



Temporary Residents' Superannuation Legislation Amendment Bill 2008

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Temporary Residents' Superannuation Legislation Amendment Bill 2008

Date introduced: 25 September 2008

House: House of Representatives

Portfolio: Treasury

Commencement: Schedule 1 commences on a day to be fixed by proclamation, or 6 months after Royal Assent, whichever is earlier. All other sections commence on the day of Royal Assent.

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

The Bill amends the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (S(UMLM) Act), the *Taxation Administration Act 1953* (TAA) and the *Income Tax Assessment Act 1997* (ITAA) so that when temporary visa holders leave Australia without taking their superannuation, relevant amounts are reportable and payable to the Commissioner of Taxation (the Commissioner) as unclaimed superannuation.

Background

Basis of policy commitment

The government announced in the 2007-08 Mid-Year Economic and Fiscal Outlook a measure to require the future superannuation contributions and existing balances for temporary residents to be paid to the Australian Government, with effect from 1 July 2008. Under the measure, temporary residents who permanently depart Australia can claim their superannuation (subject to the existing withholding tax arrangements) by contacting the Tax Office within five years of departing the country.

Temporary residents who become permanent residents will have their superannuation transferred into a superannuation fund (subject to the same tax arrangements that apply to Australian residents) with interest.

Currently, superannuation contributions, earnings and benefits are concessionally taxed in Australia on the basis that they will be used to meet the retirement income needs of Australians. Accordingly, where those benefits are accessed early prior to reaching a preservation age, additional tax is generally imposed to recover the tax concessions.

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Temporary residents are currently able to claim their superannuation after permanently departing Australia by applying for a Departing Australia Superannuation Payment (DASP) from their superannuation fund. The DASP is the value of their superannuation minus tax (which is 30 per cent for the taxed element of a benefit and 40 per cent for an untaxed element).

Despite the ability to claim their superannuation many temporary residents do not do so, leaving significant amounts of small and lost balances in the superannuation system and contributing to the total amount of lost monies in the system. According to the Australian Taxation Office's 2006-07 Annual Report there are over six million lost superannuation accounts on the Lost Member Register maintained by the Australian Taxation Office (ATO), with an aggregate value of approximately \$12 billion.¹

To address this, the amendments contained in Schedule 1 to the Bill will:

- identify the amount of superannuation as unclaimed superannuation of the person who was previously a holder of a temporary visa, where at least six months have passed since the person's temporary visa ceased to be in effect and they have left Australia
- require superannuation providers that hold such unclaimed superannuation for departed temporary visa holders to pay such amounts to the Commissioner, and
- allow departed temporary visa holders to recover any amounts paid to the Commissioner as unclaimed superannuation where certain conditions have been satisfied (subject to the DASP withholding tax).

It is important to note that the government is concerned by the growing amount of superannuation which has been identified as lost over the last decade. Superannuation funds are required to report details of lost members to the ATO, and these details are recorded on the Lost Members Register to assist individuals in locating their accounts. One purpose of this Bill is to reduce operational costs on both the ATO and superannuation funds in managing these lost accounts.

Through this Bill the government wants to ensure that superannuation tax concessions are well targeted at individuals who will retire in Australia, and as such temporary residents who have departed Australia ought not to be treated with such support.

1. Temporary Residents and Superannuation, Consultation Paper, May 2008, Commonwealth of Australia, p 1, See:
http://www.treasury.gov.au/documents/1374/PDF/Temporary_Residents_and_Superannuation.pdf

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On 5 May 2008, the Government sought submissions and comments on the proposal from stakeholders in order to assist in settling the detailed administrative and legislative design of features of the announced policy.²

By the end of May, the government received 47 written submissions from the stakeholders, including the Association of Superannuation Funds of Australia Ltd (ASFA), through the consultation process.

The submissions from the stakeholders raise some important questions about the associated issues that would arise through the passage of this Bill. They are:

- increasing business compliance costs
- potential loss of insurance cover for temporary residents while working in Australia, and
- the unintended consequence of shifting nature of hiring of temporary workers in Australia and its impact on the Australian economy.

