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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FIRST HOME SAVER ACCOUNTS BILL 2008

INCOME TAX (FIRST HOME SAVER ACCOUNTS MISUSE TAX) BILL 2008

FIRST HOME SAVER ACCOUNTS (CONSEQUENTIAL AMENDMENTS) BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Treasurer, the Hon Wayne Swan MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	***Definition***
ABN	Australian Business Number
ADIs	authorised deposit-taking institutions
APRA	Australian Prudential Regulation Authority
APRA Act	*Australian Prudential Regulation Authority Act 1998*
ASIC	Australian Securities and Investment Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
CGT	capital gains tax
Commissioner	Commissioner of Taxation
Corporations Act	*Corporations Act 2001*
Corporations Regulations	*Corporations Regulations 2001*
FHOG	First Home Owner Grant
FHSA	First Home Saver Accounts
FHSA (Consequential Amendments) Bill 2008	First Home Saver Accounts (Consequential Amendments) Bill 2008
FHSA Bill 2008	First Home Savers Account Bill 2008
Income Tax (FHSA Misuse Tax) Bill 2008	Income Tax (First Home Saver Accounts Misuse Tax) Bill 2008
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
PAYG	pay as you go
RSE	registrable superannuation entity
SIS Act	*Superannuation Industry (Supervision) Act 1993*
SIS Regulations	*Superannuation Industry (Supervision) Regulations 1994*
TAA 1953	*Taxation Administration Act 1953*

virtual PST	virtual pooled superannuation trust

General outline and financial impact

First Home Saver Accounts

The First Home Saver Accounts Bill 2008 (FHSA Bill 2008) and supporting Bills implement the Government's election commitment to introduce First Home Saver Accounts (FHSAs).

Overview of arrangements

The Government is introducing FHSAs to provide a simple, tax effective way for Australians to save for the purchase of their first home in which to live, through a combination of low taxes and Government contributions.

The legislation for FHSAs is contained in three Bills:

- the main Bill is the FHSA Bill 2008, which establishes FHSAs, governs their operation, provides for the payment of Government contributions for account holders, and provides for the prudential regulation of account providers;
- the First Home Saver Accounts (Consequential Amendments) Bill 2008 (FHSA (Consequential Amendments) Bill 2008), which contains consequential amendments to other Commonwealth laws, chiefly the taxation and corporations law; and
- the Income Tax (First Home Saver Accounts Misuse Tax) Bill 2008 (Income Tax (FHSA Misuse Tax) Bill 2008), which imposes the misuse tax to clawback benefits obtained by an account holder who improperly uses the accounts.

Chapter 1 outlines the key concepts and definitions which apply to FHSAs. It also outlines who can open an account and the arrangements for making contributions into accounts. To be eligible to open an account, an individual must:

- be aged at least 18 and under 65;
- have not previously owned a home in Australia in which they have lived; and

- provide their tax file number (TFN) to the provider and meet standard proof-of-identity requirements.

For contributions:

- there are no restrictions on who can make a contribution into an FHSA;
- all contributions must be made from post-tax income; and
- there is an overall account balance cap of $75,000 (indexed).

Chapter 2 outlines the circumstances and processes necessary for money to be paid from an FHSA. As a general rule, in order to access money to purchase a first home, personal contributions of at least $1,000 must have been made in respect of the FHSA holder in each of at least four financial years. Individuals are able to contribute the balance of their account to superannuation at any time.

The rules described in Chapter 2 limit the circumstance in which FHSAs can be accessed. The primary reason for accessing money in a FHSA is to purchase a first home in Australia in which to live. Funds can also be accessed:

- as a contribution to superannuation;
- as a transfer to another FHSA;
- when the individual reaches age 60; and
- in other limited specified circumstances.

Chapter 3 outlines the Government contribution arrangements. In general, the Government contribution is applied to up to $5,000 (indexed) of personal contributions into an account in a financial year. The rate of the Government contribution is 17 per cent for all individuals.

Chapter 4 outlines the obligations of FHSA providers before they may offer FHSAs. Authorised deposit-taking institutions (ADIs) and life insurance companies are required to notify the Australian Prudential Regulation Authority (APRA) before offering FHSAs. Trustees who hold the appropriate class of registrable superannuation entity (RSE) licence are eligible to seek authorisation as an FHSA provider.

Chapter 5 outlines the prudential regulation framework that applies to FHSA providers. A new prudential framework applies to RSE licensees that are authorised to provide FHSAs and FHSA trusts which is broadly

consistent with the prudential framework that applies to public offer superannuation funds and their trustees. APRA will be able to make prudential standards in relation to authorised trustees and FHSA trusts.

Additional investment management requirements apply to FHSAs offered by authorised RSE licensees and life insurance companies that offer FHSAs as investment-linked life policies.

Otherwise, FHSA providers that are ADIs and life insurance companies are prudentially regulated under the *Banking Act 1959* and *Life Insurance Act 1995*.

Chapter 6 outlines the tax treatment of FHSAs, which is set out in the FHSA (Consequential Amendments) Bill 2008 and the Income Tax (FHSA Misuse Tax) Bill 2008. The following taxation arrangements apply:

- individual contributions to FHSAs are not taxed as they will be made from post-tax income;
- Government contributions are not taxed;
- withdrawals to purchase a first home are not taxed;
- other withdrawals are generally not taxed.

In addition, earnings on FHSAs are taxed to the account provider at the statutory rate of 15 per cent rather than to the individual account holder. Broadly, this applies in the following way:

- the trustee of an FHSA trust is liable to pay tax at 15 per cent on the taxable income of the trust;
- an ADI calculates an FHSA component of taxable income on a similar basis to a retirement savings account, which is taxed at 15 per cent; and
- a life insurance company calculates (using the virtual pooled superannuation trust method) a class of taxable income for their FHSA and superannuation activities to be taxed at 15 per cent.

Chapter 6 also describes the FHSA misuse tax, which applies to clawback benefits obtained by individual account holders who improperly use the accounts. In general, an FHSA holder is subject to the misuse tax if FHSA money is paid to the FHSA holder to purchase a first home and:

- they were not eligible to open an account;
- they became ineligible and failed to notify the FHSA provider;
- they did not use the money to purchase or build a first home; or
- they failed the occupancy rules.

The tax does not apply if the money is transferred to superannuation, even if the FHSA holder fails one or more of these conditions.

Chapter 7 outlines how the relevant provisions of the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act) in relation to financial services licensing, conduct, advice and disclosure apply to FHSAs. The necessary amendments are in the FHSA (Consequential Amendments) Bill 2008. They ensure that FHSAs are:

- accompanied by appropriate disclosure documents (including a product disclosure statement and periodic statements);
- not subject to unnecessary regulation;
- subject to a mandatory cooling-off period; and
- treated the same under the Corporations Act, regardless of the issuing entity and the legal nature of the accounts.

Chapter 8 outlines administration and other requirements, including the provider's legal responsibilities in relation to TFNs; secrecy provisions and reporting of information to the Parliament.

Date of effect: The main Bill and amendments formally commence on the day after the date of Royal Assent. However, practical effect is in relation to FHSAs, which can only be opened or issued on or after 1 October 2008.

Proposal announced: FHSAs were announced in the 2007 Federal election campaign. On 4 February 2008, the Treasurer and the Minister for Housing announced that the Government had formally

approved the establishment of FHSAs. A detailed proposal was released for public consultation on 8 February 2008 in *First Home Saver Accounts – Outline of proposed arrangements*. The Government's final decisions were announced as part of the 2008-09 Budget on 13 May 2008 in Press Release No. 040 issued by the Treasurer.

Financial impact: The amendments in the FHSA Bill 2008 and supporting Bills will have a fiscal cost of around $1.2 billion over five years (including administration costs).

Impact on fiscal balance

2007-08	***2008-09***	***2009-10***	***2010-11***	***2011-12***
–$2.7m	–$156m	–$241m	–$341m	–$438m

Compliance cost impact: There are likely to be medium implementation costs for providers who choose to offer FHSA. However, the design of the initiative as reflected in the law has sought to minimise compliance costs for account providers.

1 Chapter 1
Opening and making contributions

Outline of chapter

.1 Parts 1 and 2 of the main Bill provide for the general operation of the First Home Saver Accounts Bill 2008 (FHSA Bill 2008) and key concepts and definitions. Division 1 of Part 3 outlines the eligibility rules for opening and issuing First Home Saver Accounts (FHSAs) and Division 2 of Part 3 outlines the rules for making contributions into accounts.

.2 This chapter outlines the key concepts and definitions that apply throughout the FHSA Bill 2008 including: the definition of an FHSA; what it means to provide an FHSA; and what a qualifying interest in a dwelling is. Other definitions are dealt with in the discussion of the provisions to which they relate.

.3 This chapter also outlines the eligibility and contribution rules for FHSAs including:

2 the rules for opening, issuing or holding an FHSA; and

3 the rules relating to contributions into an FHSA including the account balance cap and limits on when contributions can be paid into an FHSA.

Context

.1 FHSAs are designed to assist aspiring first home buyers achieve the goal of owning their first home in which to live by providing a tax effective way to save. The Government provides benefits to first home buyers using FHSAs through a Government contribution paid directly into the account and the taxation of earnings on accounts at a low rate.

.2 To achieve the objective of assisting aspiring first home buyers, it is necessary to ensure that these benefits are only provided to individuals who are saving for a first home in which to live. This is achieved by requiring individuals to satisfy certain eligibility criteria to open or be issued with and hold an FHSA.

4 A uniform set of criteria is used to determine an individual's eligibility to open an FHSA. These criteria are similar, but not identical, to those used by the States and Territories to assess eligibility for the First Home Owner Grant (FHOG).

5 Unlike the FHOG, eligibility to open an FHSA is determined on an individual basis and is not affected by the eligibility of an individual's partner. This means that an FHSA can only be held by an individual, not jointly. The FHOG arrangements will remain in place.

.1 In addition, to ensure that the assistance provided to first home buyers is targeted appropriately, there are limitations on the amount that can be saved in FHSAs and other restrictions on contributions that can be made into accounts.

Summary of new law

Eligibility to open an First Home Saver Account

.2 Before being able to open an FHSA, an individual must satisfy certain eligibility criteria. They must be aged 18 and over and under 65 years and open the account for themselves (where the individual is incapacitated, their legal personal representative may open an account for them).

.3 As the accounts are to be used to assist individuals to save for their first home, the applicant must never have previously owned a dwelling that has been their main residence. This test is based on the individual and does not take into account whether a current or former partner has previously owned a home.

.4 To help individuals and the Commissioner of Taxation (Commissioner) track FHSAs, the individual must provide their tax file number (TFN) to their FHSA provider. This helps to ensure that individuals only open one account and assists the Commissioner in paying Government contributions (outlined in Chapter 3).

.5 To ensure the integrity of the eligibility requirements, the Commissioner will undertake compliance work to ensure that individuals who open an FHSA are eligible and that only one account is opened by each individual. Penalties may apply to individuals and/or FHSA providers for breaching the eligibility requirements, including criminal penalties in certain circumstances.

Contributions to a First Home Saver Account

.6 There are no restrictions on who can make a contribution into an FHSA, however, all contributions must be made from post-tax amounts.

.7 To ensure that the taxation incentives are appropriately targeted, there is an overall account balance cap of $75,000. This cap is indexed annually in $5,000 increments.

.8 A Government contribution is also paid to an FHSA where personal contributions are made to an FHSA during the financial year. The details of the Government contribution are discussed in Chapter 3.

Detailed explanation of new law

Key concepts and definitions

First Home Saver Accounts

.9 FHSAs can only be opened or issued after 1 October 2008. ***[Subsection 8(b)]***

.10 An FHSA can only be offered by certain prudentially regulated financial institutions: authorised deposit taking institutions (ADIs); life insurance companies (including friendly societies); and registrable superannuation entity (RSE) licensees which can provide public offer superannuation funds and are authorised to offer FHSAs.

> 6 Trustees of other superannuation funds, including self managed superannuation funds, non public offer funds and exempt public sector superannuation funds, are not able to offer FHSAs as they are not subject to the same level of prudential regulation as trustees of public offer superannuation funds.
>
> 7 In addition, managed investment schemes and other investment vehicles that are not prudentially regulated are not able to offer FHSAs. Chapter 4 outlines in further detail the requirements for offering FHSAs and Chapter 5 outlines the prudential requirements applying to FHSA providers.

.1 As FHSAs can be offered by three different types of institutions, the legal nature of an FHSA will differ depending on the type of institution offering it. An FHSA offered by an ADI will be a deposit account, those offered by a life insurance company will be a policy, and those offered by

RSE licensees will be beneficial interests in a trust. This affects the definitions of an FHSA and the meaning of 'hold' and 'FHSA holder' and the definition of 'provide' and 'FHSA provider'.

Authorised deposit-taking institutions

.2 An ***ADI*** is a body corporate that is an ADI under the *Banking Act 1959*. This includes banks, building societies and credit unions. ***[Section 18]***

.3 An account is an FHSA if contributions are received by an ADI to an account described as an FHSA. ***[Subparagraph 8(c)(i)]***

.4 If provided by an ADI, an individual ***holds*** an FHSA if the account is opened in their name. The individual is therefore the ***FHSA holder***. ***[Paragraph 9(1)(a) and subsection 9(2)]***

.5 If an ADI accepts or has accepted contributions to an FHSA it ***provides*** the FHSA. The ADI is therefore the ***FHSA provider***. ***[Paragraph 10(1)(a) and subsection 10(2)]***

Life insurance companies

.6 A **life insurance company** is a company registered under the *Life Insurance Act 1995*. This includes friendly societies. ***[Section 18]***

.7 A life policy is an FHSA if the FHSA policy is issued by a life insurance company and it is described as an FHSA ***[subparagraph 8(c)(ii)]***.

8 The terms 'policy' and 'life policy' are defined in the *Life Insurance Act 1995* ***[section 18]***.

.1 If issued by a life insurance company, an individual ***holds*** an FHSA if the individual owns the FHSA policy. The individual is the ***FHSA holder*** ***[paragraph 9(1)(b) and subsection 9(2)]***.

9 The term 'owner' is described in the *Life Insurance Act 1995* ***[section 18]***.

.1 If a life insurance company ***provides*** an FHSA policy it provides an FHSA. The life insurance company is therefore the ***FHSA provider***. ***[Paragraph 10(1)(b) and subsection 10(2)]***

Authorised trustees

.2 A beneficial interest in a trust is an FHSA if it is provided by a trustee authorised as an FHSA provider and the interest is described as an FHSA ***[subparagraph 8(c)(iii)].***

10 A trustee may apply to receive authorisation as an FHSA provider under section 92 ***[section 18].***

.1 If provided by a trustee, an individual ***holds*** an FHSA if the individual holds the beneficial interest in the FHSA trust. The individual is therefore the ***FHSA holder***. ***[Paragraph 9(1)(c) and subsection 9(2)]***

.2 If a trustee ***provides*** a beneficial interest in an FHSA trust it provides an FHSA. The trustee is therefore the ***FHSA provider***. ***[Paragraph 10(1)(c) and subsection 10(2)]***

.3 The trust which is provided by a trustee authorised as an FHSA provider is defined as an ***FHSA trust***. ***[Section 18]***

First Home Saver Account contributions

.4 A ***contribution*** is defined as a contribution of money. It includes a deposit into an account held at an ADI and a payment of a premium to a life insurance company. ***[Section 18]***

.5 There are no restrictions on who can make a contribution into an FHSA; however, all contributions must be made from post-tax amounts.

11 As with other payroll deductions, an employer is still able to remit post-tax contributions on behalf of an employee to an FHSA.

.1 To assist the Commissioner administer the accounts, FHSA contributions are grouped into two categories:

12 Government contributions; and

13 personal FHSA contributions.

