

EXPLANATORY STATEMENT

Select Legislative Instrument 2008 No. 283

Issued by the Authority of the Minister for Superannuation and Corporate Law

Superannuation Industry (Supervision) Act 1993

Taxation Administration Act 1953

Superannuation (Unclaimed Money and Lost Members) Act 1999

Superannuation Industry (Supervision) Amendment Regulations 2008 (No. 4)

Taxation Administration Amendment Regulations 2008 (No. 4)

Superannuation (Unclaimed Money and Lost Members) Amendment Regulations 2008 (No. 1)

Subsection 353(1) of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act), section 18 of the *Taxation Administration Act 1953* (the Administration Act) and subsection 50(1) of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (the UCM Act) provide, in part, that the Governor-General may make regulations prescribing matters required or permitted by those Acts to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to those Acts.

The package of Regulations amends three sets of Principal Regulations in order to support the implementation of the Government's *Temporary Residents' Superannuation* measure. In broad terms, the measure provides that the superannuation benefits of a person who was a temporary resident, where at least six months have passed since the person's temporary visa ceased to be in effect and they have left Australia, are to be treated as unclaimed superannuation. Superannuation providers who hold these benefits are required to pay these amounts to the Commissioner of Taxation. The affected individuals are able to recover their benefits from the Commissioner of Taxation.

A discussion paper on the proposal was released for public consultation on 5 May 2008. The Government's final decision was announced in the Minister for Superannuation and Corporate Law's Press Release No. 050 of 8 August 2008. The draft regulations were released to a targeted industry group for confidential consultation during their development.

The *Temporary Residents' Superannuation Legislation Amendment Act 2008* and the *Superannuation (Departing Australia Superannuation Payments Tax) Amendment Act 2008* provide the framework for the measure in order to reduce the number of lost accounts and unclaimed money in the superannuation system that can arise when temporary residents leave Australia without taking their superannuation benefits with them.

Superannuation Industry (Supervision) Amendment Regulations 2008 (No. 4)

The *Superannuation Industry (Supervision) Regulations 1994*, among other things, set out the circumstances and form in which superannuation benefits may be paid.

These Regulations insert a new requirement on trustees to cash a member's benefit when the trustee is required to pay an amount under the UCM Act.

The Regulations also restrict the circumstances in which a trustee may pay a member's benefits where the member was, or has been a temporary resident and allow a pension or annuity to be commuted when the trustee is required to pay an amount under the UCM Act.

The Regulations also insert new definitions and make a number of amendments for grammatical correctness and clarity.

Details of these Regulations are set out in **Attachment A**.

These provisions of the Regulations have variable commencements: the day that Schedule 1 to the *Temporary Residents' Superannuation Legislation Amendment Act 2008* commences; 1 April 2009; or 1 July 2009.

Commencement on the day that Schedule 1 to the *Temporary Residents' Superannuation Legislation Amendment Act 2008* commences ensures that the regulations needed to support the unclaimed money framework are in place. Commencement on 1 April 2009 provides industry with time to adjust their administrative processes and systems. Those amendments commencing on 1 July 2009 align with the expected commencement of corresponding amendments to the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*. These legislative amendments are yet to be introduced into Parliament.

Taxation Administration Amendment Regulations 2008 (No. 4)

The *Taxation Administration Regulations 1976*, among other things, prescribe the amount to be withheld from superannuation benefit payments.

These Regulations align the rate of tax an entity must withhold from a departing Australia superannuation payment with the rate in the *Superannuation (Departing Australia) Superannuation Payments Tax) Amendment Act 2008* (once that Act commences). These Regulations also insert a new regulation to specify the amount of tax an entity must withhold from an amount rolled-over from an untaxed superannuation scheme where the amount rolled over exceeds the limit on these rolled-over amounts. These Regulations also insert new definitions.

Details of these Regulations are set out in **Attachment B**.

These Regulations commence on the day after registration on the Federal Register of Legislative Instruments. The commencement date ensures that the correct tax rate is withheld from departing Australia superannuation payments.

Superannuation (Unclaimed Money and Lost Members) Amendment Regulations 2008 (No. 1)

The *Superannuation (Unclaimed Money and Lost Members) Regulations 1999* establish a scheme under which superannuation providers are to give statements about lost members of superannuation funds to the Commissioner of Taxation.

