

# **EXPLANATORY STATEMENT**

## **Select Legislative Instrument 2009 No. 16**

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

*Retirement Savings Accounts Act 1997*  
*Superannuation Industry (Supervision) Act 1993*  
*Superannuation (Unclaimed Money and Lost Members) Act 1999*

*Retirement Savings Accounts Amendment Regulations 2009 (No. 1)*  
*Superannuation Industry (Supervision) Amendment Regulations 2009 (No. 1)*  
*Superannuation (Unclaimed Money and Lost Members) Amendment Regulations 2009 (No. 1)*

Subsection 200(1) of the *Retirement Savings Accounts Act 1997* (RSA Act), subsection 353(1) of the *Superannuation Industry (Supervision) Act 1993* (the SIS 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.

On 12 December 2008, a package of three sets of Regulations was approved 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 may subsequently 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 first package of Regulations were released in draft form to a targeted industry group for confidential consultation during their development. While no consultation was conducted on the second package of Regulations, the amendments to the *Retirement Savings Accounts Regulations 1997* mirror the changes made to the *Superannuation Industry (Supervision) Regulations 1994* that were approved in December 2008.

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, which seeks 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.

The purpose of this package of Regulations is to further support the implementation of the *Temporary Residents' Superannuation* measure by amending the *Retirement Savings Accounts Regulations 1997*. The package also makes further minor amendments to the *Superannuation Industry (Supervision) Regulations 1994* and *Superannuation (Unclaimed Money and Lost Members) Regulations 1999*.

***Retirement Savings Account Amendment Regulations 2009 (No. 1)***

The *Retirement Savings Accounts Regulations 1997* (RSA Regulations), among other things, set out the circumstances and form in which superannuation benefits may be paid from a retirement savings account (RSA).

The Regulations insert a new requirement on RSA providers so that a provider must release a person's benefit when the RSA provider is required to pay an amount to the Commissioner of Taxation under the UCM Act.

The Regulations restrict the circumstances in which an RSA provider may pay a temporary resident's benefit directly to the individual and also allow a pension or annuity to be commuted where the provider would be required to pay an amount of unclaimed money to the Commissioner of Taxation.

The Regulations also insert new definitions and make amendments for grammatical correctness and consistency.

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

These Regulations commence in two stages: Schedule 1 commences the day after the Regulations are registered on the Federal Register of Legislative Instruments; and Schedule 2 commences on 1 April 2009.

***Superannuation Industry (Supervision) Amendment Regulations 2009 (No. 1)***

The *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations), among other things, set out the circumstances and form in which superannuation benefits may be paid from an approved deposit taking institution and a regulated superannuation fund.

The Regulations make minor amendments to establish consistency between the SIS Regulations, the *Migration Act 1958* and the UCM Act.

The Regulations also expand the conditions of release for individuals who have been temporary residents.

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

These Regulations commence in two stages: Schedule 1 commences the day after the Regulations are registered on the Federal Register of Legislative Instruments, and Schedule 2 commences on 1 April 2009.

***Superannuation (Unclaimed Money and Lost Members) Amendment Regulations 2009 (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.

The Regulations insert a new regulation to prescribe certain visa classes for the purposes of payments by the Commissioner of Taxation under the UCM Act.

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

These Regulations commence on the day after they are registered.

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

## ATTACHMENT A

### **Details of *Retirement Savings Accounts Amendment Regulations 2009 (No. 1)***

**Regulation 1** specifies the name of the Regulations as the *Retirement Savings Accounts Amendment Regulations 2009 (No. 1)*.

**Regulation 2** provides that:

- Regulations 1 to 3 and the provisions in Schedule 1 commence on the day after they are registered;
- Regulation 4 and the provisions in Schedule 2 commence on 1 April 2009.

Commencement of Schedule 1 on the day after the Regulations are registered ensures that the Regulations needed to support the unclaimed money framework are in place. Commencement of Schedule 2 on 1 April 2009 provides RSA providers with time to adjust their administrative processes and systems in respect of payments to RSA holders.

