7 of that Act is similar to section 7 of the ADI Levy Act mentioned in **item 1** of **Schedule 3** above. Section 7 of the Life Insurance Levy Act contains the amount of levy payable by a life insurance company for a financial year. The effect of **proposed subsection 7(4A)** is that the Treasurer, in determining by legislative instrument under paragraph 7(3)(d) ‘how a life insurance company’s asset value is to be worked out’, ‘must exclude an amount equal to the total balances’ of all FHSAs provided by the life insurance company.

### Schedule 4

**Item 1** of **Schedule 4** amends **proposed paragraph 126A(2)(a)** of the FHSA Act (see **item 37** of **Schedule 2** above) to include reference to Part VIIIAB of the Family Law Act if that Part is enacted. Part VIIIAB is contained in the De Facto Financial Matters Bill 2008 that is currently before the Parliament and deals with financial matters relating to *de facto* relationships. For details of **proposed section 126A** of the FHSA Act, see **item 37** of **Schedule 2** above. If Part VIIIAB is enacted, the FHSA Act will not have to be re-amended so as to apply to family law matters between *de facto* and same sex relationships.

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## Concluding comments

As mentioned throughout this Digest, many of the amendments contained in the Bill are of a minor but technical nature. They predominantly insert references to FHSAs and provisions in the FHSA Act into a number of relevant and related Acts, particularly ones dealing with finance and taxation.

There are, however, several amendments which make substantive changes to the law, but again these are not particularly controversial and generally ensure consistency of treatment of FHSAs with (for example) retirement savings accounts.

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