These Regulations insert a new regulation to set out the details which must be included in a notice from the Commissioner of Taxation where the Commissioner is recovering an overpayment under the UCM Act. These Regulations also insert a new regulation to prescribe certain visa classes for the purposes of the UCM Act.

Details of these Regulations are set out in **Attachment C**.

These Regulations commence on the day that Schedule 1 to the *Temporary Residents' Superannuation Legislation Amendment Act 2008* commences. This ensures the regulations required to support the unclaimed money framework are in place.

The Regulations are legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

ATTACHMENT A

Details of *Superannuation Industry (Supervision) Amendment Regulations 2008 (No. 4)*

Regulation 1 specifies the name of the Regulations as the *Supervision Industry (Supervision) Amendment Regulation 2008 (No. 4)*.

Regulation 2 provides that:

- Regulations 1 to 3 and the provisions in Schedule 1 commence on the day that Schedule 1 to the *Temporary Residents' Superannuation Legislation Amendment Act 2008* commences;
- Regulation 4 and the provisions in Schedule 2 commence on 1 April 2009;
- Regulation 5 and the provisions in Schedule 3 commence on 1 July 2009.

Regulation 3 provides that Schedule 1 amends the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations).

Regulation 4 provides that Schedule 2 amends the SIS Regulations.

Regulation 5 provides that Schedule 3 amends the SIS Regulations.

Schedule 1 - Amendments commencing on commencement of Schedule 1 to the *Temporary Residents' Superannuation Legislation Amendment Act 2008*.

New definitions necessary to support the Government's *Temporary Residents' Superannuation* measure

The Regulations insert new definitions into the SIS Regulations and amend existing definitions to support the Government's *Temporary Residents' Superannuation* measure and the unclaimed money framework.

Item 15

Item 15 inserts a definition of *superannuation provider* into the SIS Regulations in relation to Part 5. A *superannuation provider* is defined as the trustee of a regulated superannuation fund, the trustee of an approved deposit fund, or an RSA provider.

Items 16 and 17

Items 16 and 17 amend the definition of *superannuation system* contained in subregulation 5.01(1). **Item 16** amends the definition to include the Commissioner of Taxation (the Commissioner) in the superannuation system where the Commissioner makes a payment to a superannuation provider under the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (UCM Act). **Item 17** amends the definition to remove paragraphs (f) and (g) which are redundant. Paragraphs (f) and (g) refer to

subsections in the *Retirement Savings Accounts Act 1997* which were repealed in 1999.

Item 22

Item 22 inserts a definition of a *permanent resident* into subregulation 6.01(2) of the SIS Regulations. A *permanent resident* is defined as the holder of a permanent visa under the *Migration Act 1958*.

Item 23

Item 23 inserts a definition of a *temporary resident* into subregulation 6.01(2) of the SIS Regulations. A *temporary resident* is defined as the holder of a temporary visa under the *Migration Act 1958*.

Compulsory cashing to meet an obligation under the *Superannuation (Unclaimed Money and Lost Members) Act 1999*

The SIS Regulations set out the circumstances when a trustee must voluntarily or compulsorily cash a member's benefits – that is pay out the benefits.

The amendments insert a new compulsory cashing event where a trustee is required to pay an amount under the UCM Act. Where a trustee is required to pay an amount under this Act, the benefits must be cashed as a lump sum and by the time required under that Act.

Items 31 and 38

Items 31 and 38 insert new regulations 6.20C and 6.24B which insert a new compulsory cashing event where a trustee is required to pay an amount in respect of a person under the UCM Act to the Commissioner. The notes included at the end of the new regulations, indicate that the amount to be paid must be paid by the time required under the UCM Act.

Items 32, 33, 39, 40, 41, 42 and 43

The SIS Regulations limit the circumstances where a benefit can be cashed in favour of the persons other than the member or their legal personal representative.

Items 32 and 33 allow a trustee of a regulated superannuation fund to cash benefits in favour of the Commissioner where the benefits are required to be paid to the Commissioner under the UCM Act. **Items 39, 40, 41, 42 and 43** make a similar amendment in respect of trustees of approved deposit funds.

