



## Tax Laws Amendment (2011 Measures No. 1) Bill 2011

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Law and Bills Digest Section

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## Tax Laws Amendment (2011 Measures No. 1) Bill 2011

**Date introduced:** 24 February 2011

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** The formal provisions commence on Royal Assent, as do **Part 1 of Schedule 1, Part 1 of Schedule 2** and the whole of **Schedule 3**.

**Part 2 of Schedule 1** and **Part 2 of Schedule 2** commence on 1 July 2014.

**Links:** The links to [the Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

### Purpose

The Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to exempt from income tax certain disaster recovery payments and subsidies.

It also amends the ITAA 1997 and the *First Home Saver Accounts Act 2008* (FHSA Act) to enable money in a First Home Saver Account (FHSA) to be paid into a genuine mortgage after the end of a minimum qualifying period.

### Background

#### Disaster relief payments

The Australian Government has paid a Disaster Income Recovery Subsidy to victims of natural disasters that have occurred in Australia since 29 November 2010 (including floods and Cyclone Yasi).<sup>1</sup> The subsidy was first announced on 10 January 2011 for an initial period of 13 weeks.<sup>2</sup> It was paid to employees, small business owners and primary producers who could demonstrate a loss of income as a direct consequence of the disaster, but is not available to anyone in receipt of another

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1. Cyclone Yasi caused significant damage to Queensland between 30 January and 3 February 2011. For further details, see the Bureau of Meteorology (BOM), *Severe Tropical Cyclone Yasi*, BOM website, 2011, viewed 2 May 2011, <http://www.bom.gov.au/cyclone/history/yasi.shtml>
  2. Australian Government, *Disaster Income Recovery Subsidy for flooding events commencing 29 November 2010*, Disaster Assist website, 7 February 2011, viewed 3 May 2011, [http://www.disasterassist.gov.au/www/disasterassist/disasterassist.nsf/Page/Currentdisasters\\_DisasterIncomeRecoverySubsidyforfloodingeventscommencing29November2010](http://www.disasterassist.gov.au/www/disasterassist/disasterassist.nsf/Page/Currentdisasters_DisasterIncomeRecoverySubsidyforfloodingeventscommencing29November2010)

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income support payment or pension, such as Age Pension, Newstart Allowance, Service Pension or Exceptional Circumstances Income Relief Payment.<sup>3</sup>

The Government has also paid a number of 'Category C' Natural Disaster Relief and Recovery Arrangements (NDRRA) grants to small businesses and primary producers affected by these events.<sup>4</sup>

Additionally, the Australian Government has made *ex gratia* payments to holders of New Zealand Special Category Visa holders who were affected by the natural disasters in the 2010–11 financial year but who were ineligible (because of their visa status) for a tax-exempt disaster relief payment. The *ex gratia* payments are of an equivalent amount to the other disaster relief payments.<sup>5</sup>

The Bill makes all these subsidies and payments exempt from income tax so that recipients can have the full use of the money.<sup>6</sup> In this regard, Bill Shorten MP (Assistant Treasurer, and Minister for Financial Services and Superannuation) said: 'The last thing needed by people who have lost everything, who are barely scraping by financially, is to worry about paying income tax on their disaster subsidy'.<sup>7</sup>

The exemption from income tax in relation to the Disaster Income Recovery Subsidy paid to those affected by the recent floods and Cyclone Yasi was announced by Prime Minister Gillard on 10 January 2011 and again on 3 February 2011.<sup>8</sup> It was also announced by the Assistant Treasurer, Bill Shorten MP, on 21 January 2011.<sup>9</sup>

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3. Ibid.