Position of significant interest groups/press commentary

In a [submission](#) to the Treasury of its views about the proposed bill, the ASFA suggested a reconsideration of the policy framework.³

In the submission, ASFA raised its broad concerns as follows:

- Rather than targeting specific problem-accounts, the government has adopted a broad brush approach
- A significant number of superannuation fund members will suffer a loss of benefits
- There may be adverse impacts on the Australian labour market
- There is an element of retrospective taxation in the proposal
- The measure does nothing to improve the retirement living standards of retirees
- The measure will impose additional costs on every APRA regulated superannuation fund in Australia, and
- The measure may breach the Constitution

ASFA argued that the retrospective nature of the change is a problem because:

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2. Senator the Hon Nick Sherry 'Payment of Temporary Residents' Superannuation to the Australian government' [Media release](#) 5 May 2008.
 3. Payment of Temporary Residents' Superannuation to the Australian Government, the Association of Superannuation Funds of Australia, Submissions, 26 May 2008

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- many temporary residents have contributed money to superannuation with the intention of leaving it within the Australian system until they have met a condition of release other than the DASP condition of release. This course of action would have been planned under current legislation and, in many cases, with financial advice;
- Where these people are forced to withdraw their benefits under the DASP provisions under penalty of forfeiture, the action will result in an imposition of tax that is substantially more than was their original reasonable expectation. In the majority of cases the resulting tax rate will exceed their personal income tax rate when employed in Australia;
- In the absence of any opportunity for these people to undo their previous actions, the effect of the change is the imposition of a retrospective tax.⁴

Additionally, ASFA contended that the measure breached the constitution for the following reasons:

Subsection 51(xxxi) of the Australian Constitution grants parliament the power to acquire property on just terms from any person for any purpose in respect of which the Parliament has power to make laws.

The proposed structure of the arrangement is to impose a tax on fund trustees of the equivalent of 100% of a temporary resident's account balance in the fund. The expectation is that the trustee will recover the tax paid from the members' account and the member will retain a property interest in the monies held by the ATO and will be able to reclaim the money on departure from Australia.

(There is a presumption in this that fund trustees have the capacity, under the relevant trust deed, to recover the tax from the member. This may be a false presumption.)

Arguably the proposal to not pay any interest on moneys that are transferred to the ATO and the proposal to confiscate amounts that remain unclaimed five years after the temporary resident has left the country would appear to be a breach of subsection 51(xxxi).⁵

The law with respect to section 51(xxxi) is notoriously complex, particularly as to when the purported property in question is something conferred by, or related to, Commonwealth legislation. Property may also be affected by other laws, particularly taxation (section 51(ii)), an independent head of power which is not directly affected by section (xxx). Further, even if a law is one to which section 51(xxxi) applies, whether interest is required to be paid appears to depend on the particular circumstances – it is not

4 Payment of Temporary Residents' Superannuation to the Australian Government, the Association of Superannuation Funds of Australia, Submissions, 26 May 2008

5 *ibid*, p. 7

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an automatic requirement.⁶ It is notable that neither the Explanatory Memorandum nor the second reading speech addresses the point raised by ASFA.

However, the main point that ASFA enunciated was the increased business costs of superannuation providers to observe the thrust of the policy associated with the complexity of compliance.

Through another submission, the Corporate Super Association (CSA) highlighted their concern with the following points:⁷

It is essential that conflict be avoided between award and contractual requirements and any new requirements under the legislation (to avoid double support requirements). If employers are to be required to comply with provisions in the legislation that conflict with award and contractual requirements, any contractual or award requirements are to be overridden, and the legislation should provide absolute protection for employers and trustees who comply with the requirements in the legislation.

We deplore the suggestion that no earnings should be paid on the proposed ATO accounts for temporary residents. We consider that this breaches fundamental principles of equity, and that interest should be paid at same rate related to the long term Treasury bond rate.

We are concerned about the insurance aspects of the proposal and consider that the proposals will involve employers in higher insurance costs or expose the employees to risks where they are not protected. We believe that costs are increased even where the employees continue to be members of the employer-sponsored fund, because the annual removal of balances will in a number of cases reduce the capital from which the insurance is funded.

Financial implications

The consequence of the policy was noted to be an increase in the underlying cash balance of the Commonwealth by some \$877 million in net terms over the Forward Estimates.