Item 44

Regulation 13.16 of the SIS Regulations does not allow the trustee of a regulated superannuation fund to alter a beneficiary's right or claim to accrued benefits by either amending the governing rules of the fund, or undertaking or consenting to an action which alters the benefits.

Item 44 amends paragraph 13.16(2)(b) to allow the trustee to alter a beneficiary's accrued benefits if the alteration is to enable the trustee to comply with the UCM Act or any of the regulations made under the existing Acts mentioned in that paragraph.

Compulsory cashing for temporary residents

Currently, the SIS Regulations require a trustee of a regulated superannuation fund to cash a member's benefits where the member makes a request to the trustee and the member was an eligible temporary resident visa holder (as defined in the SIS regulations) who has departed from Australia and their visa has ceased to be in effect. The benefits must be cashed in a period of 28 days as a single lump sum.

Regulations 6.20A and 6.24A remain unchanged other than to provide that an Australian citizen, New Zealand citizen or permanent resident is not able to make a request under the Regulations. Trustees need to receive appropriate advice from the individual applicants to confirm they are within the eligible group.

Items 24 and 34

Items 24 and **34** amend existing subregulations 6.20A(1) and 6.24A(1) respectively such that the compulsory cashing event for a temporary resident requesting payment upon departure from Australia is only triggered where the individual is not an Australian citizen, New Zealand citizen or a permanent resident.

Item 28

Item 28 amends 6.20B to reflect the additional criteria that must be met in order to receive a superannuation payment as a temporary resident who has departed from Australia. Under existing regulation 6.20B the trustee of an unfunded public sector superannuation scheme is not required to pay an amount held on behalf of a temporary resident who has departed from Australia, but the trustee may elect to do so upon the member's request. **Item 28** ensures that the regulation only applies to a temporary resident who has departed from Australia and is not an Australian citizen, New Zealand citizen or permanent resident.

Items 25, 26, 29, 30, 35, and 36

Previously, an individual's ability to access benefits under the departed temporary resident condition of release depended on the visa they held (as prescribed in Schedule 2 to the SIS Regulations). These visas are referred to as 'eligible temporary resident visas'. As a result of the Government's *Temporary Residents' Superannuation* measure a former temporary resident is able to access their benefits from the fund where (amongst other things) they were the holder of a temporary visa under the *Migration Act 1958* and are not an Australian citizen, New Zealand citizen or permanent resident at the time they make the request. A list of prescribed visas is therefore not required.

Items 25, 26, 29, 30, 35, and 36 amend paragraphs 6.20A(2)(a), 6.20A(3), 6.20B(2)(a), 6.20B(3), 6.24A(2)(a) and 6.24A(3) to replace the redundant phrase 'eligible temporary resident visa'.

Items 27 and 37

Items 27 and 37 substitute new notes under subregulation 6.20A(5) and 6.24A(5) respectively to provide a more specific reference to the definition of *departing Australia superannuation payment* in the *Income Tax Assessment Act 1997*.

Amended and new conditions of release and cashing restrictions

Schedule 1 to the SIS Regulations sets out the conditions of release that a person can satisfy and the related cashing restrictions.

Items 45 and 46

Items 45 and 46 amend existing items 103A and 204 to ensure that the wording is consistent with the terminology used in relation to the Government's *Temporary Residents' Superannuation* measure and the amendments to regulations 6.20A and 6.24A.

Items 45 and 46 also insert new conditions of release as items 103B and 204A in Schedule 1 to the SIS regulations which have the compulsory cashing event inserted by **items 31 and 38**.

Commutation of pensions and annuities

The SIS Regulations set out the form in which a member's benefits may be cashed. That is, either as a lump sum or income stream.

Under the regulations it is not possible for someone who has at any stage been a temporary resident, other than a retirement visa holder (subclass 405 or 410), and who is not currently an Australian citizen, New Zealand citizen or permanent resident to commence an income stream, unless:

- The individual met a condition of release prior to 1 April 2009;
- The individual satisfied any of the following conditions of release:
 - : terminal medical condition;
 - : permanent incapacity;
 - : temporary incapacity;
- The individual's benefits are being paid as a result of the individual's death.