**Regulation 3** provides that Schedule 1 amends the *Retirement Savings Accounts Regulations 1997* (RSA Regulations).

**Regulation 4** provides that Schedule 2 amends the RSA Regulations.

### **Schedule 1 - Amendments commencing the day after registration**

The amendments to the RSA Regulations mirror amendments made by the *Superannuation Industry (Supervision) Amendment Regulations 2008 (No. 4)*. The amendments support the Government's *Temporary Residents' Superannuation* measure in respect of benefits held in retirement savings accounts.

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

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

### **Items 4, 5, 6, 10 and 11**

**Item 4** inserts a definition of *superannuation provider* into the RSA Regulations in relation to Part 3. A *superannuation provider* is defined as an RSA provider; or the trustee of a regulated superannuation fund; or the trustee of an approved deposit fund.

**Item 5** amends the definition of the *superannuation system* to include the Commissioner of Taxation (the Commissioner) in the superannuation system where the Commissioner makes a payment to a superannuation provider under the UCM Act. Paragraphs (d) and (e) are removed as they refer to subsections in the RSA Act and the SIS Act which were repealed in 1999.

**Item 6** rewords the definition of *condition of release* to accommodate amendments to the definition that is made by Schedule 2 to the Regulations.

**Item 10** inserts a definition of *permanent resident* into subregulation 4.01(2) of the RSA Regulations. A *permanent resident* is defined as the holder of a permanent visa under the *Migration Act 1958* that has not ceased to be in effect.

**Item 11** inserts the definition of *temporary resident* into subregulation 4.01(2) of the RSA 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 RSA Regulations set out the circumstances when an RSA holder's benefits must be voluntarily or compulsorily cashed – that is paid out.

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

### **Items 17, 18 and 19**

**Item 17** inserts a new regulation that provides for a compulsory cashing event where an RSA provider was 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 regulation indicate that the amount to be paid must be paid by the time required under the UCM Act.

The RSA 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 18 and 19** allow an RSA provider to cash benefits in favour of the Commissioner where the benefits are required to be paid to the Commissioner under the UCM Act.

### **Compulsory Cashing for temporary residents**

Currently, the RSA Regulations require an RSA provider to cash a member's benefits where the member makes a request to the RSA provider and the member was an eligible temporary resident visa holder (as defined in the RSA 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.

Under the amendments, this compulsory cashing event as currently contained in the RSA Regulations is retained. However, an Australian citizen, New Zealand citizen or permanent resident is not able to make a request under this provision. RSA providers need to receive appropriate advice from the individual applicants to confirm they are within the eligible group.

## **Items 7, 12, 13, 14, 15, 16 and 21**

Currently, an individual's ability to access their benefits under the departed temporary resident condition of release depends on the visa they held (as prescribed in Schedule 3 to the RSA Regulations). These visas are referred to as 'eligible temporary resident visas' as defined in subregulation 4.01(2) of the RSA Regulations.

As a result of the Government's *Temporary Residents' Superannuation* measure a former temporary resident is able to access their benefits from the RSA provider where (amongst other things) they are 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. As such, the term 'eligible temporary resident visas' and the prescribed list of visas at Schedule 3 is no longer required.

**Item 7** deletes the definition of 'eligible temporary resident visa' from subregulation 4.01(2).

**Item 21** deletes Schedule 3, which lists the visas defined as 'eligible temporary resident visas'.

**Item 12** amends subregulation 4.23A(1) such that the compulsory cashing event for a temporary resident requesting payment upon departure from Australia may only be triggered where the individual was not an Australian citizen, New Zealand citizen or a permanent resident.

**Items 13 and 15** substitutes paragraph 4.23A(2)(a) and subregulation 4.23A(3) respectively to remove the redundant phrase 'eligible temporary resident visa'.

**Items 14 and 15** substitutes paragraph 4.23A(2)(b) and 4.23A(3) respectively to replace the phrase 'departed Australia' with 'left Australia' which is consistent with the *Migration Act 1958*.