Government contributions

.1 The Commissioner pays a Government contribution to an FHSA where personal FHSA contributions are made to an individual's FHSA during the financial year and the individual is an Australian resident for taxation purposes for at least part of that year. This Government

contribution is applied to the first $5,000 (indexed) of personal FHSA contributions made in the year.

.2 Accordingly, a ***Government contribution*** (Government contribution) for an individual is a contribution or amount paid by the Commissioner for that individual under the FHSA Bill 2008 ***[subsection 11(1)]***.

14 Chapter 3 outlines when a Government contribution is payable.

Personal First Home Saver Account contributions

.1 The FHSA Bill 2008 also defines what contributions are taken into account when the Commissioner calculates an individual's Government contribution.

.2 To ensure that the Government contribution is only paid on contributions to the FHSA system, a ***personal FHSA contribution*** does not include:

15 a Government contribution ***[subsection 11(2)]***;

16 a contribution of an FHSA balance as a transfer from a previous FHSA for the individual under section 35 ***[paragraph 11(3)(a)]***;

17 a contribution under a family law obligation ***[paragraph 11(3)(b)]***:

.1 ***family law obligation*** means a court order under the *Family Law Act 1975* or a financial agreement made under Part VIIIA of the *Family Law Act 1975* that is binding because of section 90G of that Act ***[section 18]***;

18 a re-contribution of an amount previously paid from an FHSA to satisfy the FHSA payment conditions under subsection 17(3) ***[paragraph 11(3)(c)]***; and

19 a contribution refunded to the individual under the Corporations Act on the grounds of ***[paragraph 11(3)(d)]***:

.1 an unsolicited offer, under subsection 992A(4) ***[paragraph 11(3)(d)]***;

.2 a defective product disclosure document, under section 1016F ***[paragraph 11(3)(d)]***; or

.3 exercise of the cooling-off period, under section 1019B ***[paragraph 11(3)(d)]***.

.4 A personal FHSA contribution includes a contribution which is made for the benefit of the individual. For example, a contribution made by an individual's partner or employer into their FHSA.

Qualifying interest in a dwelling

.5 The concept of qualifying interest in a dwelling is directed at ensuring that FHSAs are used to assist aspiring first home buyers to purchase a first home in which to live. To achieve this, the term is used for two purposes in the Bill.

20 It forms part of the eligibility requirements to open an FHSA, as an individual must not hold and have never held a qualifying interest in a dwelling that is or was the individual's main residence ***[paragraph 15(1)(c)]***.

21 It forms part of the payment conditions enabling the use of money from an FHSA to acquire a qualifying interest in a dwelling that will become the individual's main residence ***[paragraph 32(1)(b) and subsection 17(1)]***. This is outlined in further detail in Chapter 2.

.1 If an individual is the legal owner of the dwelling, they hold a ***qualifying interest*** in the dwelling. An individual will hold a qualifying interest in the dwelling if they hold the interest alone or with others, for example, under a joint tenancy. ***[Subsection 12(1)]***

Legal Owner

.2 An individual holds an interest if they are the legal owner; that is, if their name is recorded on the title register as the owner of the property. This is commonly referred to as freehold ownership.

.3 Persons can also hold such an interest if they:

22 have an *estate in fee simple*;

23 have a perpetual lease of the land granted by the Commonwealth or the State;

24 have a lease or licence granted by the Commonwealth, a State or Territory that may be converted into an *estate in fee simple* under the terms of the lease or licence;

25 have title to a dwelling under a long-term Crown lease, such as in the Australian Capital Territory;

26 are the registered proprietor of a flat or home unit that is part of a strata plan; or

27 have a *legal life estate* in the land (rather than a mere *equitable life estate* in the land);

.1 A person is considered to be the owner even if a financial institution or someone else holds a mortgage over the property.

.2 A qualifying interest in a dwelling includes, but is not limited to where the individual has a Crown lease, or a licence granted by the Commonwealth, a State or Territory, over the land which the dwelling is on and that lease or licence gives the individual reasonable security of tenure ***[subsection 12(2)]***.

28 The term ***Crown lease*** is defined in section 124-580 of the *Income Tax Assessment Act 1997* (ITAA 1997) as a lease of land granted by the Crown under an Australian law (other than the common law) or a similar lease granted under a foreign law.

.1 A qualifying interest in a dwelling also includes, but is not limited to where a person:

29 holds an equity of redemption in respect of the dwelling;

30 is the legal owner of a share in a company that owns land on which a flat or home unit is erected and that share gives them a right to occupy the flat or home unit; or

31 holds a right to occupy a dwelling in an aged care facility or retirement village.

[Subsection 12(3)]

.1 The regulations may also specify circumstances where an individual holds a qualifying interest in a dwelling. ***[Subsection 12(4)]***

.2 An individual first holds a qualifying interest in a dwelling when they ***acquire*** the dwelling. This is relevant to deciding whether the FHSA eligibility requirements in paragraph 15(1)(c) are satisfied.
[Subsection 12(6)]

Fixed to land

.3 If the dwelling is not fixed to land (or in circumstances specified in the proposed regulations) an individual is not considered to hold a qualifying interest in a dwelling. ***[Subsection 12(5)]***

.4 A boat, caravan or mobile home, is not a qualifying interest in a dwelling unless it is fixed to land which the individual owns.

32 The phase 'fixed to land' adopts the property law concept of fixtures.

33 If a dwelling is or was a moveable dwelling but has become so attached to the land that it forms a part of the land, it will be a fixture, and therefore legal ownership of the land may constitute the holding of a qualifying interest in a dwelling. If, however, the moveable dwelling is not so attached, ownership of it will not be treated as a qualifying interest in a dwelling.

.1

Bailey is constructing a dwelling. He will acquire a qualifying interest in the dwelling when he starts to hold the qualifying interest in the dwelling; that is, when construction of the dwelling has been completed.

Dwelling

.2 Dwelling has its ordinary meaning. This includes a unit of accommodation that is fixed to the land such as:

34 a house, flat, unit, apartment or townhouse; or

35 a demountable dwelling or re-locatable home where it is fixed to land.

Main Residence

.1 Under the eligibility criteria in section 15 and the FHSA payment conditions in section 17, the dwelling being acquired must become the ***main residence*** of the FHSA holder. A payment can only satisfy these conditions if an amount equal to the payment is used to acquire a dwelling that becomes the account holder's main residence for the requisite minimum period of time.

.2 An individual's main residence has its ordinary meaning. Factors which may be relevant include:

36 whether the individual and/or their family is living in the dwelling;

37 whether they keep personal belongings at the dwelling;

38 whether mail is delivered to the dwelling; and

39 whether the dwelling address is on the electoral roll against the name of the individual.

[Subsection 13(1)]

.1 The regulations may also specify whether a dwelling is or is not an individual's main residence for the purposes of the FHSA Bill 2008. ***[Subsections 13(2) and (3)]***

.1

Rod lives in a rented house and also rents an apartment where he stays for short holidays. The house is where Rod spends most of his time. It is also his mailing address and his address on the electoral roll. The apartment is not Rod's main residence — even for the short periods he stays there.

Rod wishes to purchase the apartment but still live mainly in his rental home. Rod cannot use his FHSA balance to make a payment to purchase a holiday home as it will not be his main residence.

Eligibility rules

First Home Saver Account eligibility requirements

.2 To ensure FHSAs are used to save towards the purchase of a first home, to be eligible to open, be issued with, or hold an FHSA, an individual must satisfy certain ***FHSA eligibility requirements***.

Personal requirements

.3 As FHSAs are intended for adults saving for a first home, the individual must be aged at least 18 years ***[paragraphs 15(1)(a) and (b)]***.

40 The individual must apply to open or be issued with an FHSA personally. For example, an employer is not able to open an FHSA on behalf of an employee or a trustee is not

able to open an FHSA for a beneficiary unless the beneficiary is incapacitated.

41 Where an individual is incapacitated, their 'legal personal representative' as defined in the ITAA 1997 may open an account for them.

.1 The individual must not open or be issued with an FHSA prior to reaching 18 years of age. If an FHSA provider inadvertently opens or issues them with an FHSA, they will not become eligible to open, be issued with, or hold an FHSA when they reach 18 years of age. ***[Paragraphs 15(1)(a) and (b)]***

.2 FHSA funds not used to purchase a first home must be transferred to superannuation. As an individual who is 65 years of age must satisfy a work test to make a contribution to superannuation, an individual must be under 65 years of age to open an account. ***[Paragraph 15(1)(b)]***

.3 Payments can only be made from an FHSA to purchase a first home if personal contributions of at least $1,000 have been made in respect of the FHSA holder in each of at least four financial years ***[subparagraph 32(1)(c)(i)].***

42 This will have implications for individuals who open or are issued with an FHSA close to 65 years of age as they will need to satisfy this requirement in order to receive a payment to acquire a qualifying interest in a home. If they cannot satisfy this requirement, they will be required to contribute their savings to superannuation ***[paragraphs 15(1)(b) and (c)].***

.1 An individual must not hold and have never held a qualifying interest in a dwelling that is or was the individual's main residence. ***[Paragraph 15(1)(c)]***

First Home Saver Account requirements

.2 To ensure that individuals can generally only access the benefits offered by FHSAs once and cannot access multiple Government contributions or avoid the account balance cap, the individual must have only held one FHSA at a time or temporarily held two FHSAs at the same time to allow them to transfer an FHSA balance to a new FHSA ***[paragraphs 15(1)(a) and (e)].***

43 This transfer is provided for under section 35 of the FHSA Bill 2008.

.1 The individual must have never held an FHSA that was closed unless it was closed as:

44 an FHSA home acquisition payment was made from the FHSA and that payment met the FHSA payment conditions under subsection 17(3), as it is being re-contributed to an FHSA:

.1 FHSA home acquisition payments are made under section 32 of the FHSA Bill 2008;

45 an initial FHSA contribution to an FHSA was refunded to the individual under the Corporations Act on the grounds of:

.1 an unsolicited offer, under subsection 992A(4);

.2 a defective product disclosure document, under section 1016F; or

.3 the exercise of the cooling-off period, under section 1019B.

[Paragraph 15(1)(f) and subsection 15(2)]

.4 Individuals do not have any specific obligations under the FHSA Bill 2008 to enable them to open an FHSA.

46 However if they do not provide an FHSA provider with all of the information it requires, they are not able to open, be issued with, or hold an FHSA.

47 If individuals make false statements about their eligibility to open, be issued with, or hold an FHSA, or deliberately open more than one FHSA, penalties apply. These penalties are necessary to ensure the integrity of the FHSA system and to ensure that the taxation incentives provided through FHSAs are targeted appropriately.

.1 When an individual makes a statement to an FHSA provider, they are taken to have made a statement to a taxation officer under subsection 8J(9) of the *Taxation Administration Act 1953* (TAA 1953).

.2 If an individual makes a false or misleading statement in the FHSA application, they commit an offence under section 8K of the TAA 1953 (for making a false or misleading statement) or section 8N of the TAA 1953 (for recklessly making a false or misleading statement).

Obligations of the First Home Saver Account provider in opening or issuing a First Home Saver Account

.3 FHSA providers have an obligation to ensure that an individual applying to open, be issued with, or hold an FHSA provides the required information to satisfy the eligibility criteria. These requirements are in addition to any requirements stipulated under other laws, such as the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

.4 To open or issue an FHSA, an FHSA provider must ensure that an individual has completed an application in the approved form which states that they satisfy all of the FHSA eligibility requirements ***[paragraph 19(1)(a) and subparagraph 19(1)(b)(i)]***.

48 Approved forms are discussed in further detail in Chapter 8.

49 This includes, but is not limited to, an approved form issued by the Commissioner under section 388-50 in Schedule 1 to the TAA 1953 ***[section 55]***.

50 The FHSA provider is only able to open or issue an FHSA where the FHSA is for a single individual. That is, joint FHSAs are not permitted as two people cannot hold, own or have a beneficial interest in the same FHSA.

.1 To ensure that only one account is opened per individual:

51 if the individual already has an FHSA, the application must state that the individual will transfer the old FHSA balance to the new FHSA for the individual. This is under section 35 of the FHSA Bill 2008; or

52 if the individual previously held an FHSA which was closed, the application must state that the individual is opening the new FHSA to receive a re-contribution of an amount previously paid from an FHSA to satisfy the FHSA payment conditions under subsection 17(3).

.1 The individual must still meet the FHSA eligibility requirements to re-contribute the payment. That is, not have acquired a qualifying interest in a dwelling which is their main residence.

.2 Their previous FHSA contributions were refunded to the individual under the Corporations Act on the grounds of: an unsolicited offer under subsection 992A(4); a defective product disclosure document under section 1016F; or the exercise of a cooling-off period under section 1019B.

[Subparagraphs 19(1)(b)(ii) and (iii)]

.1

Annika received a payment from her FHSA in June 2015 which she used to place a deposit on a home. Her FHSA was closed.

In July 2015, Annika was notified by the home owners that they no longer wished to sell the property and the deposit was refunded to her.

Annika wishes to continue to save for a home and would like to re-contribute the refunded deposit to an FHSA. As her original FHSA is closed, Annika will be able to open a new FHSA within six months to continue saving.

.3 In addition, to ensure that only one account is opened for each individual, an FHSA provider must also check the individual has quoted their TFN in connection with the operation of the FHSA Bill 2008 and the Superannuation Acts ***[paragraph 19(1)(c)].***

53 The TFN quotation arrangements are outlined in Part 5 of the FHSA Bill 2008 and regulate the quotation use and storage of an individual's TFN. This is outlined in Chapter 8.

.1 An FHSA provider commits an offence if they open or issue an FHSA where the individual has not completed an application in the approved form (which states they are eligible) and quoted their TFN. The penalty is up to 100 penalty units. ***[Subsection 19(2)]***

.2 If an FHSA provider fails to comply with these obligations, the FHSA created is still valid. ***[Subsection 19(3)]***

Ceasing to be eligible to hold an First Home Saver Account

.3 It is important to ensure that, once opened or issued, an FHSA is only held by an individual who is saving to purchase a first home. An individual ceases to be eligible to have an FHSA if they acquire a qualifying interest in a dwelling that is their main residence or once they turn 65 years of age.

.4 If an FHSA holder fails to meet the FHSA eligibility requirements, they must notify the FHSA provider in the approved form within 30 days. ***[Subsections 20(1) and (2)]***

Implications of becoming ineligible for an account

.5 Once an individual becomes ineligible to hold an FHSA, the account must be closed and generally the balance must be transferred to superannuation. However, where the individual is 60 years or over, the individual may elect to receive a payment from the FHSA directly. This is a permitted purpose for a payment out of an FHSA and is discussed in further detail in Chapter 2.

.6 As a result, when notifying the FHSA provider, an FHSA holder must either:

54 state they are 60 years or over and would like to receive a payment from the FHSA directly; or

55 authorise the FHSA provider to contribute the savings in the FHSA to their interest in a complying superannuation plan:

.1 a 'complying superannuation plan' is defined in the ITAA 1997 ***[section 18]***.

[Subsection 20(4)]

.2 If an FHSA holder fails to comply with these requirements, there may be consequences under the TAA 1953.

56 The FHSA holder is liable for an administrative penalty under section 286-75 of Schedule 1 to the TAA 1953.

57 The FHSA holder may also commit an offence for failure to comply with requirements set out under a taxation law under section 8C of the TAA 1953.

[Subsection 20(1), Note]

Exceptions to the requirements

.1 An individual is not required to notify the FHSA provider if they close their FHSA within 30 days of becoming ineligible or if the funds in the account are paid out under section 32 within 30 days to acquire a qualifying interest in a home. ***[Subsection 20(3)]***

.1

Judy acquires a qualifying interest in a dwelling on 15 August 2010 by using a deposit bond and loan from MT Bank Ltd. She moves into the dwelling on 17 August 2010 and it becomes her main residence. From that date she becomes ineligible to hold the account.