The explanatory memorandum says that this measure will have a positive revenue impact to the government as follows:⁸

6. See Lumb and Moens' *The Constitution of the Commonwealth of Australia*, 7th ed. 2007, pp. 183–184.

7. Submission of Temporary Residents and Superannuation, Corporate Super Association, May 2008

8. Explanatory Memorandum, Temporary Residents' Superannuation Legislation Amendment Bill 2008, p. 9

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2007-08	2008-09	2009-10	2010-11	2011-12
Nil	\$251m	\$378m	\$299m	\$224m

The explanatory memorandum notes that, in relation to Commonwealth implementation costs, provisions, for costs of \$10 million per annum for the Australian Taxation office (ATO) and \$2 million per annum for the Department of Immigration and Citizenship (DIAC) over the forward estimates period were made in the *2007-08 Mid-Year Economic and Fiscal Outlook*.⁹ Similarly, it notes that:

Superannuation funds are estimated to, on average, have implementation costs of \$33,000 per provider and ongoing annual costs of \$2,500 per provider.¹⁰

Key issues

There were over 239,152 temporary resident visas granted with work rights and over 87,300 business long-stay '457 visas' issued in the financial year ending in June 2007,¹¹ and the quantum of temporary visa has been increasing.

For the temporary residents who did not take back their superannuation amount at the time of departure from Australia, this Bill would result in their unclaimed superannuation balance to be transferred to the ATO after six continuous months from the day of departure. And hence, the ATO will be authorised to issue a notice to relevant superannuation funds to comply with the provisions of this legislation.

Departed temporary residents will be able to claim, for an indefinite period, their superannuation benefits less the DASP tax, back from the ATO.

Superannuation funds:

Upon notice from the Commissioner, the provider agency of superannuation to departed temporary residents will have to pay that superannuation to the Commissioner.

In the process, the Government expects that this bill will assist to reduce the number of small and lost accounts relieving the burden from superannuation funds to manage ever increasing number of such accounts.

9. *ibid.*, p. 9.

10. *ibid.*

11. *ibid.*

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Government agencies:

The Bill will require the ATO to implement a system to match those individuals identified by the DIAC as departed temporary visa holders with account information provided by superannuation funds, and then will notify superannuation funds about the status.

The ATO will pay individuals (or their legal personal representatives) where amounts are claimed late, and roll over amounts into a superannuation fund if directed by the claimants.

The DIAC will identify those individuals who are to be considered for the purpose of notification by the ATO to the relevant superannuation agencies.

Comparison of key features of new law and current law

Under the provisions of the current law, the superannuation of a departed temporary visa holder who does not take a DASP upon departure remains in the fund until it is claimed or becomes payable to the Commissioner as unclaimed money (eg., reached age 65, no contributions received and no contact). The departed temporary visa holder can later claim the amount back from the Commissioner.

Under the provisions of the proposed law, the superannuation of a departed temporary visa holder, who does not take a DASP upon departure, could be paid to the Commissioner as unclaimed superannuation. The departed temporary visa holder can later claim back the amount from the Commissioner.

Main provisions

For the purpose of Part 3A of the S(UMLM) Act, several new concepts are inserted into the definition provision at section 8.

Items 5-7 and 9-12 deal with the amendment of Part 3A of the S(UMLM) Act, with the insertion of new concepts at section 8 of the S(UMLM) Act. The meaning of concepts including *approved form, engage in conduct, general interest charge, leave Australia, legal personal representative, schedule statement day, superannuation interest*, and *terminal medical condition* are in general associated with the duties and obligations of superannuation funds in terms of submission of statement and payments for a departed temporary resident from Australia.

Item 13-15 deal with the insertion of **new subsections 16(7), 17(2A)** and a note into subsection 17(1) of the S(UMLM) Act in respect of the submission of statements to the Commissioner of 'unclaimed money' with a superannuation provider. Under subsection 12(1) of the S(UMLM) Act (member reached age 65) and section 16 of the S(MULM) Act, a person is not required to specify an amount in a statement for the purposes of section 17 of the S(UMLM) Act and paying the amount thereof. These amendments waive

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the obligation to submit another statement under section 16 of the S(UMLM) Act or to transfer the money under section 17, suggesting that the provider will not commit an offence under subsections 16(5) and 17(6) of the S(UMLM) Act in complying with Part 3A of the S(UMLM) Act. The Commissioner's requirement to make a payment under Part 3A and not under section 17 of the S(UMLM) Act has been suggested for the money received by the Commissioner under both section 17 and Part 3A of the S(UMLM) Act.