4. Category C of the NDRRA is 'a community recovery package designed to support a holistic approach to the recovery of regions, communities or sectors severely affected by a natural disaster'. It comprises one or more of the following: a) a community recovery fund; b) recovery grants for small businesses; and c) recovery grants for primary producers. For further details, see Australian Government, *Natural Disaster Relief and Recovery Arrangements*, Determination 2011, Version 1, pp. 3–4, viewed 21 April 2011, [http://www.ema.gov.au/www/emaweb/emaweb.nsf/Page/EmergencyManagement\\_RecoveringfromEmergencies\\_NaturalDisasterReliefandRecoveryArrangements\\_NDRRAGuidelines](http://www.ema.gov.au/www/emaweb/emaweb.nsf/Page/EmergencyManagement_RecoveringfromEmergencies_NaturalDisasterReliefandRecoveryArrangements_NDRRAGuidelines)

5. Further details about the Special Category Visa (SCV) are available at Department of Immigration and Citizenship, *New Zealanders in Australia*, Fact Sheet no. 17, November 2010, viewed 21 April 2011, <http://www.immi.gov.au/media/fact-sheets/17nz.htm>

6. A similar exemption was made in relation to disaster payments made in the past, such as those made in relation to the 'Black Saturday' bushfires that occurred in Victoria on 7 February 2009.

7. B Shorten MP (Assistant Treasurer and Minister for Financial Services and Superannuation), *Ensuring disaster payments are income tax exempt*, media release, no. 35, 24 February 2011, viewed 19 April 2011, <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/035.htm&pageID=003&min=brs&Year=&DocType=0>

8. J Gillard MP (Prime Minister), *Income recovery subsidy assistance to help those affected by the floods*, media release, 10 January 2011, viewed 21 April 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F589658%22> and J Gillard MP (Prime Minister), *Commonwealth assistance for Queenslanders impacted by Tropical Cyclone Yasi*, media release, 3 February 2011, viewed 21 April 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F572579%22>

9. B Shorten MP (Assistant Treasurer and Minister for Financial Services and Superannuation), *Tax exemption for business assistance payments paid to flood victims*, media release, no. 016, 21 January 2011, viewed 21 April 2011,

## First Home Saver Accounts

Since October 2008, the Australian Government has encouraged people to save for their first home by offering tax concessions and Government contributions on a banking product known as the 'First Home Saver Account'. Currently, if a FHSA holder purchases his or her first home before certain minimum release conditions for the account are met, the account must be closed and the balance of the account is paid to the account holder's superannuation fund or retirement savings account.<sup>10</sup>

The Bill provides greater flexibility by allowing the balance of the FHSA to be paid into a genuine mortgage at the end of a minimum qualifying period if the account holder purchases a house before the release conditions for the account are satisfied. In this way, the balance of the account can be used for the very purpose for which the account was established (that is, the purchase of a home, rather than providing a source of retirement income much later in life). The amendments contained in the Bill will apply to houses purchased after Royal Assent.

The measure was announced in the 2010–11 Budget.<sup>11</sup>

## Committee consideration

The Senate Standing Committee for the Scrutiny of Bills had no comment to make on the Bill.<sup>12</sup>

## Policy position of non-government parties/independents

The Coalition supports the Bill.<sup>13</sup> None of the independents, nor the Greens Member of Parliament, Adam Bandt MP, spoke to the Bill when it was referred to the Main Committee of the House of Representatives on 24 March 2011.

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<http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/016.htm&pageID=003&min=brs&Year=&DocType=0>

10. The current release conditions are that the FHSA holder has made a minimum contribution of \$1000 in at least four financial years (which need not be consecutive financial years); the FHSA has exceeded the \$80 000 cap and has held the account for more than four financial years; or the FHSA holder declares that he or she will purchase an interest in a property with another FHSA holder who has already met one of the two conditions just noted.
11. Australian Government, *Budget Overview*, 11 May 2011, p. 6, viewed 21 April 2011, [http://cache.treasury.gov.au/budget/2010-11/content/overview/download/Budget\\_Overview.pdf](http://cache.treasury.gov.au/budget/2010-11/content/overview/download/Budget_Overview.pdf)  
See also W Swan MP (Treasurer) and T Plibersek MP (Minister for Housing), *Helping Australians Buy Their First Home By Increasing Flexibility of First Home Saver Accounts*, media release, no. 033, 11 May 2010, viewed 21 April 2011, <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/033.htm&pageID=003&min=wms&Year=2010&DocType=0>
12. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2011*, 2 March 2011, p. 37, viewed 19 April 2011, <http://www.aph.gov.au/Senate/committee/scrutiny/alerts/2011/d02.pdf>
13. See, for example, A Smith MP, 'Second reading speech: Tax Laws Amendment (2011 Measures No. 1) Bill 2011', House of Representatives, *Debates*, 24 March 2011, p. 3367, viewed 21 April 2011, <http://www.aph.gov.au/hansard/reps/dailys/dr240311.pdf>