Items 2, 4, 7, 9, 11, 14, 18, 19, 20, and 21

Items 2, 4, 7, 9, 11 and 14

The pension and annuity standards in the SIS Regulations provide the circumstances where a benefit may be commuted. **Items 2, 4, 7, 9, 11 and 14** allow a trustee to commute a pension or annuity which commenced in breach of the payment standards, where as a result of the commutation, there would be an obligation to pay an amount under subsection 20F(1) of the UCM Act.

For example, a superannuation trustee may commence paying an income stream to an individual who was a temporary resident at the time the income stream commenced. The trustee later becomes aware, when the provider receives a notice from the Commissioner under section 20C of the UCM Act, that the individual is or was a temporary resident for whom the provider should never have started paying an income stream. In this circumstance the provider is able to commute the income stream. If the income stream was commuted the provider would be required to pay an amount under the UCM Act.

Items 18, 19, 20 and 21

While a trustee is able to commute a non-commutable allocated annuity and non-commutable allocated pension, a trustee can only cash the amount in certain circumstances. **Items 18, 19, 20 and 21** enable the trustee to cash the amount where the amount is being cashed to satisfy an obligation to pay an amount under subsection 20F(1) of the UCM Act. That is unclaimed money payments in respect of temporary residents who have departed from Australia and failed to withdraw their benefits.

Minor technical amendments

Items 1, 3, 5, 6, 8, 10, 12, 13 and 47 make amendments to the pension and annuity standards for grammatical correctness and clarity and to enable the additional subparagraphs inserted by **items 2, 4, 7, 9, 11 and 14** to be inserted in the appropriate form. The items do not change the intent or ongoing operation of the regulations.

Schedule 2 - Amendments commencing on 1 April 2009

Conditions of release for temporary residents

Superannuation savings are required to be held in the superannuation system until a person has met a condition of release. The conditions of release include where the individual has reached preservation age, has been permanently or temporarily incapacitated, and death.

Under the Government's *Temporary Residents' Superannuation* measure, from the commencement of the Regulations an individual, who has at any stage been a temporary resident (other than a retirement visa holder) and who is not an Australian citizen, New Zealand citizen or permanent resident, is only able to withdraw their superannuation benefits under limited conditions of release.

Item 1

Item 1 amends the definition of *condition of release*, contained in subregulation 6.01(2), to make meeting a condition of release subject to new regulation 6.01B.

Item 2

Item 2 inserts a new regulation, 6.01B into the SIS Regulations.

The new regulation sets out the conditions of release that an individual can satisfy, if at any stage the individual has been a temporary resident, other than a retirement visa holder (subclass 405 or 410), and the individual is not currently an Australian citizen, New Zealand citizen or permanent resident.

In this circumstance, the only conditions of release that can be satisfied is a condition that the individual satisfied before 1 April 2009, or the conditions at items 102, 102A, 103, 103A, new 103B 109, 202, 202A, 204 and new 204A of Schedule 1 to the SIS Regulations.

These conditions are:

- Death;
- Terminal medical condition;
- Permanent incapacity;
- Temporary incapacity;
- Unclaimed money payment; and
- Departed temporary resident.

Items 3, 4 and 5

Items 3, 4 and 5 insert notes after subregulations 6.18(1), 6.19(1) and 6.23(1) respectively to alert the reader to new regulation 6.01B and the conditions of release that are available to temporary residents.

Example 1

Sue is 60 when she arrives in Australia from the UK on a temporary resident visa. She finds work as a receptionist and works at this job for three years before retiring at age 63 on 5 February 2009. Sue does not apply for her benefits at this stage. Sue travels through Australia for 6 months before returning to the UK. She requests the release of her benefits under the retirement condition of release. As she met this condition before 1 April 2009 she satisfies this condition of release. That is, she turned 63 and had stopped working before 1 April 2009.

Schedule 3 - Amendments commencing on 1 July 2009**Items 1 and 2**

The SIS Regulations define the term ‘eligible temporary resident visa’ with reference to a prescribed list in Schedule 1AB to the SIS Regulations.

As a result of the Government's *Temporary Residents' Superannuation* measure the term is no longer required.

Item 1 deletes the definition of 'eligible temporary resident visa' from subregulation 6.01(2).

Item 2 deletes Schedule 1AB, which lists the visas defined as 'eligible temporary resident visas'.