Item 16 inserts **new sections 20A –20P** into the S(UMLM) Act. These provisions deal with the Commissioner's notice to a superannuation provider asking for a statement; making payment to the Commissioner by a certain time; encompass how, when and under what circumstances a superannuation provider identifies a temporary visa holder; and when it withdraws an identity provided under section 20C of the S(UMLM) Act.

For instance, **proposed section 20C of the Bill** deals with notice under Part 3A of the S(UMLM) Act requires the Commissioner to give a written notice (section 20C notice) to a superannuation provider for a fund identifying a person, if the Commissioner is satisfied that all of the circumstances exist:

- There are reasonable ground to believe that the person has a superannuation interest in the fund
- The person was previously a holder of a temporary visa, other than a visa prescribed by the *Superannuation (Unclaimed Money and Lost Members) Regulation 1999* Regulation) that has ceased to be in effect
- The person left Australia after starting to be the holder of the visas
- At least six continuous months have passed since the visas ceased to be in effect and the person left Australia and
- The person is not a holder of a temporary visa or permanent visa
- The person is not an Australian citizen, or New Zealand citizen, and
- The person has not made a valid application for a permanent visa that has not been finally determined under the *Migration Act 1958*.

In general terms, once a provider receives a notice from the Commissioner under **proposed section 20C** of the S(UMLM) Act, it is required to give a statement and make a payment to the Commissioner by a certain time.

The Commissioner, however, is not required to give a notice under section 20C of the S(UMLM) Act (even where all the circumstances mentioned above exist) to a superannuation provider that is either:

- The trustee of a state or territory public sector superannuation scheme within the meaning of section 18 of the S(UMLM) Act; or

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- The trustee of an unfunded public sector scheme as defined in the *Superannuation Guarantee (Administration) Act 1992*.

The Commissioner must revoke a notice given to a superannuation provider under **proposed section 20C** if the Commissioner is satisfied that the notice should never have been given to the provider in the first place for a person (ie, the circumstances for giving the notice did not exist in the first place); or the circumstances relating to a person have changed since the time the notice was given (ie, the circumstances for giving the notice no longer exist)(**proposed section 20J**).

The proposed new section 20D of the Bill deals with a superannuation providers' requirement to give statements and make payments to the Commissioner (following receipt of a notice under **proposed section 20(C)** of the S(UMLM) Act) in the approved form and by the required time (**proposed sections 20(D) and 20(E)**). The statement must be given to the Commissioner by the end of the next scheduled statement day after the notice which the statement relates to was given.

The proposed new section 20E of the Bill requires a superannuation provider that received a notice under **proposed section 20C** from the Commissioner to give the statement in the approved form, and to provide it by the next scheduled statement day after 28 days have passed. The nature of the required information must be relevant to the superannuation interest in the fund of the person identified in the notice and /or to the administration of Part 3A of the S(UMLM) Act and related tax legislation.

The proposed new section 20F of the Bill requires a superannuation provider that receives a section 20C notice from the Commissioner which has not been revoked could be required to make payments to the Commissioner in respect of the person identified in the notice. The amount payable by the provider to the Commissioner is the difference between the *starting amount*, and the total of the amounts that have already been paid or are payable by the provider in respect of the person.

The proposed new section 20G of the Bill discharges superannuation providers from further liability to the temporary resident, once it has made payments of the whole amount to the Commissioner that is payable by the time under Part 3A of the S(UMLM) Act.

Generally, if the Commissioner has received an amount under the S(UMLM) Act for a person and the person was a departed temporary visa holder, then those amounts can be claimed back (subject to any withholding tax that may apply). **The proposed new section 20H of the Bill** authorises the Commissioner to pay an amount in respect of a person to the person, or to a single fund (if the person so directs and if the Commissioner is satisfied they are an Australian citizen, New Zealand citizen or the holder of a permanent visa or a visa prescribed by the Regulations). This authority is exercisable either on application by the person, or at the Commissioner's own initiative.

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If a superannuation provider makes a payment because of a notice under section 20C of the S(UMLM) Act in respect of a person, and the Commissioner is satisfied that the amount paid exceeded the amount that was payable (if any) in connection with the notice in respect of the person, **the proposed new Section 20K of the Bill** underlines the obligation of the Commissioner to refund the excess to the provider of the originating fund (or to the provider of the successor fund if the original fund no longer exists). Similarly, accidental overpayments made to departed temporary residents under **proposed section 20H** are recoverable (**proposed section 20L**).