On 25 August 2010, Judy applies to her FHSA provider, the WT Life Insurance Company (WT Life), for a payment for the purpose of repaying the deposit bond. As this is within 30 days of becoming ineligible, she is not required to notify WT Life.

Revoking a notice

.2 If an FHSA holder subsequently realises that they do satisfy the account criteria they may revoke the notice.

.3 However, the notice cannot be revoked if:

58 it has been more than 30 days since the original notice was provided; or

59 the FHSA has been closed by the FHSA provider under paragraph 22(2)(b).

.1 If the FHSA provider has already made a direct payment to the FHSA holder or contributed the FHSA to superannuation but the FHSA is still open, the notice can also not be revoked as it would be administratively difficult to unwind the transaction.

[Subsection 20(5]

.1

On 15 February 2011, Aidan inherits a home from his great grandmother's estate. On 20 February 2011, he notifies his FHSA provider, RDR Bank Limited that he no longer satisfies the eligibility criteria. On 27 March 2011, RDR Bank Limited contributes the savings in his FHSA to his superannuation fund (the JR Superannuation Fund) and closes his account.

On 30 March 2011, Aidan realises that, as he has not and never intends to live in the home, he still satisfies the account criteria and notifies RDR Bank Limited that he revokes the notice. Although Aidan has revoked the notice, as the savings have already been contributed to the JR Superannuation Fund, the revocation has no effect.

The Commissioner believes that the eligibility criteria have not been met

.2 As part of compliance activities, the Commissioner conducts checks to ensure that individuals are eligible to hold an FHSA.

.3 If the Commissioner believes that an FHSA holder did not satisfy the eligibility criteria when the FHSA was opened or issued or that the FHSA holder no longer satisfies the eligibility criteria, the Commissioner is required to notify the FHSA provider. ***[Subsection 21(1)]***

.4 The notice must explain that the FHSA provider must:

60 contribute the savings in the FHSA to superannuation and close the FHSA under section 22;

61 not pay contributions to the FHSA under section 26; and

62 not pay amounts from the FHSA under sections 31, 32 and 35.

[Subsection 21(3)]

.1 The Commissioner must also give the FHSA holder a copy of this notice. This allows the FHSA holder an opportunity to respond to the notice if they believe they meet the eligibility criteria. ***[Subsection 21(2)]***

.2 The conditions for opening an FHSA require an individual to quote their TFN. If an FHSA holder has quoted an invalid TFN, the Commissioner may give a notice under section 67 that the Commissioner is not satisfied the individual has a TFN. This notice must also explain the effects of sections 22, 26, 32 and 35. ***[Paragraph 113-B(1)(a), Note]***

.3 If the Commissioner subsequently believes that an FHSA holder did satisfy the conditions for opening an FHSA when the FHSA was opened or issued and continues to satisfy the eligibility criteria, the Commissioner must revoke the notice unless:

63 it has been more than 30 days since the original notice was provided; or

64 the FHSA has been closed by the FHSA provider under paragraph 22(2)(b).

[Subsection 21(4)]

.1 If the Commissioner revokes the notice, the Commissioner must also notify the FHSA holder so that they are aware that the Commissioner no longer believes they do not satisfy the eligibility criteria. ***[Subsection 21(5)]***

Inactive First Home Saver Accounts

.2 To ensure that FHSAs are held only by individuals who are eligible to hold an FHSA, an FHSA may become inactive if certain events occur.

.3 An FHSA becomes ***inactive*** if an FHSA provider has received a notice (which has not been revoked):

65 from the FHSA holder, under subsection 20(1), that they do not meet the eligibility criteria;

66 from the Commissioner, under subsection 21(1), that the FHSA holder did not satisfy the eligibility criteria when the FHSA was opened or issued or holds (or previously held) a qualifying interest in a dwelling which is their main residence; or

67 from the Commissioner, under subsection 67(2), that the TFN quoted by the FHSA holder is invalid and the Commissioner is not satisfied they have a TFN.

[Subsection 23(1)]

.1 An FHSA also becomes inactive if:

68 the FHSA holder makes a home acquisition payment under section 32, or a payment directly to the FHSA holder under section 33, and the FHSA balance is nil;

69 the FHSA holder turns 65 years of age; or

70 the FHSA was opened or issued under subparagraph 19(1)(b)(ii) as the FHSA holder was transferring FHSA savings from another FHSA, and the transferred savings were not received within 44 days of opening or issuing the new FHSA.

[Subsections 23(2) to (4)]

Closing an inactive First Home Saver Account

Closing a First Home Saver Account

.1 Where an FHSA has become inactive, the FHSA provider must either:

71 make a payment to the FHSA holder directly (if the FHSA holder is 60 years or over and has authorised the payment); or

72 otherwise contribute the FHSA balance to superannuation; and

73 close the FHSA.

[Subsection 22(2)]

.1 If the FHSA provider contributes the FHSA to superannuation, the FHSA provider must make the contribution:

74 to the FHSA holder's nominated own interest in a complying superannuation plan; or

75 if no nominated fund exists, to the FHSA provider's default superannuation plan.

[Subsection 22(3)]

.1 The timeframe within which the FHSA must be closed differs depending on the reason for the account being inactive.

.2 If an FHSA is inactive because the FHSA provider has received a notice that the FHSA has become inactive under subsection 23(1) the FHSA provider must allow 30 days for the notice to be revoked. If the notice is not revoked, the provider must close an individual's FHSA 14 days after the end of the 30-day waiting period. ***[Paragraph 22(1)(a)]***

.1

An FHSA provider receives a notice on 1 November 2010 that the FHSA holder does not meet the account criteria under subsection 21(1). The FHSA provider must not pay contributions or make payments until 30 November 2010 to give the Commissioner an opportunity to revoke the notice.

The FHSA provider then has until 15 December 2010 (14 days after the end of the waiting period) to make a payment (if the FHSA holder is over 60 and authorises the payment) or contribute the FHSA to

superannuation and close the account. This allows the FHSA provider a total of 44 days from 1 November 2010 to satisfy its obligations.

.3 In all other circumstances an FHSA provider must close an inactive FHSA 14 days after:

76 a payment being made under subsection 23(2);

77 the FHSA holder reaching 65 years of age under subsection 23(3); or

78 a transfer not being received 44 days after the FHSA was opened or issued under subsection 23(4).

[Paragraph 22(1)(b)]

.1 An FHSA provider commits an offence if the FHSA provider fails to close the FHSA in accordance with its obligations. The penalty is up to 100 penalty units. ***[Subsection 22(4)]***

.2 If an FHSA provider fails to close the FHSA in accordance with its obligations, any contribution paid or payment made is still valid. ***[Subsection 22(5)]***

Default superannuation plan

.3 As an FHSA provider may be required to contribute the balance of an FHSA to superannuation to enable it to close an FHSA, it must specify a default superannuation plan in which to make the payment if the FHSA holder has not nominated a plan.

.4 All FHSA providers are required to nominate in writing a default superannuation plan. This is a complying superannuation plan to which it will make payments under paragraph 22(3)(b) ***[subsection 24(1)]***.

79 It is intended that the FHSA provider will be required to disclose this default superannuation plan to the FHSA holder when an FHSA is opened or issued.

.1 If the FHSA needs to change its default superannuation plan as the plan ceases to be a complying superannuation plan, the FHSA provider must nominate another default superannuation plan in writing ***[subsection 24(1)]***.

80 It is intended that the FHSA provider will be required to disclose this new default superannuation plan to the FHSA holder when this occurs.

81 The FHSA provider may also change its default superannuation plan at other times by making a written nomination stating the new default superannuation plan. It is also intended that the FHSA provider notify the FHSA holder when this occurs.

.1 An FHSA provider commits an offence if it fails to comply with its obligations to nominate a default superannuation plan. The penalty is up to 100 penalty units. ***[Subsection 24(2)]***

Contributions

.2 To ensure that the assistance provided to first home buyers is targeted appropriately, there are limitations on the amount that can be saved in an FHSA and other restrictions on contributions that can be made to an FHSA.

.3 Generally, an FHSA provider must not allow an amount to be contributed to an FHSA where the account holder is aged 65 or over, the FHSA is inactive or the account balance cap has been or will be breached.

An account holder aged 65 or over

.4 An FHSA holder is not eligible to hold an FHSA once they turn 65 years of age, and under section 22 an FHSA provider is required to close an FHSA within 14 days of the FHSA holder turning age 65.

.5 If an FHSA holder is aged 65 years or over and the FHSA is still open, the FHSA provider must not allow any contributions, personal or Government, to be paid to the FHSA ***[subsection 25(1)]***.

82 If an FHSA holder is eligible to receive a Government contribution it may be paid by the Commissioner directly to the FHSA holder ***[section 41]***.

Inactive First Home Saver Account

.1 An FHSA provider must not pay any contributions to an inactive FHSA. ***[Subsection 26(1)]***

Breach of the account balance cap

.2 In order to ensure that the FHSA taxation incentives are targeted appropriately, there is an overall account balance cap on all FHSAs.

Account balance cap

.3 In the 2008-09 financial year the ***account balance cap*** is $75,000. This cap will be indexed in $5,000 increments under section 30 ***[section 29]***.

83 The financial year means the financial year as defined in the ITAA 1997 ***[section 18]***.

Breach of account balance cap — limit on contributions

.1 An FHSA provider can only allow a limited range of contributions to be made to an FHSA if the FHSA balance is over the account balance cap or the contribution would cause the FHSA balance to exceed the account balance cap. Other amounts contributed to an FHSA are not allowed in these circumstances. ***[Subsection 27(1)]***

.2 In these circumstances, an FHSA provider may only allow the following contributions to be paid to the FHSA:

84 a Government contribution defined under subsection 11(1);

85 a contribution of an FHSA balance transferred to a new FHSA for the individual FHSAs under paragraph 11(3)(a); or

86 a re-contribution of an amount under paragraph 11(3)(c) as it was an amount previously paid from an FHSA to satisfy the FHSA payment conditions subsection 17(3).

[Paragraph 27(1)(b)]

.1

Megan's account balance is $70,000. On 1 May 2010, Megan makes a contribution of $5,000 to her FHSA. If the account balance cap is $75,000, the contribution does not exceeded the account balance cap.

Megan is entitled to a Government contribution of $780 on her $5,000 contribution. Her FHSA provider will be able to pay the Government contribution to her FHSA as, although it will cause her FHSA balance to exceed $75,000, the payment of a Government contribution does not cause her to exceed the account balance cap.

Breach of the account balance cap — return of contributions

.2 If an FHSA provider receives a contribution which would cause the FHSA balance to exceed the account balance cap, it is not necessary for the whole amount of the contribution to be rejected or returned. The

amount in excess of the account balance cap may be rejected or returned. ***[Paragraph 27(1)(b), Note]***

.1

Michael has an account balance of $73,000. On 1 November 2010 he makes a $3,000 personal FHSA contribution to his FHSA. If the account balance cap is $75,000 and the entire contribution is paid to his FHSA, it will exceed the account balance cap.

The account balance cap is only exceeded if the FHSA balance exceeds $75,000. The FHSA provider is not able to pay the entire contribution to his account; however, to ensure Michael's FHSA does not exceed the account balance cap it may either:

87 return the entire $3,000 to him so that his account balance remains at $73,000; or

88 return $1,000 to him (the amount which exceeds the account balance cap) so that his account balance does not exceed the account balance cap of $75,000.

Breach of the account balance cap — timing

.1 If the account balance of an FHSA exceeds the account balance cap, an FHSA holder is in ***breach*** of the account balance cap from that time onwards ***[subsection 28(1)]***.

89 If the account balance of an FHSA subsequently falls below the account balance cap, an FHSA holder will have still breached the cap from the time it was originally breached.

.1

On 28 April 2009, Steven makes a contribution to his FHSA and his balance reaches $75,000. On 15 August 2009, Steven's FHSA provider pays earnings of $1,000 to his FHSA and his account balance is $76,000. If the account balance cap is $75,000, Steven's FHSA will have breached the account balance cap on 15 August 2009.

On 1 November 2009, Steven's FHSA suffers an investment loss of $1,500 and his account balance falls to $74,500. As Steven breached the cap on 15 August 2009, Steven's FHSA provider is still only able to pay a limited range of contributions to his FHSA, despite the fact his actual account balance is below the current account balance cap.

Breach of the account balance cap — re-contribution

.2 If an individual is making a re-contribution of an amount previously paid from an FHSA to satisfy the FHSA payment conditions under subsection 17(3), they will not have breached the account balance cap even if the re-contributed amount is above the current account balance cap.

90 If the re-contributed amount is above the current account balance cap, an FHSA provider is only able to pay limited contributions to the FHSA as the FHSA exceeds the current account balance cap.

91 If the re-contributed amount is not above the current account balance cap, an FHSA will have not breached the account balance cap from the time the new FHSA is opened, until the time when the new FHSA balance exceeds the new account balance cap.

92 If the account balance cap has increased since the FHSA holder received a payment from the original FHSA, they will not have breached the cap in the new FHSA until the account balance in the new account breaches the cap.

[Subsections 28(2) and (3)]

.1

In June 2009, the balance of Elise's FHSA is $75,000. In July 2009, her account is credited with $500 of earnings. If the account balance cap is $75,000, the FHSA provider will only be able to pay a limited range of contributions to her FHSA.

In December 2009, Elise withdraws the balance of her FHSA, now $75,500, to purchase a home. The sale of the home falls through in July 2010.

In July 2010, Elise applies to her FHSA provider to open a new FHSA as she failed to purchase a home and would like to continue saving. Assuming the account balance cap has increased to $80,000, Elise is able to contribute the full $75,500. She will not have breached the account balance cap until her account balance exceeds $80,000.

Breach of account balance cap — family law obligations

.2 If a payment is made from an FHSA under a family law obligation under paragraph 31(1)(c) and, after this payment is made the FHSA balance is less than the account balance cap in that year, the FHSA holder

will have not breached the account balance cap from the time the payment is made, until such time as the FHSA balance exceeds the account balance cap. ***[Subsections 28(4) and (5)]***

Indexation of account balance cap

.3 To ensure that the account balance cap is aligned with an individual's ability to save, the account balance cap is indexed annually to full-time average weekly ordinary time earnings.

.4 The account balance cap is indexed annually, by multiplying the account balance cap for the 2008-09 financial year by its indexation factor. The result is rounded down to the nearest $5,000, to ensure that the cap remains in round figures ***[subsection 30(1)]***.

93 The ***indexation factor*** is the proportional change in full-time adult average weekly ordinary time earnings from the middle month of the December quarter 2007 to the middle month of the December quarter just before the relevant financial year. The indexation factor is calculated to four decimal places and rounded to three decimal places ***[subsections 30(3) and (4)]***.

.1 The amount cannot be reduced by indexation; that is, it is not indexed if the indexation factor is less than one. ***[Subsection 30(2)]***

.1

If the indexation calculation increases the threshold to $80,500, the indexed amount is rounded down to $80,000.

Penalties

.2 An FHSA provider must only pay limited contributions to an FHSA where:

94 the holder is 65 years or over;

95 the FHSA is inactive; or

96 the account balance cap has been breached.

[Sections 25 to 27]

.1 If the FHSA provider allows another type of contribution to an FHSA, but returns the contribution within 30 days of receipt, the provider will not contravene these requirements. ***[Subsections 25(2), 26(2) and 27(2)]***

.2 An FHSA provider commits an offence if it allows an amount to be contributed to an FHSA in these circumstances. The penalty is up to 100 penalty units. ***[Subsections 25(3), 26(3) and 27(3)]***

.3 If an FHSA provider fails to comply with its obligations to not allow a contribution in these circumstances, the contribution is still valid. ***[Subsections 25(4), 26(4) and 27(4)]***

• Chapter 2
Payments from a First Home Saver Account

Outline of chapter

– Division 3 of Part 3 of the main Bill provides for the circumstances in which money may be paid from a First Home Saver Account (FHSA).