ATTACHMENT B

Details of *Taxation Administration Amendment Regulations 2008 (No. 4)*

Regulation 1 specifies the name of the Regulations as the *Taxation Administration Amendment Regulations 2008 (No. 4)*.

Regulation 2 provides that the Regulations commence on the day after registration.

Regulation 3 provides that Schedule 1 amends the *Taxation Administration Regulations 1976* (Administration Regulations).

Schedule 1 – Amendments commencing the day after registration**Excess untaxed roll-over amounts****Item 1**

Item 1 inserts a definition of *departing Australia superannuation payment* into regulation 39. *Departing Australia superannuation payment* has the meaning given by section 301-170 of the *Income Tax Assessment Act 1997*.

Item 2

Item 2 inserts a definition of *excess untaxed roll-over amount* in regulation 39. *Excess untaxed roll-over amount* has the meaning given by section 306-15 of the *Income Tax Assessment Act 1997*.

Item 3

Item 3 inserts Regulation 42A – **Departing Australia Superannuation Payment** into the Administration Regulations. This Regulation provides that the amount of tax to be withheld from a departing Australia superannuation payment is given by section 5 to the *Superannuation (Departing Australia Superannuation Payments) Tax Act 2007*.

The Administration Regulations already specified the amount of tax to withhold from a departing Australia superannuation payment in regulation 43A. Item 3 renumbered that provision as 42A.

Item 3 also inserts Regulation 42B – **Excess Untaxed Roll-Over Amounts** into the Administration Regulations. This Regulation provides that the amount of tax to be withheld from an excess untaxed roll-over amount is the amount worked out under section 5 of the *Superannuation (Excess Untaxed Roll-over Amounts Tax) Act 2007*.

Item 4

Item 4 omits Regulation 43A which becomes new Regulation 42A.

ATTACHMENT C

Details of *Superannuation (Unclaimed Money and Lost Members) Regulations 2008 (No. 1)*

Regulation 1 specifies the name of the Regulations as the *Superannuation (Unclaimed Money and Lost Members) Regulations 2008 (No. 1)*.

Regulation 2 provides that the Regulations commence on the day that Schedule 1 to the *Temporary Residents' Superannuation Legislation Amendment Act 2008* commences.

Regulation 3 provides that Schedule 1 amends the *Superannuation (Unclaimed Money and Lost Members) Regulations 1999* (Unclaimed Regulations).

Schedule 1 - Amendments commencing the day that Schedule 1 to the Temporary Residents' Superannuation Legislation Amendment Act 2008 commences.

Item 1 substitutes existing regulation 4A and inserts new Regulations 4B and 4C.

Eligibility Age

The *Superannuation (Unclaimed Money and Lost Members) Act 1999* (the UCM Act) sets the eligibility age for men at 65 and for women at 60. In both cases the eligibility age may also be prescribed by the regulations.

Regulation 4A currently prescribes age 65 as the eligibility age for women.

Regulation 4A is substituted such that the eligibility age for an individual is the greater of age 65 or the age the benefit becomes payable as provided in the fund's governing rules.

This amendment is not directly related to the Government's *Temporary Residents' Superannuation* measure. It accommodates older products which do not become payable until an age greater than 65. Under the definition of unclaimed money, these products could become unclaimed money and payable to the Commissioner of Taxation (Commissioner) even though the product is not payable to the member.

Prescribed visas

Subparagraphs 20C(1)(b)(i) and 20H(1)(a)(ii) of the UCM Act provide that the holder of a visa that is prescribed in regulations will not be subject to the Government's *Temporary Residents' Superannuation* measure.

New regulation 4B is inserted into the Unclaimed Regulations to prescribe subclass 405 investor retirement visa and subclass 410 retirement visa for the purposes of the UCM Act.

Recovery of overpayments

Where the Commissioner recovers an overpayment under paragraph 20L(4)(a) of the UCM Act, the Commissioner must provide a notice to the debtor containing prescribed information.

New regulation 4C is inserted into the Unclaimed Regulations and sets out the necessary information to be included in the notice being:

- the name of the person in respect of whom the Commissioner made the payment;
- the name of the debtor;
- the amount of the excess payment that is sought to be recovered;
- a statement that the Commissioner may recover that amount from the debtor as a debt due by the debtor to the Commonwealth 28 days after the notice is given to the debtor.