If the Commissioner makes a payment in respect of a person on the direction of the person to a fund, and the superannuation provider of that fund has not credited the payment to an account within 28 days after the payment was made, **the proposed new Section 20M of the Bill** requires that the superannuation provider must return that payment to the Commissioner.

The proposed new section 20N introduces a disclosure regime under part 3A of the S(UMLM) Act allows for the disclosure of migration and citizenship information by central agencies for the purposes of administering the measure. The relevant agencies, in today's terms, are the Department of Immigration and Citizenship and the Australian Taxation Office.

The proposed new section 20P of the Bill provided a mechanism to settle disputes arising out of a decision relating to a payment under section 20H of the S(UMLM) Act, including the amount paid by the Commissioner and/or destination of the payment. A 'person' includes the person to whom the amount belongs, the person's legal representative, or a beneficiary. The section refers to Part IVC of the *Taxation Administration Act 1953* which sets out the procedures for dispute resolution for taxation decisions.

The proposed new section 25A of the Bill (item 18) authorises the Commissioner to quote the tax file number of a person and of the fund while giving notice to a superannuation provider under section 20C of the S(UMLM) Act. **Proposed new subsection 25(2A) (item 17)** allows a statement in the approved form from a provider to the Commissioner to contain the tax file number of the provider, of the fund and of the person identified in a notice under section 20C of the S(UMLM) Act (if it was quoted to the provider or in the notice). **Under the provision of new paragraph 29(1)(aa) (item 20)**, the Commissioner can request the tax file number of a person to be quoted for the purpose of administering the S(UMLM) Act or Superannuation (Unclaimed money and Lost Members) Regulations 1999 (Regulations) from someone who claims to be entitled to a payment under the S(UMLM) Act, someone who claims to be a lost member or someone who claims to be entitled to a payment under the S(UMLM) Act and a lost member.

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However, the amendment to **subsection 29(4) (item 21)** allows the person, who refuses to provide tax file number to the Commissioner, not to be prevented from receiving payment (if any) that is payable under Part 3A of the S(UMLM) Act.

Item 22 (the new section 49 of the Bill) issues a clarification that the money paid to the Commissioner under the S(UMLM) Act is not held on trust by the Commissioner and it is not special public money under the *Financial Management and Accountability Act 1997*.

Items 23-27 amend the TAA on the tax treatment, penalty provisions and taxation objections against a notice under **proposed section 20C** of the S(UMLM) Act and under the relevant provisions in Part 3A of the S(UMLM) Act. The provisions also represent the amendment to the tax-free treatment of a payment by the Commissioner to a fund as a roll-over superannuation benefit, identifying it as included in the 'contribution segment' of the superannuation interest in the receiving fund, and thus treating it as tax free component of the interest. The non-inclusion of this payment in the assessable income of the receiving fund would ensure that an amount which is already subject to the DASP withholding tax is not further taxed when it is paid by a fund as a superannuation benefit from the interest.

Items 28-35 and 37 amend the ITAA to ensure that a payment from the Commissioner under section 20H of the S(UMLM) Act is a superannuation benefit under ITAA; the ITAA sets out how to work out the tax-free component and the taxable component of the payment that is a superannuation benefit. Under the TAA, amounts that are payable or repayable to the Commissioner by a provider under Part 3 of the S(UMLM) Act are a tax-related liability, whereby a general interest charge accrues on any unpaid amount after the time the payment becomes due and payable. The rules to work out the tax components of a superannuation benefit that is a payment from the Commissioner under section 20H of the S(UMLM) Act are set out under Subdivision 307-C of the ITAA. Like any other superannuation benefit, a payment from the Commissioner can consist of a 'tax-free component', and a 'taxable component'.

Concluding comments

Except for the ASFA and CSA, there are no outright objections recorded against the Bill by any other stakeholders, nor by any of the non-government political parties.

There are certain sensitivities involved with the superannuation agencies, especially with the implementation of the ATO system of reporting by the superannuation providers given the concerns raised by them with respect to compliance costs. These issues should be given full consideration to ensure that compliance costs are kept at a reasonable level commensurate with the policy objectives of the legislation.

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