– This chapter outlines those circumstances and the processes that must be followed by FHSA providers and holders in relation to payments.

– In this chapter, *payment* refers to any money leaving the FHSA, *withdrawal* refers to money being paid from an FHSA to the individual, *transfer* refers to movement between two FHSAs (similar to portability in superannuation) and *contributions to superannuation* refers to money being contributed from an FHSA to superannuation.

Summary of new law

– As FHSAs are intended to encourage saving for a first home, the circumstances in which FHSAs can be accessed will be limited to ensure the tax concessions and Government contributions provided to these accounts are used for the intended purpose.

– The main ways money can be paid from an FHSA are:

- for the purchase of a first home in Australia (see paragraphs 2.23 to 2.40);
- by being contributed to superannuation (see paragraphs 2.44 to 2.50);
- by being transferred to another FHSA (see paragraphs 2.51 to 2.56); and
- when the individual reaches age 60 (see paragraphs 2.41 to 2.43).

– There are a number of other situations in which money can be paid from an FHSA. These include:

- where the account holder dies;
- under a family law obligation;
- for a payment of fees to the account provider;
- for a payment in respect of overpayments of Government contributions;
- for the return of contributions which should not have been accepted by the provider; and
- under certain consumer protection provisions in the *Corporations Act 2001* (Corporations Act).

– The payment rules in the main Bill do not override the *Bankruptcy Act 1966*. This means account providers are not prevented from paying the trustee in bankruptcy an amount from an individual's FHSA.

Purchase of a first home

– In order to withdraw money from their FHSA, an individual under age 60 must request a payment and declare the payment will meet the payment conditions outlined in subsection 17(1). That is, the money will be used in acquiring a qualifying interest in a dwelling, and that that dwelling will become the individual's main residence.

– In addition, personal contributions of at least $1,000 must have been made in respect of the FHSA holder in each of at least four financial years. However, if an account cannot receive further contributions under section 27 because it has breached the account balance cap, the requirement is that the account holder has had an account open in at least four financial years.

– If the individual is acquiring a qualifying interest together with another individual, or group of individuals, the four-year rule only needs to be met by one of the people acquiring an interest.

Transfer to another First Home Saver Account

– Individuals are permitted to move between account providers.

– To transfer from their existing FHSA provider to another, an individual will need to make an application to either their current provider, or their new provider.

– Account providers will be required to act on this transfer request within 30 days.

Contributing to superannuation

– Individuals can contribute the balance of their FHSA to superannuation at any time. This recognises that an individual's circumstances may change, and that they may no longer wish to save for a first home.

– To contribute their FHSA to superannuation, an individual will need to make an application to their FHSA provider. Account providers will be required to act on a request to contribute to superannuation within 30 days.

– In addition, where an individual is no longer eligible to have an account, the account must be closed and the balance contributed to superannuation.

Detailed explanation of new law

General rules on making payments from First Home Saver Accounts

– FHSA providers can make payments from an FHSA only:

- for the account holder acquiring a qualifying interest in a first home in Australia (under section 32);
- after the account holder has reached age 60 (under section 33);
- upon the death of the account holder;
- as a contribution to superannuation (under subsection 22(2) and section 34);
- as a transfer to another FHSA (under section 35);
- to return contributions which should not have been accepted (subsections 25(2), 26(2) and 27(2));

- to fulfil an obligation under certain consumer protection provisions in the Corporations Act;
- under a family law obligation;
- to collect fees; and
- to pay an amount owing to the Commonwealth in respect of overpayments of the Government contribution.

[Section 31]

– However, as the payment rules in the main Bill do not override the *Bankruptcy Act 1966*, account providers are not prevented from paying the trustee in bankruptcy an amount from an individual's FHSA. ***[Section 128]***

– An FHSA provider who makes payments from an FHSA in other circumstances commits an offence (see paragraph 2.64 for more detail) and a penalty of up to 100 penalty units applies. However, a contravention does not affect the validity of a payment. ***[Subsections 31(2) and (3)]***

Payment of entire balance

– In most cases when money is paid from an FHSA, the entire balance must be paid. This requirement is discussed in more detail under the relevant payment provisions.

– The exceptions to the requirement recognise legitimate circumstances where a partial payment from an FHSA should be allowed. These are:

- under a family law obligation;
- a payment of fees from the FHSA; and
- a repayment of overpaid Government contributions.

– As the payment rules in the main Bill do not override the *Bankruptcy Act 1966*, account providers will not be prevented from paying the trustee in bankruptcy an amount less than an individual's entire balance. ***[Section 128]***

Purchase of a first home

– To withdraw money from their FHSA to purchase a first home, an individual must make an application in the approved form to their FHSA

provider requesting that an amount be paid. This is known as a ***home acquisition payment***. ***[Section 14 and paragraph 32(1)(a)]***

– The approved form rules permit the Commissioner of Taxation (Commissioner) to identify the information necessary for account holders to give to their provider. To assist the Commissioner with compliance activity, it is intended this will include information identifying the home proposed to be acquired.

– Providers are unable make a home acquisition payment where the account is inactive. An inactive account indicates there may be problems with the eligibility of the account holder to have the account, and therefore it is not appropriate to allow money to leave the account. See Chapter 1 for a description of inactive accounts. ***[Paragraph 32(1)(e)]***

– The FHSA holder must have declared in the application that the payment will meet the payment conditions set down in subsection 17(1). That is, the money will be used to acquire a qualifying interest in a dwelling, and that that dwelling will become the individual's main residence. ***[Paragraph 32(1)(b)]***

In acquiring a home

– The payment conditions specify an amount equal to the payment must be used in acquiring a qualifying interest in a dwelling within six months of the payment being made from the FHSA. The dwelling must be in Australia (this includes the Territories of Christmas Island and Cocos (Keeling) Island) or Norfolk Island. ***[Paragraph 17(1)(a)]***

– As money is fungible, the words 'an amount equal to the payment' in the payment conditions ensure money withdrawn from an FHSA does not need to be tracked to ensure it is used in acquiring a qualifying interest in a home. It is sufficient for an amount equal to the amount withdrawn to be used.

– The words 'in acquiring' are designed to cover a range of situations where individuals acquire an interest in a dwelling. The following examples demonstrate where a payment will and will not be used in acquiring a qualifying interest in a dwelling.

1

> Andrew wishes to purchase his first home. After finding the perfect home, he wishes to use the money in his FHSA for the deposit.
>
> Andrew can withdraw his money, because using the money to pay the deposit is using it 'in acquiring a qualifying interest in a dwelling'.

2

Daniel, a builder, wants to withdraw money from his FHSA to purchase a block of land on which he will build his home.

Daniel can withdraw his money because using the money to purchase the block of land is using it 'in acquiring a qualifying interest in a dwelling'. In this case, purchasing land is part of the process of acquiring an interest in a dwelling.

See paragraph 2.31 and Example 2.6 for other conditions relating to the purchase of land.

3

Anna, Daniel's next door neighbour, already owns a vacant block of land on which she wishes to have Daniel build her first home.

Anna can withdraw her money, as using the money to pay Daniel to build the home will be using it 'in acquiring a qualifying interest in a dwelling'.

4

Rahul is currently renting an apartment in which he lives, and he also owns an investment property. He would like to move into his investment property, but wants to renovate it first.

He will be unable to withdraw the money from his FHSA to pay for the renovations, because as he already owns the property, he is not using the money 'in acquiring a qualifying interest in a dwelling'.

– The funds from an FHSA may be withdrawn to purchase or construct a home even if, under the same contract or arrangement, other dwellings are being purchased or constructed that will not be the person's main residence.

1

Lian engages a developer and enters into a contract for them to build three townhouses on a block of land she owns. Lian will use the money in her FHSA to help fund the cost of one of the units, which she will occupy as her main residence. As she satisfies the other eligibility conditions for the withdrawal of the money in her FHSA, Lian can withdraw the money to pay the developer.

– When money is being withdrawn for the purchase of land, or a dwelling which is not complete, the construction must be completed within a reasonable period after the withdrawal. This ensures that the

individual cannot defeat the occupancy rules by delaying the completion of their home. ***[Paragraph 17(1)(c)]***

1

> Following Example 2.2, Daniel withdraws his money to commence building his home. However, due to severe weather conditions, construction takes longer than usual.
>
> As the delay was caused by the weather, it is reasonable for the construction to have taken longer than usual, and therefore Daniel will meet the payment conditions.

Occupancy rules

– In order to meet the payment conditions, the dwelling must be the individual's main residence for six continuous months, starting within a designated period. ***[Paragraph 17(1)(b)]***

– For a dwelling that is complete when the payment is made, the designated period starts when the person acquires the dwelling. For a dwelling that is not complete when the payment is made, the period starts when the construction is complete. Whether a dwelling is complete is a matter of evidence and a building completion certificate (eg, a certificate of occupancy) would be relevant (and normally sufficient) evidence. The period ends 12 months after the period starts or at a later time that the Commissioner considers reasonable in the circumstances. ***[Subsection 17(2)]***

1

> Joshua wishes to use his FHSA to purchase a house by the beach. He intends to use it as a holiday house for one week a year, and rent it out for the remainder.
>
> Joshua will not be able to use his FHSA, as the house would not be his main residence for six continuous months.

– See Chapter 1 for more detail on the definition of 'main residence'.

Recontribution

– If an individual would otherwise fail the payment conditions, they will be treated as having satisfied them, if, within six months of the payment, the individual contributes to an FHSA an amount equal to the payment or, a lesser amount that is reasonable in the circumstances. ***[Subsection 17(3)]***

1

Andrew withdraws $20,000 from his FHSA to purchase the home in Example 2.1. However, the vendor withdraws the home from sale after Andrew has incurred $4,000 in legal costs as part of his expenses to acquire the home. To satisfy the payment conditions, Andrew must either acquire another home within six months or return $16,000 to an FHSA. Contributing $16,000 to a new FHSA (as opposed to the $20,000 he withdrew) will be reasonable in the circumstances because of the $4,000 he spent on legal fees.

Four-year rule

– A payment cannot be made from an FHSA to purchase a first home unless personal contributions of at least $1,000 have been made in respect of the FHSA holder in each of at least four financial years. However, if an account cannot receive further contributions under section 27 because it has breached the account balance cap, the requirement is that the account holder has had an account open in at least four financial years. Account providers will need to verify that this condition has been met. ***[Subparagraphs 32(1)(c)(i) and (ii)]***

– Alternatively, if the individual is acquiring a qualifying interest together with another individual, or group of individuals, the four-year rule only needs to be met by one of the people acquiring an interest. The individual will need to declare this is the case. ***[Subparagraph 32(1)(c)(iii)]***

1

Adrian and Vinita are purchasing their first home together. Adrian has been in the workforce longer than Vinita, and has made contributions of $8,000 in seven separate financial years. Vinita however, has only had her account open for one year.

To withdraw her money, Vinita must declare that she is purchasing her home with Adrian, and that Adrian has made contributions of at least $1,000 in four or more financial years.

For Adrian to withdraw his money, his provider must verify the four-year rule has been met.

– The main Bill allows for regulations to be made specifying other requirements that need to be met. ***[Paragraph 32(1)(d)]***

– A home acquisition payment will generally be the entire balance of the FHSA. Where this is not the case, the account will become inactive, and the balance must either be contributed to superannuation, or if the account holder is over age 60, paid directly to them. See Chapter 1 for a description of inactive accounts. ***[Section 23]***

– A payment under this section will be tax free. ***[Schedule 1, item 31, First Home Saver Accounts (Consequential Amendments) Bill 2008 (FHSA (Consequential Amendments) Bill 2008), subsection 345-50(2) of the Income Tax Assessment Act 1997 (ITAA 1997)]***

Age 60

– Account holders who have reached age 60 may request, at any time, that their FHSA be paid to them. The request must be in the approved form. ***[Paragraphs 33(1)(a) and (b)]***

– Consistent with the treatment of superannuation for individuals aged 60 and over, a payment under this section will be tax free. ***[Schedule 1, item 31, FHSA (Consequential Amendments) Bill 2008, subsection 345-50(2) of the ITAA 1997]***

– Payments at age 60 will generally be the entire balance of the FHSA. Where this is not the case, the account will become inactive, and the balance must be contributed to superannuation. See Chapter 1 for a description of inactive accounts. ***[Section 23]***

Contributions to superannuation from a First Home Saver Account

– At any time, an account holder may request, in the approved form, that the entire balance of their FHSA be contributed to a complying superannuation plan. Requiring the entire balance to be contributed prevents individuals from periodically contributing money to superannuation to avoid reaching the account balance cap.
[Paragraphs 34(1)(a) and (b)]

– ***Complying superannuation plan*** has the same meaning as in the ITAA 1997 and means a complying superannuation fund, a complying approved deposit fund, a retirement savings account or a public sector superannuation scheme. ***[Section 18]***

– The contribution must be to a superannuation interest held by the account holder, unless there is a family law obligation which requires the FHSA to be contributed to another individual's superannuation interest (see paragraphs 2.57 and 2.58 for an explanation of family law obligations). ***[Paragraph 34(1)(a) and subparagraph 31(1)(c)(i)]***

– Contributions to superannuation from an FHSA will be treated as non-concessional contributions in the hands of the receiving superannuation fund as they will not be included in the fund's assessable income (see Chapter 7 for more detail). ***[Schedule 1, item 24, FHSA (Consequential Amendments) Bill 2008, section 295-171 of the ITAA 1997]***

– However, amounts contributed from an FHSA will not be eligible for the superannuation co-contribution as the money within the account may already have attracted a Government contribution and/or been concessionally taxed. ***[Schedule 3, item 37, FHSA (Consequential Amendments) Bill 2008, paragraph 7(1)(v) of the Superannuation (Government Co-contribution) for Low Income Earners Act 2003]***

– As they are required to contribute the amount to a complying superannuation plan, providers will need to confirm that the superannuation plan nominated by the account holder is a complying plan.

– Providers making contributions to superannuation will be required to provide the superannuation provider with a statement in relation to the payment. This statement will be required to be in the approved form. See Chapter 8 for more detail. ***[Schedule 1, item 65, FHSA (Consequential Amendments) Bill 2008, section 391-10 of the Taxation Administration Act 1953 (TAA 1953)]***

Transfer to another First Home Saver Account

– An account holder may request, at any time, that the entire balance of their FHSA be transferred to another FHSA provider. The request must be in the approved form. Requiring the whole balance to be transferred ensures individuals do not have two FHSAs open at the same time. ***[Paragraphs 35(1)(a) and (b)]***

– Providers are unable to make a transfer where the account is inactive. ***[Paragraph 35(1)(c)]***

– The transfer must be to another FHSA held by the account holder, unless there is a family law obligation which requires the FHSA to be transferred to another individual's FHSA (see paragraphs 2.57 and 2.58 for an explanation of family law obligations). ***[Paragraph 35(1)(a) and subparagraph 31(1)(c)(ii)]***

– These provisions allow an account holder to give the transfer request to their prospective FHSA provider and have the prospective provider arrange the transfer (on the account holder's behalf) directly with the old provider. That is, the words 'an FHSA holder requests the FHSA provider' cover the holder making the request of their existing provider via their prospective provider.