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## Financial implications

According to the Explanatory Memorandum, the Bill has the following financial impact:

- tax exemption for the Disaster Income Recover Subsidy: nil
- tax exemption for *ex gratia* payments to New Zealand non-protected special category visa holders: nil
- tax exemption for recovery grants for the 2010–11 floods and Cyclone Yasi: \$82.5 million over the forward estimates period
- increasing the flexibility of FHSAs: nil.<sup>14</sup>

## Key provisions

### Schedule 1—Tax exemption for payments to individuals for recent disasters

**Item 1** amends section 11–15 of the ITAA 1997, which sets out a list of provisions in the ITAA 1997 and the *Income Tax Assessment Act 1936* (ITAA 1936) that make ordinary or statutory income exempt from income tax in certain circumstances.<sup>15</sup> Specifically, **item 1** includes in that list a reference to the two new tax exemptions for payments to individuals contained in the Bill (being the exemptions for *ex gratia* payments to New Zealand non-protected special category visa holders and the Disaster Income Recovery Subsidy for the floods that occurred in Australia on or after 29 November 2010 and for Cyclone Yasi)—see **item 2** for further details.

**Item 2** amends the table in section 51–30 of the ITAA 1997 to provide that certain payments are exempt from income tax in the following circumstances:

- an individual who received an *ex gratia* payment (known as the ‘Disaster Income Recovery Subsidy’) for the floods that occurred in Australia after 29 November 2010 or Cyclone Yasi—if the payment was claimed after 9 January 2011 but before 1 March 2011, or
- an individual who received an *ex gratia* payment (known as ‘assistance for New Zealand non-protected special category visa holders’)—if the payment was claimed after 30 January 2011 but before 1 August 2011.<sup>16</sup>

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14. Explanatory Memorandum, Tax Laws Amendment (2011 Measures No. 1) Bill 2011, pp. 3–5. The figures for the financial impact of the tax exemption for recovery grants for the 2010–11 floods and Cyclone Yasi ‘do not include any allowance for the exemption of assistance to small businesses and primary producers affected by Cyclone Yasi, which cannot be quantified until more information on businesses likely to have been affected is known’; similarly, the estimates ‘do not include allowance for future Category C grants that may be made for future events’. *Ibid.*, p. 4.

15. An electronic copy of section 11–15 of the ITAA 1997 is available at: [http://www.austlii.edu.au/au/legis/cth/consol\\_act/itaa1997240/s11.15.html](http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s11.15.html) (viewed 19 April 2011).

16. An electronic copy of section 51–30 is available at: [http://www.austlii.edu.au/au/legis/cth/consol\\_act/itaa1997240/s51.30.html](http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s51.30.html) (viewed 19 April 2011). See also

The exemptions end on 1 July 2014.<sup>17</sup>

## Schedule 2—Tax exemption for recovery grants for the 2010–11 floods and Cyclone Yasi

**Item 1 of Schedule 2** amends section 11–55 of the ITAA 1997, which sets out a list of provisions in the ITAA 1997 (and the ITAA 1936) which make amounts ‘non-assessable non-exempt’ income.<sup>18</sup>

**Item 2 of Schedule 2** to the Bill amends Division 59 of the ITAA 1997, which sets out particular amounts that are non-assessable non-exempt income. Particularly, **item 2** inserts **proposed section 59–55**, which provides that recovery grants for small businesses and primary producers that were made under Category C of the NDRRA in relation to the 2010–11 floods are *not* assessable income and are *not* exempt income.

**Item 2** also inserts **proposed section 59–60**, which provides that recovery grants for small businesses and primary producers that were made under Category C of the NDRRA in relation to Cyclone Yasi are also *not* assessable income and are *not* exempt income.