**Item 16** substitutes a new note under subregulation 4.23A(5) 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 2 to the RSA Regulations sets out the conditions of release that a person can satisfy and the related cashing restrictions.

## Item 20

**Item 20** amends existing item 104 in Schedule 2 to ensure that the wording is consistent with the terminology used in relation to the Government's *Temporary Residents' Superannuation*, the *SIS Amendment Regulations 2008 (No. 4)* and the amendments to regulation 4.23A.

**Item 20** also inserts a new condition of release at item 104A in Schedule 2 to the RSA Regulations where an RSA provider is required to pay an amount under the UCM Act.

## ***Commutation of pensions and annuities***

The RSA 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; or
- The individual's benefits are being paid as a result of the individual's death.

## Items 3, 8 and 9

The pension standards in the RSA Regulations provide the circumstances where a benefit may be commuted. **Item 3** allows an RSA provider to commute a pension which was commenced in breach of the payment standards, where as a result of the commutation, there is an obligation to pay an amount under subsection 20F(1) of the UCM Act.

For example, an RSA provider may commence paying an income stream to an individual who was a temporary resident when the income stream commenced. The provider later becomes aware, when the provider receives a notice from the Commissioner under section 20C of the UCM Act, that the individual 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 (effectively stop) the income stream. If the income stream were stopped the provider would be required to pay an amount under the UCM Act.

While an RSA provider is able to commute a non-commutable allocated annuity and non-commutable allocated pension, an RSA provider can only cash the amount in certain circumstances. **Items 8 and 9** enable the RSA provider to cash an amount to satisfy an obligation to pay an amount to the Commissioner under subsection 20F(1) of the UCM Act. That is, unclaimed money payments to the Commissioner in respect of temporary residents who have departed from Australia and failed to withdraw their benefits.

### ***Minor amendments***

#### **Items 1 and 2**

To achieve grammatical correctness and consistency with the *Government's Temporary Residents' Superannuation* measure, minor amendments are made by **items 1 and 2**. These amendments do not change the intent or ongoing operation of the Regulations.

**Item 1** amends the structure of 1.07(3A)(e)(i) to improve readability of the paragraph.

**Item 2** amends the pension standards that enable the additional subparagraphs inserted by **item 3** to be inserted in the appropriate form.

### **Schedule 2 - Amendments commencing 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 these 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.

#### **Items 1 and 2**

**Item 1** amends the definition of *condition of release*, contained in subregulation 4.01(2), to make meeting a condition of release subject to new regulation 4.01B.

**Item 2** inserts a new regulation, 4.01B into the RSA Regulations.

The regulation sets out the conditions of release that an individual can satisfy, if at any stage the individual had 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 met is a condition that the individual satisfied before 1 April 2009, or the conditions at items 102, 102A, 103, 104 and new 104A, 108 and 112 of Schedule 2 to the RSA Regulations.

These conditions are:

- Death;
- Terminal medical condition;
- Permanent incapacity;
- Temporary incapacity;
- Unclaimed money payments;
- Departed temporary resident; and
- Release authority for excess contributions.

### **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.

### **Items 3 and 4**

**Items 3 and 4** insert notes after subregulations 4.21(1) and 4.22(1) respectively to alert the reader to new regulation 4.01B and the conditions of release that are available to temporary residents.

## ATTACHMENT B

**Details of *Superannuation Industry (Supervision) Amendment Regulations 2009 (No. 1)***

**Regulation 1** specifies the name of the Regulations as the *Superannuation Industry (Supervision) Amendment Regulations 2009 (No. 1)*.

**Regulation 2** provides that

- Regulations 1 to 3 and the provisions in Schedule 1 commence on the day after they are registered; and
- Regulation 4 and the provisions in Schedule 2 commence on 1 April 2009.

Commencement of Schedule 1 on the day after the Regulations are registered ensures that consistency is achieved with the existing legislation. Commencement on 1 April 2009 provides industry with time to adjust their administrative processes and systems in respect of payments to superannuation fund members.

**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 as amended by *Superannuation Industry (Supervision) Amendment Regulations 2008 (No. 4)*.