– An amount transferred from one FHSA to another FHSA will not be a personal contribution and will not be subject to the prohibition on accepting contributions once the account balance has reached the account balance cap. This recognises that FHSA balances can grow above the account balance cap due to interest/earnings and Government

contributions and that this should not prevent account holders changing providers. ***[Paragraph 11(3)(a) and subparagraph 27(1)(b)(ii)]***

– Providers making transfers to another FHSA will need to ensure that it is a valid FHSA and will be required to provide the other provider with a statement in relation to the payment. This statement will be required to be in the approved form. See Chapter 8 for more detail. ***[Schedule 1, item 65, FHSA (Consequential Amendments) Bill 2008, section 391-10 of the TAA 1953]***

Other payments

Family law

– As FHSAs are intended to be used to purchase a first home, generally funds cannot be paid directly to an account holder's spouse or ex-spouse under a family law obligation. However, the balance of the FHSA can be split under a family law obligation and transferred to an FHSA, or contributed to a superannuation interest, of the account holder's spouse or ex-spouse. The amount transferred or contributed may be the whole or part of the balance of the FHSA. Where the account holder's spouse or ex-spouse is over age 60, the amount may be paid directly to them. ***[Paragraph 31(1)(c)]***

– A ***family law obligation*** is either a court order under the *Family Law Act 1975*, or a financial agreement under Part VIIIA of that Act, which is binding because of section 90G of that Act. ***[Section 18]***

Return of the product under the Corporations Act 2001

– The Corporations Act allows individuals to return a financial product and have their money repaid in certain circumstances. Because this Bill would otherwise override these circumstances by limiting when an account provider can make a payment, provision has been made to allow account holders to have their money paid from their FHSAs in accordance with specified provisions in the Corporations Act.

– The situations where an account holder will be able to access their money are:

- where there has been unsolicited offer of an FHSA (subsection 992A(4) of the Corporations Act);
- where the product disclosure statement was defective (section 1016F of the Corporations Act); and
- within 14 days of opening the account (section 1019B of the Corporations Act). Section 19A of the Corporations Act is to

be amended to include FHSAs within the cooling-off requirements ***[Schedule 2, item 14 of the FHSA (Consequential Amendments) Bill 2008].***

[Subparagraph 31(1)(d)(ii)]

Death

– Account providers will be able to release money on the death of an account holder. The FHSA will form part of the deceased's estate in the same way as other assets and will not be taxable in the hands of the beneficiary. ***[Paragraph 31(1)(e)]***

Bankruptcy

– The *Bankruptcy Act 1966* makes provision for the division of property on bankruptcy. As contributions to FHSAs are all voluntary, the payment rules in this Bill will not override anything in that Act. This means that the trustee in bankruptcy will be able to access the funds in an FHSA. This differs from the treatment of superannuation for bankruptcy purposes. ***[Section 128]***

Timing of payments and offences

– Upon receiving an application for the release of funds for the purchase of a first home, at age 60, to contribute to superannuation or transfer to another FHSA, the provider must make the payment as soon as is practicable, and in any event within 30 days of the application having been made. A provider who fails to comply with this payment rule commits an offence and a penalty of up to 100 penalty units applies. However, a contravention does not affect the validity of a payment. ***[Subsections 32(2) to (4), subsections 33(2) to (4), subsections 34(2) to (4) and subsections 35(2) to (4)]***

– The offence provisions in Division 3 of Part 3 of this Bill do not specify which fault elements apply. Under section 5.6 of the *Criminal Code Act 1995*, where an offence provision does not specify a fault element, the fault element will be:

- for a physical element that consists of conduct — intention; and

- for a physical element that consists of circumstances or a result — recklessness.

126 Chapter 3
Government contributions to First Home Saver Accounts

Outline of chapter

.1 Part 4 of the main Bill provides for the Government to pay annual First Home Saver Account (FHSA) contributions to supplement the personal contributions of individuals. This chapter covers:

127 the eligibility of individuals to receive a Government contribution and the amount of the contribution to which they are entitled;

128 the method of payment of the Government contribution and the mechanisms for correcting late payments and underpayments, and recovering overpayments; and

129 the administration of contribution arrangements by the Commissioner of Taxation (Commissioner), including the review of the Commissioner's decisions.

Context

.1 The Government is providing assistance to first home buyers through FHSAs in two ways: Government contributions based on personal contributions to FHSAs and low tax on earnings. Chapter 6 outlines the arrangements for the taxation of earnings.

.2 The Government contribution is 17 per cent of up to $5,000 (indexed) of personal contributions made to an FHSA during the year and is usually paid directly into individual FHSAs by the Commissioner.

Summary of new law

.3 A Government contribution is payable for an individual for a financial year on personal contributions of up to $5,000 (indexed) made during the year, and is paid at a rate of 17 per cent.

.4 The Commissioner determines that Government contributions are payable and pays them into FHSAs. The Commissioner must pay a Government contribution no later than 60 days of receiving both the income tax return of the individual for the financial year in which the personal contributions were made (or notice in the approved form that they are not required to lodge a tax return for the financial year) and the FHSA contributions statement from the individual's FHSA provider.

.5 The Commissioner usually only pays Government contributions into the FHSA held by the individual. However, the Commissioner also has the power to pay Government contributions directly to the individual (or their legal personal representative), or their superannuation provider (eg, if the individual has elected or been compelled to contribute their FHSA balance to superannuation).

.6 The Commissioner compensates individuals for the late payment or underpayment of their Government contributions through paying additional amounts as Government contributions. Similarly, the Commissioner has various powers to recover overpayments of Government contributions from an individual (or their legal personal representative), or their FHSA or superannuation provider.

Detailed explanation of new law

Government contributions

.7 A ***Government contribution*** (Government contribution) for an individual is a contribution or amount paid by the Commissioner for that individual under the main Bill. ***[Subsection 11(1)]***

Eligibility for a Government contribution

.8 A Government contribution is payable for an individual for a financial year where the following criteria are satisfied.

130 During the financial year, personal contributions are made to the FHSA. Individual contributions that are not eligible for a Government contribution are discussed in paragraph 3.12.

131 The individual lodges an income tax return in relation to the financial year, or notifies the Commissioner in the approved form that they are not required to lodge a tax return in relation to the financial year.

132 The tax return or notice states that the individual has met the residency requirements outlined in the *Income Tax Assessment Act 1936* (ITAA 1936) for at least part of the income year corresponding to the financial year.

133 The individual actually satisfies the residency requirements for at least part of the income year corresponding to the financial year.

.1 The Commissioner is able to rely on the individual's return or notice that states they meet the residency requirements in determining that a Government contribution is payable. However, if the statement is incorrect, there is an overpayment and the Commissioner may take action to recover the Government contribution paid (see paragraphs 3.37 to 3.50). ***[Sections 36 and 37]***

.2 For the individual's income tax return (or notice) and the provider's FHSA contributions statement to be in the approved form, they must be complete.

Individual contributions ineligible for a Government contribution

.3 A Government contribution is not paid to an FHSA for a financial year for individual contributions made in the following circumstances.

134 Where under a family law obligation, an amount is transferred to the FHSA of a spouse or ex-spouse.

135 If an individual transfers their FHSA balance from one FHSA provider to another under the FHSA portability provisions.

136 Where an individual re-contributes an amount previously paid from their FHSA to purchase a home where the home is not purchased or the occupancy requirements are not met. Such a re-contribution is permitted within six months of the payment being made.

137 Where a contribution is refunded to an individual under the Corporations Act on the grounds of:

.1 an unsolicited offer, under subsection 992A(4);

.2 a defective product disclosure document, under section 1016F; or

.3 in exercising the cooling-off period, under section 1019B.

[Subsection 11(3)]

Amount of the Government contribution

.4 The first step in working out the Government contribution payable is to total the personal contributions made during the financial year to an FHSA held by an individual. Only the first $5,000 (indexed) is considered; any excess is disregarded. The law refers to the personal contributions considered as the ***covered contributions***. ***[Subsections 38(1) and (2)]***

.5 The amount of the Government contribution is the covered contributions multiplied by 17 per cent. ***[Subsection 38(3)]***

Rounding rules

.6 If an individual is entitled to a Government contribution for a financial year but the amount would otherwise be less than $20, the contribution is rounded up to $20. Other Government contribution amounts that are not whole dollar amounts are rounded up to the nearest dollar. ***[Subsections 38(4) and (5)]***

Government contribution threshold

.7 For the 2008-09 financial year, Government contributions are paid on the first $5,000 contributed to an individual's FHSA each year. The amount of the threshold is indexed annually, by multiplying the threshold for the 2008-09 financial year by its indexation factor. The result is rounded down to the nearest $500, to ensure that the contribution threshold remains in round figures ***[section 39 and subsection 40(1)]***.

138 The indexation factor is the proportional change in full-time adult average weekly ordinary time earnings from the middle month of the December quarter 2007 to the middle month of the December quarter just before the relevant financial year. The indexation factor is calculated to four decimal places and rounded to three decimal places ***[subsections 40(3) to (5)]***.

.1 The amount cannot be reduced by indexation; that is, it is not indexed if the indexation factor is less than one. ***[Subsection 40(2)]***

.1

If the indexation calculation increases the threshold to $5,900, the indexed amount is rounded down to $5,500.

Payment of a Government contribution

.2 The Commissioner must determine that a Government contribution is payable for an individual for a financial year if the Commissioner is satisfied that the Government contribution is payable for that financial year. ***[Subsection 41(1)]***

.3 The Government superannuation co-contribution also relies on the Commissioner making determinations. The proposed machinery rules for Government contributions are generally similar to those for the superannuation co-contribution. This assists the Australian Taxation Office in implementing administrative arrangements for Government contributions and assists industry in complying with the machinery rules.

Determination of eligibility for a Government contribution

.4 In deciding whether to make a determination under section 41, the Commissioner may have regard to:

139 the income tax return lodged for the individual for the relevant financial year, or a notice in the approved form advising the Commissioner that the individual is not required to lodge an income tax return in respect of the financial year in which the personal contributions were made. This information is used to determine whether an individual meets the residency requirements;

140 the information about the personal contributions made in respect of the individual, contained in FHSA contributions statements given to the Commissioner by FHSA providers; and

141 other information which may assist in determining the individual's eligibility to receive a Government contribution for the financial year. For example, if the Commissioner received information that indicates that the individual was not an Australian resident at any time during the income year, the Commissioner may determine that a Government contribution is not payable.

[Subsection 41(2)]

.1 If the Commissioner makes a determination that a Government contribution is payable to the individual for the financial year, the

Commissioner must also determine where the Government contribution is to be directed.

.2 The Commissioner usually only pays Government contributions into the individual's FHSA. However, the Commissioner also has the power to pay Government contributions directly to the individual (eg, if the individual has closed their account to buy or build their first home in which to live), their legal personal representative (eg, if the individual has passed away), or the individual's superannuation provider (eg, if the individual has elected or been compelled to contribute their FHSA balance to superannuation). ***[Subsection 41(3)]***

Notification of payment

.3 If the Commissioner pays a Government contribution to the FHSA or superannuation account of an individual, the Commissioner must notify the individual and either the FHSA or superannuation provider (as appropriate) when the payment is made. If the Commissioner pays a Government contribution directly to the individual or their legal personal representative, the Commissioner must notify the individual or their representative when the payment is made. ***[Section 45]***

Payment date for Government contributions

.4 The Commissioner must pay the Government contribution on or before the ***payment date*** for that contribution. The payment date is the 60th day after the Commissioner has received both the income tax return of the individual (or notice in the approved form advising that they are not required to complete an income tax return for the financial year), and the FHSA contributions statement from the FHSA provider. ***[Section 42]***

Returning Government contributions

.5 If the Commissioner has paid a Government contribution for an individual to their FHSA or superannuation provider, and the provider is unable to credit the contribution to the individual's account within 28 days of receipt, the provider must repay the contribution to the Commonwealth. The provider must also advise the Commissioner of the repayment in the approved form when the amount is repaid. A common case is where the provider is unable to credit the amount because the individual has closed their FHSA and moved to a different provider.

.6 General collection and recovery provisions in Part 4-15 of Schedule 1 to the *Taxation Administration Act 1953* apply to the liability to repay the Government contribution. The provider may incur a general interest charge if they fail to repay the Government contribution within 28 days and an administrative penalty if they fail to notify of the repayment.

142 The general interest charge is calculated seven days after the provider becomes liable to repay the amount. The charge is applied daily until both the unpaid amount and any outstanding general interest charges applied to the unpaid amount are repaid.

[Section 43, subsections 52(1), (3) and (4)]

.1 Paragraphs 3.25 and 3.26 also apply in respect of returning underpaid amounts to the Commonwealth. ***[Section 47, subsections 52(1), (3) and (4)]***

Late payment of Government contributions

.2 To compensate the individual for receiving their Government contribution late, the amount of a Government contribution is increased by an interest amount if it is paid late in certain circumstances. That is, if the Commissioner does not pay the amount of a Government contribution that the individual is entitled to receive on or before the payment date for that contribution (as outlined in paragraph 3.24), interest is calculated and paid on the Government contribution.

.3 The purpose of this provision is to make any interest payable part of the actual Government contribution. Therefore, interest payable on a Government contribution is treated for all purposes in the same manner as the Government contribution itself (eg, for taxation purposes).

.4 The increase in the Government contribution by any interest payable is calculated:

143 on the amount of the Government contribution that remains unpaid on the payment date (which in most of these cases is the whole amount);

144 for the period from the payment date for the Government contribution until the day on which it is paid (in full); and

145 on a daily basis using the average yield 90-day Bank Accepted Bill rate.

[Section 44]

Underpayments of Government contributions

.1 An underpayment occurs when the Commissioner pays an amount of a Government contribution and is satisfied that the amount paid is less than the correct amount. This may be the result of the FHSA provider

under-reporting the level of personal contributions made to an individual's FHSA during the financial year. The ***underpaid amount*** is the amount by which the correct amount exceeds the amount paid.

.2 If an underpaid amount exists, the Commissioner must determine that this underpaid amount is to be paid in respect of the individual for the financial year; that is, the Commissioner must make a determination in respect of the underpayment.

.3 The Commissioner is required to correct the underpayment by the payment date as specified in paragraph 3.24, and credit the underpaid amount to either:

146 the individual's FHSA or superannuation provider;

147 the individual; or

148 the individual's legal personal representative, as outlined in paragraph 3.22.

[Subsections 46(1) to (4)]

.1

In the 2008-09 financial year, Dorothy makes personal contributions of $5,000. TGG Bank provides the Commissioner with Dorothy's contribution information for the year, but incorrectly reports her personal contributions as $1,000 instead of $5,000.

Based on Dorothy's contribution information provided by TGG Bank, the Commissioner pays a Government contribution of $170 into Dorothy's account. As Dorothy is actually entitled to receive a Government contribution of $850, her contribution has been underpaid by $680.

Late payment of underpaid amounts

.2 The amount of a Government contribution is increased by an interest amount if the underpaid amount is not paid on or before the payment date for that amount, as outlined in paragraph 3.30. ***[Subsections 46(5) and (6) and 48(1)]***

.3 The increase in the Government contribution by any interest payable on underpaid amounts is to be calculated:

149 on the underpaid amount that remains unpaid on the payment date;

150 for the period from the payment date for the underpaid amount until the day on which that amount is paid (in full); and

151 on a daily basis using the average yield 90-day Bank Accepted Bill rate.

[Subsection 48(2)]

Small underpayments

.1 Where the Commissioner makes a determination in relation to an underpaid amount of less than $5 and that amount is to be paid by cheque to the individual or their legal personal representative, the amount is increased to $5. This avoids very small cheque amounts being sent to recipients. ***[Section 49]***

Overpayments of Government contributions

.2 An overpayment of a Government contribution occurs if the Commissioner pays an amount of a Government contribution for an individual for an income year, and either no Government contribution was payable, or the amount paid was greater than the amount that should have been paid. This may be the result of the FHSA provider overstating the level of personal contributions made to the individual's account during the financial year. ***[Subsection 50(1)]***

152 Where an FHSA misuse payment is made, Government contributions are recovered through the FHSA misuse tax, rather than the overpayment provisions discussed in paragraphs 3.37 to 3.50 (see separate discussion in Chapter 6 — Taxation).