The exemptions contained in **Schedule 2** end on 1 July 2014.<sup>19</sup>

## Schedule 3—First Home Saver Accounts

As mentioned in the Background section to this Digest, **Schedule 3** increases the flexibility of the FHSA Act by allowing money in a FHSA to be paid into a genuine mortgage after the end of a minimum qualifying period if the FHSA holder purchases a home before the usual FHSA release conditions are satisfied. Currently the FHSA Act only allows the balance of the account to be transferred to a superannuation fund or a retirement savings account.

**Item 7 of Schedule 3** inserts **proposed subsections 17(5) and (6)** into the FHSA Act. Section 17 of that Act deals with the meaning of the term ‘*FHSA payment conditions*’ in a variety of circumstances, including where a person makes a ‘FHSA home acquisition payment’ or (as will be the case following the insertion of **proposed subsections 17(5) and (6)**) a ‘FHSA mortgage payment’.<sup>20</sup>

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section 51–1 of the ITAA 1997 at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/itaa1997240/s51.1.html](http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s51.1.html) (viewed 19 April 2011), which states that ordinary and statutory income that is covered by the tables in Division 51 of the ITAA 1997 is exempt from income tax.

17. See **items 3 and 4 of Schedule 1** to the Bill, which set out the provisions that end (‘sunset’) on 1 July 2014.

18. An electronic copy of section 11–55 of the ITAA 1997 is available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/itaa1997240/s11.55.html](http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s11.55.html) (viewed 19 April 2011).

19. See **items 4 and 5 of Schedule 2** to the Bill, which set out the provisions that end (‘sunset’) on 1 July 2014.

20. The term ‘*FHSA payment conditions*’ is actually defined in section 18 of the FHSA Act. The definition is to be amended by **item 11 of Schedule 3** to the Bill, which replaces the current definition with a new definition that provides that a ‘FHSA home acquisition payment’ satisfies the ‘FHSA payment conditions’ in the circumstances set

**Proposed subsection 17(5)** provides that a FHSA mortgage payment satisfies the ‘FHSA payment conditions’ for a qualifying interest in a dwelling if within 28 days of the payment being made, the FHSA holder uses an amount equivalent to the payment to repay all or part of a loan secured by a genuine mortgage over the qualifying interest and for which the account holder is a mortgagor. The term ‘genuine mortgage’ is defined to mean a mortgage where the mortgagors and mortgagees deal with each other at arm’s length and none of the mortgagors is an associate of any of the mortgagees.<sup>21</sup>

The person must hold the qualifying interest for at least six months, with the dwelling being the person’s main residence during this period.<sup>22</sup> If the construction of the dwelling is not complete when the payment is made, construction must be complete within a reasonable period after the payment is made.<sup>23</sup>

**Item 25** inserts **proposed section 32A** into the FHSA Act to make it an offence for a FHSA provider to fail to provide the amount requested by the FHSA holder for repaying a mortgage if he or she acquires a home before the usual qualifying period for the FHSA period ends. The FHSA provider must provide the amount as soon as practicable after the application is made and no later than 30 days after the application is made. Specifically, **proposed section 32A** applies if:

- a FHSA holder acquires at a particular time (known as the ‘*acquisition time*’) a qualifying interest in a dwelling in Australia or Norfolk Island
- before that time the FHSA holder had never held a qualifying interest in a dwelling in Australia or Norfolk Island at a time when the dwelling was the FHSA holder’s main residence
- the FHSA holder gives the FHSA provider an application in the approved form requesting an amount be paid from the FHSA
- the FHSA holder declares (in the application) that the payment will satisfy the payment conditions mentioned in **proposed subsection 17(5)** of the FHSA Act<sup>24</sup>
- one of the following requirements is met:

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out in subsection 17(1) to (4), and a ‘FHSA mortgage payment’ satisfies the FHSA payment conditions in the circumstances set out in **proposed subsections 17(5) and (6)**.