**Schedule 1 - Amendments commencing the day after the Regulations are registered*****Minor amendments***

The aim of these amendments is to achieve grammatical correctness and consistency between the legislation supporting the Government's *Temporary Residents' Superannuation* measure.

**Items 1 to 8, 10, 12 to 15, 17, and 19 to 26**

**Items 1 and 2** amend subregulations 6.01(2) (c)(ii) and 6.01(2)(b)(ii) respectively, to clarify that the reference to 'Nil' was to a 'Nil' cashing restriction.

The *Migration Act 1958* does not refer to the term 'departed Australia', but rather 'left Australia'. The legislation supporting the Government's *Temporary Residents' Superannuation* measure also uses the term 'left Australia'. For consistency, **items 3 to 8, 13, 14 and 15** amend the SIS Regulations to replace the phrase 'departed Australia' with 'left Australia'.

An error was introduced by the *Superannuation Industry (Supervision) Amendment Regulations 2008 (No. 4)* in the headings to regulations 6.20C and 6.24B in relation to

payments to the Commissioner. **Items 9 and 16** correct these errors by referring to the 'Commissioner of Taxation' rather than the 'Commissioner for Taxation'.

### **Items 10, 17, 21 to 25**

**Items 10 and 17** amend regulations 6.20C and 6.24 respectively to replace the phrase 'member's interest' with 'person's interest'. Items 21 to 25 make the same amendment to items 103B and 204A in schedule 1 to the SIS regulations. This amendment provides for the circumstances where unclaimed money has been paid to the Commissioner in respect of a person other than the member, for example non-member spouse (See subsection 12(2) of the UCM Act).

**Items 12 and 19** ensure that consistent wording is used within the subregulations of regulations 6.22 and 6.26.

### **Item 20**

**Item 20** corrects an oversight and includes the '1997 Tax Act', which is defined as the *Income Tax Assessment Act 1997*, in paragraph 13.16(2)(b) of the SIS Regulations. This will allow a provider to alter a member's benefits where the alteration was necessary for compliance with the 1997 Tax Act. This amendment is unrelated to the *Temporary Residents' Superannuation* measure.

### **Items 11, 18, 23 and 26**

**Items, 11, 18, 23 and 26** amend regulations 6.20C and 6.24B to remove the requirement to cash benefits in favour of the Commissioner as a single lump sum. The benefits are only required to be cashed as a lump sum, which is consistent with the UCM Act. The respective items in Schedule 1 are also updated by **items 23 and 26**.

## **Schedule 2 - Amendments commencing on 1 April 2009**

**Item 1** amends regulation 6.01B to clarify which member was subject to restricted conditions of release.

In addition, **item 1** broadens the conditions of release a temporary resident can satisfy by enabling the cashing of benefits where a provider has received a release authority from the Commissioner of Taxation. This ensures temporary residents do not receive a benefit from making excess contributions into the superannuation system.

**ATTACHMENT C****Details of *Superannuation (Unclaimed Money and Lost Members) Amendment Regulations 2009 (No. 1)***

**Regulation 1** specifies the name of the Regulations as the *Superannuation (Unclaimed Money and Lost Members) Amendment Regulations 2009 (No. 1)*.

**Regulation 2** provides that the Regulations commence on the day after they are registered.

This commencement ensures the Regulations required to support the unclaimed money framework are in place before payments are made by the Commissioner.

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

**Schedule 1 - Amendment****Prescribed visas**

Where a departed temporary resident's benefit is paid to the Commissioner under the UCM Act, subsection 20H(2)(b)(iii) of that Act provides that an amount can be paid by the Commissioner to a fund where directed by a person who is, under the *Migration Act 1958*, a holder of a permanent visa or a visa prescribed by the Regulations.

**Item 1** inserts a new regulation 4BA into the UCM Regulations.

This new regulation allows individuals who are on 410 and 405 visas to direct the Commissioner to pay unclaimed money held in respect of them to a complying superannuation plan. This enables these individuals who are here on retirement visas to hold their superannuation within the superannuation system.