.1 The ***amount overpaid*** is the whole of the amount already paid if no Government contribution was payable, or the amount by which the amount paid exceeds the correct amount of Government contribution payable. ***[Subsection 50(2)]***

.2 The Commissioner may take action to recover an overpayment and has several methods of recovery subject to certain conditions being satisfied. ***[Subsection 50(3)]***

.3 These alternatives are necessary because contributions may have been paid to entities other than the individual (or their legal personal representative); for example, to their FHSA or superannuation provider.

Recovery from a future Government contribution payable to an individual

.4 The Commissioner may deduct the whole or part of the amount overpaid from any future Government contribution payable for an individual. To do this, there must be a *future* Government contribution payable (including Government contributions payable but not yet paid) from which the Commissioner is able to deduct the amount overpaid, with the difference then being paid. Where available, this would be the most straightforward method of recovery for the Commissioner. Under this method, the Commissioner must notify the individual within 28 days of the deduction being made. ***[Subsections 50(3), (5) and (6)]***

Recovery from an individual (or their legal personal representative)

.5 Where the Commissioner has paid a Government contribution directly to the individual (or their legal personal representative), the Commissioner may recover the whole or part of the amount overpaid directly from the individual (or their representative). Under this method, the Commissioner must give the individual (or their representative) written notice of the proposed recovery and at least 28 days in which to pay the amount. ***[Subsections 50(3) and (5)]***

.6 Where the individual (or their representative) fails to pay the amount within 28 days, a general interest charge may be applied. The general interest charge is calculated 28 days after the individual becomes liable to repay the amount. The charge is applied daily until both the unpaid amount and any outstanding general interest charges applied to the unpaid amount are repaid. ***[Subsections 52(2) and (3), paragraph 52(4)(b)]***

.7 The Commissioner may decide to withdraw the notice in certain circumstances, where the Commissioner considers it is appropriate to do so. This may include consideration of the circumstances that led to the overpayment and the circumstances in which the individual finds themselves at the time the Commissioner is seeking recovery. ***[Subsection 50(4)]***

Recovery from a First Home Saver Account or superannuation provider

.8 The Commissioner may recover the whole or part of the amount overpaid from an FHSA provider to whom either the Commissioner has paid the Government contribution for the individual, or another FHSA provider if the FHSA balance has been transferred. The amount is a debt due by the FHSA provider to the Commonwealth. ***[Subsections 50(3) and (5)]***

.9 The Commissioner may not seek recovery of an overpayment from an FHSA provider for an individual for whom (when the notice is given by

the Commissioner to the FHSA provider) the provider no longer holds an FHSA on behalf of the individual.

.10 As outlined in paragraph 3.43, where the FHSA provider fails to pay the amount within 28 days, a general interest charge may be applied. The general interest charge is calculated 28 days after the provider becomes liable to repay the amount. The charge is applied daily until both the unpaid amount and any outstanding general interest charges applied to the unpaid amount are repaid. ***[Subsections 52(2) and (3), paragraph 52(4)(b)]***

.11 As outlined in paragraph 3.44, the Commissioner may decide to withdraw the notice in certain circumstances, where the Commissioner considers it is appropriate to do so. ***[Subsection 50(4)]***

.12 The recovery arrangements described in paragraphs 3.45 to 3.48 also apply in respect of a superannuation provider into which FHSA savings are transferred.

Small overpayments

.13 If the Commissioner makes a determination in relation to an overpaid amount and that amount is less than $100 (or a different amount specified in the regulations), then the Government contribution is increased by the overpaid amount. ***[Section 51]***

Administration

Review of decisions

.14 Any individual affected by a decision may ask the Commissioner for a review of that decision. The Commissioner will then arrange for an independent review to be undertaken and either affirms, varies or sets aside and substitutes a new decision. In that process, the Commissioner may arrange for an authorised review officer to undertake the review.

.15 The Commissioner must authorise taxation officers to be authorised review officers. ***[Sections 71 and 72]***

.16 A review applicant may at any time withdraw the application and if this occurs the application is taken to have never been made. This withdrawal may be done in writing or another manner as approved by the Commissioner. ***[Section 73]***

.17 These review rules are essentially the same as those that apply under the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*.

.18 Where the Commissioner raises an assessment of FHSA misuse tax, the objection and review rules for income tax assessments apply (see discussion in Chapter 6 — Taxation).

153 Chapter 4
Offering First Home Saver Accounts

Outline of chapter

.1 Division 1 of Part 7 of the main Bill outlines the requirements for providers offering First Home Saver Accounts (FHSAs).

.2 This chapter explains what FHSA providers must do before they offer, or invite to offer, FHSAs. Providers that are authorised deposit-taking institutions (ADIs) and life insurance companies are required to notify the Australian Prudential Regulation Authority (APRA), while trustees must be authorised by APRA before they are permitted to offer FHSAs.

.3 Consequential amendments ensure that the APRA will have functions and powers in relation to FHSA providers, and can cancel a trustee's registrable superannuation entity (RSE) licence where the trustee's authorisation as an FHSA provider has been cancelled on grounds of breach or non-compliance.

Context

.4 As noted in Chapter 1, FHSAs can only be offered by certain prudentially regulated financial institutions: ADIs; life insurance companies (including friendly societies); and RSE licensees (trustees) which operate public offer entities and are authorised to offer FHSAs.

> 154 Trustees of other superannuation entities, including self managed superannuation funds, non public offer funds and exempt public sector superannuation funds, will not be able to offer FHSAs as they are not subject to the same level of prudential regulation as trustees of public offer entities.
>
> 155 In addition, managed investment schemes and other investment vehicles that are not prudentially regulated will not be able to offer FHSAs.

.1 The legal nature of an FHSA will differ depending on the institution that offers it. FHSAs offered by an ADI will be an account to which the ADI accepts deposits, those offered by a life insurance company will be a

life policy and those offered by trustees will be a beneficial interest in a trust. This affects the requirements that providers must meet before offering FHSAs.

.2 APRA will have administrative responsibility for these requirements as well as the prudential requirements in Division 2 of Part 7 (outlined in Chapter 5), subject to any provisions that will be administered by the Australian Securities and Investments Commission (ASIC).

Summary of new law

.3 Before ADIs and life insurance companies offer FHSAs, they must give notice to APRA.

.4 Trustees must be authorised by APRA before offering FHSAs, because FHSAs are a new non-superannuation product. Trustees with public offer, extended public offer and acting trustee RSE licences will be able to apply for authorisation.

.5 Trustees will be required to satisfy APRA that they can continue to comply with the relevant prudential requirements in relation to their RSE licence as well as under the FHSA Bill 2008. This means they will be required to satisfy specific requirements relating to their risk management strategy and ensure that their capital requirements also apply in respect of their FHSA activities, but will not be required to create a new risk management strategy or obtain extra capital.

.6 Once authorised, trustees will be required to offer FHSAs out of a separate trust from their superannuation fund, as the sole purpose test that applies to superannuation funds prevents trustees from offering FHSAs from within their superannuation funds.

.7 Merits review will apply to APRA decisions in relation to authorisation. These will be consistent with the reviewability of APRA's decisions in relation to RSE licensing.

.8 APRA can cancel the trustee's RSE licence on the grounds that APRA has cancelled the trustee's FHSA authorisation because of a breach or failure to comply with conditions imposed on the authorisation.

.9 Consequential amendments are made to the *Australian Prudential Regulation Authority Act 1998* (APRA Act) to give APRA functions and powers in relation to FHSA providers. These amendments also allow APRA to receive protected information and protected documents in relation to the FHSA Bill 2008, and to share information with the

Commissioner of Taxation (Commissioner) and ASIC in relation to the administration of the FHSA Bill 2008.

Detailed explanation of new law

Authorised deposit-taking institutions and life insurers to give notice

.10 ADIs and life insurers are required to give notice to APRA before they offer FHSAs. ***[Section 123]***

.11 The prudential supervision of FHSAs offered by ADIs and life insurance companies is outlined in Chapter 5.

Registrable superannuation entity licensees to be authorised

.12 As FHSAs are a new, non-superannuation product, trustees will be required to obtain authorisation from APRA before offering FHSAs. Authorisation aims to control entry into the FHSA industry and ensure that trustees meet minimum fitness and propriety requirements and have the necessary risk management systems and resources to offer this product.

.13 The significance of the authorisation process is that the trustee of an FHSA trust must not issue or offer FHSAs unless the trustee is authorised by APRA under the FHSA Bill 2008. Trustees who offer FHSAs without authorisation are liable to a penalty. ***[Section 110]***

Who can apply for authorisation

.14 A trustee who has a class of licence that would enable the trustee to be, or act as, the trustee of a public offer superannuation fund will be able to apply for authorisation. These include:

156 a public offer entity licence as established by subsection 29B(2) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act);

157 an extended public offer entity licence prescribed by regulation 3A.03 of the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations); or

158 an acting trustee licence prescribed in regulation 3A.03A of the SIS Regulations.

[Subsection 89(1)]

.1 The threshold requirements ensure that only trustees who have gained approval to operate public offer superannuation entities, by demonstrating that they have the requisite experience and resources, will be able to be authorised to offer FHSAs.

Process for applying for authorisation

.2 Sections 89 to 91 establish the processes for applying for authorisation as an FHSA provider. Section 89 establishes the requirements for applications and the requirements for notifying certain changes to pending applications. This process is broadly based on the process for applying for a RSE licence under the SIS Act.

.3 An application must be in the approved form, contain the information required by the approved form and be accompanied by the required application fee, if any is prescribed. ***[Subsection 89(2)]***

.4 In considering an application, APRA:

159 can request additional information from a body corporate or a group of individual trustees that has applied for an RSE licence;

160 must specify a reasonable time for complying with the request;

161 can deem an application as having been withdrawn if the applicant does not provide the requested information within the specified time and does not have a reasonable excuse for not doing so; and

162 must take all reasonable steps to inform the applicant if it treats an application as having been withdrawn.

[Section 90]

.1 APRA will have 30 days to decide applications, with discretion to extend this period by a further 14 days. If APRA does not make a decision by the end of the period, it is taken to have refused the application. ***[Section 91]***

Granting authorisation

.2 APRA must grant an authorisation to a trustee if it has no reason to believe that the applicant would fail to comply with the FHSA Bill 2008, FHSA prudential standards that apply to the trustee and FHSA

regulations, or any conditions imposed on the authorisation if authorisation was granted. ***[Section 92]***

.3 APRA must also be satisfied that the applicant is a constitutional corporation that holds an appropriate class of RSE licence. That is, the applicant must hold a public offer, extended public offer or acting trustee RSE licence. ***[Paragraph 92(1)(d)]***

.4 The application must comply with the requirements set out in section 89.

Risk management

.5 APRA must be satisfied that the risk management strategy for the applicant takes into account the trustee's additional FHSA business as required by paragraph 29H(1)(b) of the SIS Act. Paragraph 29H(1)(b) of the SIS Act requires the risk management strategy of the trustee to set out reasonable measures and procedures that apply to identify, monitor and manage a range of risks that may arise in respect of the operations of the RSE licensee as well as all its other activities, or proposed activities, to the extent that they are relevant to its activities, or proposed activities, as an RSE licensee. As operating an FHSA trust and offering FHSAs could have a significant impact on the trustee's resources, this new activity is relevant for the trustee's activities as an RSE licensee and must be reflected in the trustee's risk management strategy.

Capital requirements

.6 Trustees are required to satisfy capital requirements, by holding capital or having approved arrangements in respect of their superannuation activities before being granted a public offer, extended public offer or acting trustee RSE licence. Section 93 requires trustees to ensure that the capital held in respect of their superannuation activities also covers their FHSA activities, but trustees will not be required to obtain extra capital. ***[Subsection 93(1)]***

.7 An applicant satisfies this provision if:

163 it satisfies the requirement in subsection 29DA(2) of the SIS Act and regulation 3A.04 of the SIS Regulations to hold $5 million in net tangible assets. As a result, the applicant's capital held under the SIS Act would be available in respect of its activities as a trustee of FHSA trusts;

164 it satisfies the requirement to have an approved guarantee of at least $5 million (subsection 29DA(3) of the SIS Act and

the prescribed amount in regulation 3A.04 of the SIS Regulations), and the approved guarantee also applies in respect of each FHSA trust of which the trustee is, or is proposing to become, the trustee. The trustee would be required to amend its deed of approved guarantee to ensure that the guarantee is also given in respect of its activities as a trustee of FHSA trusts;

165 the sum of its net tangible assets and approved guarantee is at least $5 million (subsection 29DA(4) of the SIS Act and the prescribed amount in regulation 3A.04 of the SIS Regulations), and the approved guarantee also applies in respect of each FHSA trust of which the trustee is, or is proposing to become, the trustee. The trustee would be required to amend its deed of approved guarantee to ensure that the guarantee is also given in respect of its activities as a trustee of FHSA trusts; or

166 it already complies with requirements given by APRA in relation to capital, and agrees to comply with new requirements given by APRA in relation to the custody of the assets of each FHSA trust of which it is, or is proposing to become, the trustee. In addition to the written requirements under subsection 29DA(5) of the SIS Act in relation to the custody of superannuation fund assets, the trustee will also be required to comply with written requirements in relation to the custody of FHSA trust assets.

[Subsections 93(2) to (5)]

Other

.1 The trustee is required to quote its Australian Business Number (ABN) on a range of documents unless it receives an exemption from APRA. The trustee is also required to quote the ABN of the FHSA trust on a range of documents unless it receives an exemption from APRA. ***[Section 94]***

Conditions imposed on authorisation

.2 Conditions that are considered fundamental to ensuring the prudent operation of all FHSA trusts are imposed on all authorisations. Other conditions may also be specified in regulations, allowing additional conditions to be imposed on all RSE licences in a timely manner where necessary. ***[Section 97]***

.3 APRA has the power to impose additional conditions on a single authorisation as long as those conditions are not inconsistent with conditions that are imposed under section 97 ***[subsections 98(1) and (2)].*** This ensures that APRA is able to impose conditions on individual authorisations, in particular where there may be a specific prudential risk applying to that trustee or the FHSA trust it manages. Failure to report significant breaches of conditions on authorisation is an offence under section 111.