21. **Item 12** of **Schedule 3** to the Bill inserts the term ‘*genuine mortgage*’ (and its definition) into section 18 of the FHSA Act. Section 18 contains definitions for terms used in that Act. The terms ‘*arm’s length*’ and ‘*associate*’ are defined to have the same meaning as in the ITAA 1997 (see **items 8 and 9** of **Schedule 3** to the Bill). There, the term ‘*arm’s length*’ is defined in section 995–1 of the ITAA 1997 but only by way of advising someone trying to determine if parties deal at arm’s length to consider ‘any connection between them and any other relevant circumstance’. The term ‘*associate*’ is defined in section 995–1 of the ITAA 1997 to have the meaning given by section 318 of the ITAA 1936. There it is defined (in the context of the associate of an entity) to mean (among other things) a relative, a business partner, spouse or child of that partner, trustee of a trust under which the person benefits, and a company over which the person has sufficient influence (such as a majority voting interest).
22. **Proposed paragraph 17(5)(b)** of the FHSA Act.
23. **Proposed paragraph 17(5)(c)** of the FHSA Act.
24. See **item 7** of **Schedule 3** to the Bill.

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- the requirement in subparagraph 32(1)(c)(i) of the FHSA Act would be met if the FHSA holder were taken to have made a personal FHSA contribution of at least \$1000 for the financial year that includes the acquisition time and each later financial year<sup>25</sup>
  - the FHSA holder is in breach of the account balance cap and has held a FHSA in at least four financial years (including the year in which the payment is to be made),<sup>26</sup> or
  - the FHSA holder declares (in the application) that he or she holds the qualifying interest with another FHSA holder in respect of whom the requirement in subparagraph 32(1)(c)(i) or another requirement mentioned in this bullet point is met
- the provider is satisfied any requirements specified in the regulations are met, and
  - the FHSA is inactive only because of paragraph 23(1)(c) or (e) (about a FHSA remaining open until a FHSA mortgage payment can be paid) and is yet to be closed.<sup>27</sup>

The FHSA provider must pay the requested amount as soon as practicable after the application is made—and no later than 30 days after the application is made.<sup>28</sup> Failure to do so is an offence that carries a maximum penalty of 100 penalty units.<sup>29</sup>

If the FHSA mortgage payment fails to satisfy the FHSA payment conditions, or the payment satisfies the ‘FHSA payment conditions’<sup>30</sup> but is a ‘FHSA ineligibility payment’,<sup>31</sup> the FHSA holder is liable to pay tax imposed by the *Income Tax (First Home Saver Account Misuse Tax) Act 2008*.<sup>32</sup>

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25. Subparagraph 32(1)(c)(i) of the FHSA Act requires personal FHSA contributions of at least \$1000 per financial year to have been made for the FHSA holder in at least four financial years (one of which may be the financial year in which the payment is to be made).
26. The term ‘*account balance cap*’ is defined in section 29 of the FHSA Act to mean \$75 000 for the 2008-09 financial year. This amount is indexed annually but only moves by increments of \$5 000. The current cap is \$80 000. For further details, see Australian Taxation Office (ATO), *First home saver accounts - rates and thresholds*, ATO website, 9 July 2010, viewed 21 April 2011, <http://www.ato.gov.au/individuals/content.aspx?doc=/content/00248470.htm>
27. Paragraphs 23(1)(c) and (e) are repealed and substituted by **item 21** of **Schedule 3** to the Bill.
28. **Proposed subsection 32A(2)** of the FHSA Act.
29. **Proposed subsection 32A(3)** of the FHSA Act. The term ‘*penalty unit*’ is defined in section 4AA of the *Crimes Act 1914* as \$110. If the offender is a body corporate, a court may impose a penalty up to five times this amount: section 4B of the *Crimes Act 1914*. Thus the maximum penalty that a court may impose under **proposed subsection 32A(3)** is \$11 000 (if the offender is an individual) or \$55 000 (if the offender is a body corporate).
30. The term ‘*FHSA payment conditions*’ is defined in **proposed subsection 17(5)** of the FHSA Act (which is to be inserted by **item 7** of **Schedule 3** to the Bill).
31. The term ‘*FHSA ineligibility payment*’ is defined in section 16 of the FHSA Act to mean a home acquisition payment that is made from a FHSA held by a person at a time when the person did not satisfy the FHSA eligibility requirements.
32. **Item 34** of **Schedule 3** to the Bill inserts **proposed subsection 345–100(2)** into the ITAA 1997. The Commissioner of Taxation may make an assessment of the amount of the tax under section 169 of the ITAA 1936.

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