.4 APRA must consult with ASIC where the RSE licensee also holds an Australian Financial Services Licence and the imposition of a condition may affect the RSE licensee's ability to provide financial services. Consultation will help to ensure consistent approaches to the regulation of RSE licensees who are also holders of an Australian Financial Services Licence. However, failure by APRA to consult with ASIC does not invalidate any additional condition that is imposed. ***[Subsections 98(3) and (4)]***

Compliance with conditions

.5 APRA can direct an RSE licensee to comply with a licence condition within a specified time where APRA has reasonable grounds to believe that the RSE licensee has breached the licence condition. ***[Section 99]***

.6 This power is significant, because while breaching an authorisation condition does not directly result in a trustee committing an offence, failure to comply with an APRA direction given under section 99 may result in the trustee committing an offence under section 112. Section 99 does not include a minimum timeframe for complying with a request to give APRA some flexibility in setting timeframes that are reasonable in the circumstances, given the nature of the information that is being requested and the level of prudential risk involved. APRA may also cancel an authorisation if a trustee fails to comply with an authorisation condition. ***[Section 107]***

Varying conditions on authorisation

.7 Trustees may apply to APRA for a variation or revocation of a condition that has been imposed on an authorisation by APRA. ***[Section 100]***

.8 APRA can request additional information in respect of an application made under section 100. This ensures that APRA is able to obtain relevant information pertaining to the application. ***[Section 101]***

.9 APRA has 30 days to decide an application to vary a condition on an authorisation, but may extend this period by a further 14 days. ***[Section 102]***

.10 APRA may vary or revoke a condition on authorisation on application from the trustee in certain circumstances and, if it does so, it must inform the applicant. APRA must also consult with ASIC in certain circumstances. APRA is not required to vary or revoke any condition of an authorisation in the terms requested by the trustee in an application under section 100. ***[Section 103]***

.11 APRA may also vary or revoke an authorisation condition on its own initiative as long as the variation or revocation is not inconsistent with any condition imposed under section 97 or the trustee's RSE licence. If the trustee is also the holder of an Australian Financial Services Licence, APRA must consult with ASIC in certain circumstances. ***[Section 104]***

.12 APRA must notify trustees of its decisions in respect of variations or revocations. ***[Section 105]***

Cancellation of authorisation

.13 APRA may cancel in writing authorisations where trustees:

167 have requested that their authorisation be cancelled;

168 are 'disqualified persons' under Part 15 of the SIS Act, as it applies in Division 2, Part 7 of the FHSA Bill 2008. (For details of how the SIS Act applies to FHSA trustees, refer to Chapter 5);

169 have breached, or APRA has reason to believe they will breach, a condition imposed on the authorisation; or

170 have failed to comply, or APRA has reason to believe they will fail to comply, with a direction by APRA under section 99.

[Section 107]

.1 APRA must notify trustees of decisions to cancel authorisations. ***[Subsection 107(3)]***

.2 APRA must also consult with ASIC in certain circumstances before cancelling an authorisation and notify ASIC after it has cancelled an authorisation. ***[Section 108]***

.3 APRA may allow an authorisation to continue in effect in respect of specified provisions of the FHSA Bill 2008, FHSA prudential standards and regulations, or any other law of the Commonwealth, that it administers after the authorisation has been cancelled. This ensures that trustees who have had their authorisation cancelled can continue to perform certain specified duties in respect of an FHSA trust, for example, processes associated with winding-up an FHSA trust or transferring members' benefits under the successor fund arrangements. ***[Section 109]***

Offences

.4 It is an offence for a person to be, or act as, a trustee of an FHSA trust unless the person is an ADI, life insurance company, or a trustee that holds an authorisation as an FHSA provider. In addition, an ADI or life insurance company cannot offer FHSAs if its authorisation under the *Banking Act 1959* or registration under the *Life Insurance Act 1995* does not allow the entity to offer such accounts or life policies. The penalty for breach of this requirement is two years imprisonment and/or 120 penalty units. ***[Section 110]***

.5 It is also an offence for a trustee to fail to notify APRA of breaches of authorisation conditions that are, or are likely to be, significant. This offence contains a significance test, consistent with the test under the *Banking Act 1959*, the *Life Insurance Act 1995* and the SIS Act. ***[Section 111]***

.6 The significance test takes into consideration a number of factors to be used when judging if a breach is significant or not. Significant breaches must be notified in writing and must be reported as soon as practicable and in any event within 10 business days.

.7 Consistent with the SIS Act, this offence is a strict liability offence punishable by 50 penalty units. These offences are ones of strict liability because they are basic, objective requirements of APRA's prudential supervision functions, and should be complied with by all persons. Consistent with section 6.1 of the *Criminal Code Act 1995*, this offence provision does not require proof of a mental element.

.8 In addition, it is an offence for a trustee to fail to comply with a direction from APRA to comply with a condition on an authorisation under section 99. This is a strict liability offence, which carries a penalty of 60 penalty units. ***[Section 112]***

.9 This offence is a strict liability one because it is a basic, objective requirement of APRA's prudential supervision of FHSA providers that are trustees, and should be complied with by all trustees. As the fundamental prudential requirements for trustees who provide FHSAs are imposed as

conditions on authorisation, it is essential that trustees comply with APRA's directions to comply with a condition of authorisation. Consistent with section 6.1 of the *Criminal Code Act 1995*, this offence provision does not require proof of a mental element.

.10 Any contravention of these offence provisions does not affect the validity of a transaction, such as the issue of an interest in an FHSA trust. This protects the interests of members of an FHSA trust where the trustee of that trust is in contravention of the provisions. ***[Section 113]***

Merits review of APRA decisions

.11 APRA's decisions in relation to authorisation are subject to merits review, where the equivalent decision in relation to the RSE licensing process is also subject to merits review. The process for seeking review is set out in section 75 and 76, and these are modelled on sections 344 and 345 of the SIS Act. ***[Section 74]***

Consequential amendments to the *Superannuation Industry (Supervision) Act 1993*

.12 APRA may cancel a trustee's RSE licence where the trustee's authorisation as an FHSA provider has been cancelled under paragraphs 107(2)(b) to (f) of the FHSA Bill 2008. A trustee's authorisation may be cancelled under these paragraphs where the trustee has breached, or may breach, conditions on authorisation or has failed, or may fail, to comply with a direction to comply with conditions on authorisation. These are breaches of fundamental requirements of the prudential framework. ***[Schedule 3, item 38, FHSA (Consequential Amendments) Bill 2008]***

.13 Where APRA cancels a trustee's authorisation as an FHSA provider following a request from the trustee, under paragraph 107(2)(a), it would not be a ground to cancel the trustee's RSE licence as such a cancellations would not result from the trustee breaching fundamental prudential requirements.

Consequential amendments to the APRA Act

.14 APRA has responsibility for the prudential supervision of FHSA providers and has responsibility for the administration of the relevant parts of the FHSA Bill 2008. ***[Schedule 3, items 5 to 9, FHSA (Consequential Amendments) Bill 2008]***

.15 A reference to the 'First Home Saver Accounts Act 2008' is inserted into the definition of 'prudential regulation framework law' in subsection

3(1) of the APRA Act. The term 'prudential regulation framework law' is the list of laws under which APRA takes its functions and powers. Inserting the 'First Home Saver Accounts Act 2008' into this list gives APRA functions and powers for administering the provisions of the FHSA Bill 2008 relating to prudential regulation. The definition is also required for the purposes of APRA's advisory powers and the secrecy provisions contained within section 56 of the APRA Act. ***[Schedule 3, item 5, FHSA (Consequential Amendments) Bill 2008]***

.16 The term 'FHSA provider' is inserted into the definition of 'body regulated by APRA' in subsection 3(2) of the APRA Act. Although ADIs and life insurers are already in this definition, and trustees are included in the definition in their capacity as trustees of superannuation entities, this definition clarifies that these entities in their capacity as FHSA providers are also prudentially regulated by APRA. ***[Schedule 3, item 6, FHSA (Consequential Amendments) Bill 2008]***

.17 Section 56 of the APRA Act is amended to refer to the FHSA Bill 2008. Section 56 protects information and documents given to APRA (apart from those already made public from other sources) from being disclosed without authorisation, while allowing for efficient and effective information exchange between APRA and other regulators. ***[Schedule 3, items 8 and 9, FHSA (Consequential Amendments) Bill 2008]***

.18 These amendments enable APRA to gather protected information and protected documents under the FHSA Bill 2008, and to share information with regulatory agencies such as the Australian Securities and Investments Commission, and any other regulatory agencies prescribed in the regulations, to assist these agencies to perform their duties and functions. It also imposes appropriate confidentiality requirements on such information.

.19 These amendments insert new paragraphs in the definitions of 'protected document' and 'protected information' in subsection 56(1) of the APRA Act. Documents produced under, or for the purposes of administering, a provision of the FHSA Bill 2008 which is administered by the Commissioner is a 'protected document' and 'protected information'. These amendments ensure that where the Commissioner gives documents or information to APRA in the course of administering the FHSA Bill 2008, such documents or information are protected by the confidentiality requirements under section 56 of the APRA Act and cannot be disclosed except in specified circumstances and subject to any conditions that may be imposed under this section.

171 Chapter 5
Prudential regulation of First Home Saver Account providers

Outline of chapter

.1 The main Bill provides the regulatory framework for First Home Saver Accounts (FHSAs) offered by authorised deposit-taking institutions (ADIs), life insurance companies and registrable superannuation entity (RSE) licensees that are authorised to offer FHSAs (trustees).

.2 ADIs and life insurance companies are already subject to prudential supervision under the *Banking Act 1959* and the *Life Insurance Act 1995* respectively. Consequential amendments to the *Banking Act 1959*, the *Life Insurance Act 1995* and the *Australian Prudential Regulation Authority Act 1998* (APRA Act) ensure that the Australian Prudential Regulation Authority (APRA) can administer, monitor and enforce these entities' FHSA activities.

.3 Division 2 of Part 7 creates a prudential regulatory framework for FHSA trusts operated by trustees that are authorised under the First Home Saver Accounts Bill 2008 (FHSA Bill 2008). It does this by applying the relevant parts of the SIS Act regulatory framework to FHSAs, FHSA trusts, their trustees and holders of FHSAs issued by trustees. APRA also has the power to make prudential standards in relation to FHSA trusts and trustees.

.4 Additional investment management requirements apply to FHSAs offered as investment-linked products by life insurance companies and trustees. These requirements reflect the differences in the purpose and nature of FHSAs from the products generally offered by life insurance companies and trustees.

Context

.5 The FSHA Bill 2008 provides a prudential regulatory framework for FHSA trusts and trustees that are authorised to operate these trusts, rather than regulating them directly under the *Superannuation Industry (Supervision) Act 1993* (SIS Act). This is because FHSAs are not a superannuation product, and the sole purpose test that applies to

superannuation funds prevents trustees from offering FHSAs from within their superannuation entities.

.6 The requirement for a separate trust also preserves the integrity of Australians' retirement savings by preventing cross-contamination and cross-subsidisation of FHSAs by superannuation — where the funds of superannuation members (many of whom will be ineligible to open an FHSA) are used to fund the start-up and operating costs of FHSAs. Similarly, FHSA trusts cannot invest through pooled superannuation trusts and cannot pay benefits into eligible rollover funds.

.7 The (SIS Act) creates a prudential regulatory framework for RSE licensees and superannuation funds, and deals with matters including duties and obligations for trustees, responsible officers of trustees, auditors, actuaries, custodians and investment managers of superannuation funds. The SIS Act also provides APRA with powers and functions in relation to the prudential supervision of superannuation funds and trustees.

.8 Division 2 of Part 7 applies the SIS Act prudential regulatory framework to FHSA trusts, where it is appropriate to do so, to ensure regulatory consistency for the trustees' FHSA activities and superannuation activities.

.9 Unlike under the SIS Act framework, APRA will have the power under the FHSA Bill 2008 to make prudential standards in relation to FHSA trusts and trustees, thereby enabling prudential standards to apply consistently to all FHSA providers where this is necessary.

.10 As FHSAs have a different purpose and nature from superannuation products and life policies that are usually offered by trustees and life insurance companies, and FHSA holders are likely to have a shorter investment horizon, additional investment management requirements apply to FHSAs offered by trustees and as investment-linked life policies.

Summary of new law

.11 The FHSA business of ADIs and life insurance companies will be supervised under the prudential framework in the *Banking Act 1959* and the *Life Insurance Act 1995* respectively.

.12 However, life insurance companies that offer FHSAs as investment-linked contracts will be subject to additional investment management requirements that take into account the purpose and nature of FHSAs.

These requirements are consistent with those that apply to trustees that offer FHSAs.

.13 The FSHA Bill 2008 provides a prudential regulatory framework for FHSA trusts and trustees that are authorised to operate these trusts, rather than regulating them directly under the SIS Act.

.14 Relevant parts of the SIS Act are applied by reference, in accordance with the application provisions, under Division 2 of Part 7 of the FHSA Bill 2008. This Division also excludes any provisions of the SIS Act that are not relevant to FHSA trusts and trustees, and modifies the application of particular provisions of the SIS Act to ensure the regulatory framework applies correctly.

.15 These provisions ensure that FHSA trusts, trustees, and persons who have duties, functions and powers in relation to these entities will be subject to a prudential regulation framework that is consistent with the framework applying to superannuation funds and their trustees, where appropriate, while still reflecting the differences between these two products.

.16 Unlike under the SIS Act framework, APRA will have the power under the FHSA Bill 2008 to make prudential standards in relation to FHSA trusts and trustees, thereby enabling prudential standards to apply consistently to all FHSA providers where this is necessary.

Detailed explanation of new law

First Home Saver Account providers that are ADIs

.17 FHSA providers that are ADIs are already prudentially regulated under the *Banking Act 1959*. Section 8 establishes that FHSAs may be offered as accounts by ADIs, which ensures that the prudential framework under the *Banking Act 1959* will apply to FHSAs. ADIs may offer FHSAs if they are not prevented from doing so by any condition imposed on their authorisation under section 9 of the *Banking Act 1959*.
[Section 110]

.18 FHSA providers that are ADIs can transfer their FHSA business to other ADIs under the *Banking Act 1959* and the *Financial Sector (Business Transfer and Group Restructure) Act 1999*.

Amendments to the Banking Act 1959

.19 To ensure that APRA has appropriate supervisory and enforcement powers in relation to ADIs' FHSA activities, the First Home Saver Accounts (Consequential Amendments) Bill 2008 (FHSA (Consequential

Amendments) Bill 2008) makes consequential amendments to the *Banking Act 1959*. These amendments give APRA the ability to take action under the *Banking Act 1959* where an FHSA provider that is an ADI has, or may have, breached a prudential requirement under the FHSA Bill 2008.

.20 Enabling APRA to enforce requirements that apply to FHSA providers that are ADIs under the *Banking Act 1959* rather than the FHSA Bill 2008 ensures that ADIs are subject to a consistent monitoring and enforcement regime and minimises compliance costs. For prudential requirements applying to FHSA providers that are ADIs, see Division 3 of Part 7 of the FHSA Bill 2008.

.21 APRA is able to issue a direction under section 11CA of the *Banking Act 1959*, in respect of an FHSA provider that is an ADI, where specified triggers relating to the FHSA Bill 2008 are satisfied.

172 Where an FHSA provider that is an ADI has contravened the FHSA Bill 2008, APRA can issue one of the directions listed in subsection 11CA(2) of the *Banking Act 1959* ***[Schedule 3, item 10, FHSA (Consequential Amendments) Bill 2008, paragraph 11CA(1)(a) of the Banking Act 1959].***

173 Where an FHSA provider that is an ADI is likely to contravene the FHSA Bill 2008, and the contravention is likely to give rise to a prudential risk, APRA can issue one of the directions listed in subsection 11CA(2) of the *Banking Act 1959* ***[Schedule 3, item 11, FHSA (Consequential Amendments) Bill 2008, paragraph 11CA(1)(c) of the Banking Act 1959].***

.1 APRA can issue a direction to comply with all or part of the FHSA Bill 2008 under paragraph 11CA(2)(aa) of the *Banking Act 1959*, where one of the triggers in subsection 11CA(1) is satisfied. All other directions in subsection 11CA(2) can also be issued to an FHSA provider that is an ADI, where these directions are relevant to the ADI's FHSA activities, but no amendment is required as these directions relate to the entirety of the ADI's business and are not limited to matters arising under the *Banking Act 1959*. ***[Schedule 3, item 12, FHSA (Consequential Amendments) Bill 2008, subsection 11CA(2) of the Banking Act 1959]***

.2 APRA can accept an enforceable undertaking in connection with a matter arising under the FHSA Bill 2008, if the matter is within APRA's responsibility. Therefore, if APRA has a concern about an FHSA provider that is an ADI, and the concern relates to a prudential requirement under the FHSA Bill 2008, APRA can address the concern by accepting an enforceable undertaking from the FHSA provider. ***[Schedule 3, item 13, FHSA (Consequential Amendments) Bill 2008, section 18A of the Banking Act 1959]***

.3 If APRA has the power to make a decision under the FHSA Bill 2008 in relation to an FHSA provider that is an ADI, and the decision is subject to merits review, review of the decision is conducted in accordance with Part 6 of the *Banking Act 1959*. This ensures a consistent regime of review of APRA's decisions in relation to ADIs. Currently, APRA does not have the power to make decisions in relation to ADIs under the FHSA Bill 2008. ***[Schedule 3, item 14, FHSA (Consequential Amendments) Bill 2008, section 51A, Banking Act 1959]***

.4 ADIs are required to report significant breaches of the FHSA (Consequential Amendments) Bill 2008 to APRA. ***[Schedule 3, item 15, FHSA (Consequential Amendments) Bill 2008, section 62A of the Banking Act 1959]***

First Home Saver Account providers that are life insurance companies

.5 FHSA providers that are life insurance companies authorised under the *Life Insurance Act 1995* are already prudentially regulated under that Act. Where life insurance companies offer FHSAs, section 8 requires that they be offered as 'life policies', which ensures that FHSAs will be a life policy as defined by section 9 of the *Life Insurance Act 1995* and therefore subject to the full prudential framework under the *Life Insurance Act 1995*.

.6 Life insurance companies may offer FHSAs if they are not prevented from doing so by any condition on their registration imposed under section 22 of the *Life Insurance Act 1995*. ***[Section 110]***

.7 In addition, under the FHSA Bill 2008, new investment management requirements will apply to FHSAs that are offered by life insurance companies as investment-linked contracts, within the meaning of section 14 of the *Life Insurance Act 1995*. Details are set out in paragraphs 1.28 and 1.29.

.8 FHSA providers that are life insurance companies can transfer their FHSA business to other life insurance companies under the *Life Insurance Act 1995* and the *Financial Sector (Business Transfer and Group Restructure) Act 1999*.

Amendments to the Life Insurance Act 1995

.9 The definitions of 'investment account' and 'investment-linked account' in section 14 of the *Life Insurance Act 1995* are amended to clarify that an FHSA that is offered as an investment account or investment-linked account can be withdrawn in accordance with the requirements under section 31 of the FHSA Bill 2008. ***[Schedule 3, items 16 to 19, FHSA (Consequential Amendments) Bill 2008]***

.10 The current definitions of an ‘investment account’ and ‘investment-linked account’ require the account balance to be paid on ‘a specified date’ or one of a number of specified dates (see subparagraphs 14(2)(a)(ii) and 14(4)(b)(ii) of the *Life Insurance Act 1995*). The amendments to section 14 clarify that an investment account or an investment-linked account can also be a contract that provides for the balance of the contract to be paid in accordance with the release criteria under section 31 of the FHSA Bill 2008.

.11 Auditors and actuaries will be able to give information relating to FHSAs to APRA:

174 where the auditor or actuary is required to give information under sections 88 and 89 of the *Life Insurance Act 1995* relating to a contravention of the *Life Insurance Act 1995* or the FHSA Bill 2008 to APRA; and

175 where an auditor or actuary may give information to APRA under sections 88A and 98A of the *Life Insurance Act 1995*, if the auditor or actuary considers the information may assist APRA in performing its functions under the *Life Insurance Act 1995* or the FHSA Bill 2008.

[Schedule 3, items 20 and 21, FHSA (Consequential Amendments) Bill 2008, section 74, Life Insurance Act 1995]

.1   APRA’s monitoring and investigation powers under Part 7 of the *Life Insurance Act 1995* apply to the FHSA activities of FHSA providers that are life insurance companies. ***[Schedule 3, items 22 and 23, FHSA (Consequential Amendments) Bill 2008]***

.2   The effect of these amendments is to extend APRA’s monitoring and enforcement powers to prudential requirements that apply to life insurance companies under the FHSA Bill 2008.

.3   For example, APRA will be able to accept an enforceable undertaking under section 133A in connection with a matter arising under the FHSA Bill 2008. The triggers for issuing a show-cause notice under section 136 are satisfied if APRA suspects an FHSA provider that is a life insurance company has breached, or is likely to breach, a prudential provision of the FHSA Bill 2008. APRA will also be able to conduct an investigation in relation to a matter arising under the FHSA Bill 2008, where the FHSA provider is a life insurance company.

.4   Prudential standards that apply to life insurance companies cannot be inconsistent with the FHSA Bill 2008. ***[Schedule 3, item 24, FHSA (Consequential Amendments) Bill 2008, section 230A, Life Insurance Act 1995]***

.5 APRA can issue a direction under subsection 230B(2) of the *Life Insurance Act 1995* to comply with all or part of the Life Insurance Act, in respect of an FHSA provider that is a life insurance company, where:

176 an FHSA provider that is a life insurance company has contravened the FHSA Bill 2008; or

177 an FHSA provider that is a life insurer is likely to contravene, the FHSA Bill 2008 and the contravention is likely to give rise to a prudential risk.

[Schedule 3, item 25, FHSA (Consequential Amendments) Bill 2008, paragraphs 230B(1)(a) and (b), Life Insurance Act 1995]

.1 APRA can issue a direction to comply with all or part of the FHSA Bill 2008 under paragraph 230B(2)(a) of the *Life Insurance Act 1995*, where one of the triggers in subsection 230B(1) is satisfied. All other directions in subsection 230B(2) can also be issued to an FHSA provider that is a life insurance company, where these directions are relevant to the life insurance company's FHSA activities, but no amendment is required as these directions relate to the entirety of the life insurance company's business and are not limited to matters arising under the *Life Insurance Act 1995*. ***[Schedule 3, item 25, FHSA (Consequential Amendments) Bill 2008, subsection 230B(2), Life Insurance Act 1995]***

.2 If APRA has the power to make a decision under the FHSA Bill 2008 in relation to an FHSA provider that is a life insurance company, and the decision is subject to merits review, review of the decision would be conducted in accordance with section 236 of the *Life Insurance Act 1995*. This ensures a consistent regime of review of APRA's decisions for life insurance companies. Currently, APRA does not have the power to make decisions in relation to life insurance companies under the FHSA Bill 2008. ***[Schedule 3, items 26 and 27, FHSA (Consequential Amendments) Bill 2008]***

First Home Saver Account providers that are trustees

.3 The prudential supervision of trustees who are authorised under the FHSA Bill 2008 as FHSA providers will be given effect through the provisions in Division 2 of Part 7 and section 121.

Basic application provision

.4 The basic application provision creates application rules in relation to the requirements, functions and obligations that apply to trustees of FHSA trusts, FHSA trusts, an interest in an FHSA trust and holder of such an interest. ***[Section 114]***

.5 Subject to the exclusion and modification provisions in Division 2 of Part 7 ***[subsection 114(1)]***:

> 178 the first application rule ensures that all obligations, functions and requirements that apply to trustees of public offer superannuation funds will apply to trustees of FHSA trusts ***[paragraph 114(2)(a)]***;
>
> 179 the second application rule ensures that all obligations, functions and requirements that apply in relation to a public offer superannuation fund will apply in relation to an FHSA trust ***[paragraph 114(2)(b)]***;
>
> 180 the third application rule ensures that all obligations that apply in relation to members of superannuation funds will apply in relation to holders of FHSAs issued by trustees ***[paragraph 114(2)(c)]***; and
>
> 181 the fourth application rule ensures that all the requirements that apply in relation to a superannuation interest will apply to an interest in an FHSA trust ***[paragraph 114(2)(d)].***

Trustees of First Home Saver Account trusts

.1 Under the first application rule, all the obligations that apply to a trustee that is a trustee of a public offer superannuation fund will apply to a trustee of an FHSA trust (FHSA trustee), subject to the exclusion and modification provisions. ***[Paragraph 114(2)(a)]***

.2 Where an obligation applies to all trustees of regulated superannuation funds or trustees of a public offer entity, this obligation will apply to an FHSA trustee.

.1

> Section 35A imposes accounting and record keeping obligations on trustees of 'all superannuation entities'. Paragraph 35A(1)(a) provides:
>
> *'(1) Each* **trustee of a superannuation entity** *must ensure that:*
>
> *(a) accounting records that correctly record and explain the transactions and financial position of the* **entity** *are kept;'*
>
> As the term 'superannuation entities' includes a 'public offer superannuation fund', this obligation will apply to trustees of an FHSA trust. Applying this rule, paragraph 35A(1)(a) becomes:

(1) [The] **FHSA trustee** *must ensure that:*

(a) accounting records that correctly record and explain the transactions and financial position of the [FHSA trust] are kept.

.2

Section 133 allows APRA to suspend or remove trustees if specified triggers are satisfied. Subsection 133(1) provides:

'(1) The Regulator may suspend or remove **a trustee of a superannuation entity** *if:'*

Again, as the term 'superannuation entities' includes a 'public offer superannuation fund', this obligation will apply to trustees of an FHSA trust. Applying this rule, subsection 133(1) becomes:

(1) The Regulator may suspend or remove **an FHSA trustee** *if:*

.3

Section 154 imposes on trustees certain limitations on the payment of commission and brokerage. Subsection 154(1) provides:

'(1) The **trustee of a public offer entity** *must comply with the requirements of the regulations in relation to the payment of commission or brokerage in respect of:'*

[…]

(2) The **trustee** *is guilty of an offence if the* **trustee** *contravenes subsection (1).*

As the term 'public offer entity' includes a 'public offer superannuation fund', this requirement will apply to a trustee of an FHSA trust. Applying this rule, section 154 becomes:

(1) The **FHSA trustee** *must comply with the requirements of the regulations in relation to the payment of commission or brokerage in respect of:*

[…]

(2) The **FHSA trustee** *is guilty of an offence if the* **trustee** *contravenes subsection (1).*

.3 Where an obligation only applies to a trustee of a fund that is not a public offer superannuation fund — including a self managed superannuation fund, a non public offer superannuation fund and an

exempt public sector superannuation fund — these obligations will not apply to an FHSA trustee. These provisions, subsections or paragraphs will be automatically excluded by this application rule, and no further rules are needed to deal with these cases.

.1

Paragraph 35A(1)(c) requires trustees of self managed superannuation funds to keep accounting records and audit the fund in specific ways. These requirements do not apply to a trustee of a public offer superannuation fund, and so will be automatically excluded by the basic application provision.

Applying this rule, subsection 35A(1) will contain these requirements:

(1) [The] **FHSA trustee** *must ensure that:*

(a) accounting records that correctly record and explain the transactions and financial position of the [FHSA trust] are kept; and

(b) the accounts of the [FHSA trust] are kept in a way that enables the preparation of reporting documents referred to in section 13 of the Financial Sector (Collection of Data) Act 2001; and

(d) the accounting records of the [FHSA trust] are kept in a way that enables those accounts, statements and returns to be conveniently and properly audited in accordance with this Act.

.2

Section 104A requires trustees of self managed superannuation funds to sign a declaration.

As this requirement does not apply to the trustee of a public offer superannuation fund, this requirement will not apply to an FHSA trustee. Applying this rule, section 104A will be automatically excluded.

First Home Saver Account trusts

.4 Under the second application rule, all the obligations and requirements that apply in relation to a public offer superannuation fund will apply in relation to FHSA trusts, and persons that have obligations, functions or powers in relation to FHSA trusts. ***[Paragraph 114(2)(b)]***

.5 Where an obligation applies to all superannuation entities, this obligation will apply to FHSA trusts.

.1

Section 52 inserts certain provisions into the governing rules of all 'superannuation entities'. Subsection 52(1) provides:

'(1) If the governing rules of **a superannuation entity** *do not contain covenants to the effect of the covenants set out in subsection (2), those governing rules are taken to contain covenants to that effect.'*

As the term 'superannuation entities' includes a 'public offer superannuation fund, this requirement will apply to an FHSA trust. Applying this rule, subsection 52(1) becomes:

(1) If the governing rules of ***an FHSA trust*** *do not contain covenants to the effect of the covenants set out in subsection (2), those governing rules are taken to contain covenants to that effect.*

.2

Section 129 requires approved auditors and actuaries of a superannuation entity to report certain breaches to APRA. Subsection 129(1) provides:

'(1) This section applies to a person in relation to **a superannuation entity** *if:*

> *(a) the person forms the opinion that it is likely that a contravention of any of the following may have occurred, may be occurring, or may occur, in relation to the entity:'*

As the term 'superannuation entity' includes a 'public offer superannuation fund', this obligation will apply to auditors and actuaries of FHSA trusts. Applying this rule, subsection 129(1) becomes:

(1) This section applies to a person in relation to **an FHSA trust** *if:*

> *(a) the person forms the opinion that it is likely that a contravention of any of the following may have occurred, may be occurring, or may occur, in relation to the FHSA trust:*

.3

Section 257 enables APRA to require the trustee to appoint a person to investigate the financial circumstances of the fund. Subsection 257(1) provides, in part:

'(1) APRA may, by written notice given to **a trustee of a superannuation entity***, require* **the trustee, or the trustees, of the entity** *to appoint an individual, or a committee of individuals, to:*

> *(a) carry out an investigation of the whole or a specified part of the financial position of* **the entity** *as at a specified time or in relation to a specified period;'*

As the term 'entity' in paragraph (a) includes a 'public offer superannuation fund', APRA's power to require an investigation would apply in relation to the financial position of the FHSA trust. Applying this rule, subsection 257(1) will provide, in part:

(1) APRA may, by written notice given to **an FHSA trustee***, require* **the trustee** *to appoint an individual, or a committee of individuals, to:*

> *(a) carry out an investigation of the whole or a specified part of the financial position of* **the FHSA trust** *as at a specified time or in relation to a specified period;*

.6 Where an obligation only applies in relation to funds other than a public offer superannuation fund — including a self managed superannuation fund, a non public offer superannuation fund or an exempt public sector superannuation fund — these obligations will not apply in relation to an FHSA trust. These provisions, subsections or paragraphs will be automatically excluded by this application rule.

.1

Section 129 requires the auditor or actuary of a superannuation fund to provide information to the Regulator in specified ways, if the person forms the opinion that a breach may have occurred, may be occurring, or may occur. Subsection 129(3) provides, in part:

'(3) Subject to subsection (3A), the person must, immediately after forming the opinion:

> *(a) tell a* **trustee of the entity** *about the matter in writing; and*
>
> *(b) if* **the superannuation entity is not a self managed superannuation fund** *[…] — tell the Regulator about the matter in writing; and*
>
> *(c) if* **the superannuation entity is a self managed superannuation fund** *[…] — tell the Regulator about the matter in the approved form.'*

As the term 'self managed superannuation fund' does not include a 'public offer superannuation fund', the requirement in paragraph (c) is

not relevant for FHSA trusts and will be automatically excluded. Applying this rule, subsection 129(3) becomes:

(3) Subject to subsection (3A), the person must, immediately after forming the opinion:

(a) tell **an FHSA trustee** *about the matter in writing; and*

(b) tell the Regulator about the matter in writing;

Holder of a First Home Saver Account

.7 Under the third application rule, all the requirements that apply in relation to members or beneficiaries of public offer superannuation funds will apply in relation to holders of FHSAs. ***[Paragraph 114(2)(c)]***

.1

Section 105 requires trustees of regulated superannuation funds to keep members and beneficiaries reports for at least 10 years. Members and beneficiaries reports are defined as a report given:

(b)(i) in the case of **a regulated superannuation fund—***to all* **members of the fund***, or to* **all members included in a particular class of members**;

By applying this rule, the requirements relating to members of a superannuation fund will be a requirement relating to holders of an FHSA. The definition of a 'member or beneficiary report' becomes a report given:

(b)(i) in the case of **an FHSA trust***—to all* **FHSA holders***, or to all* **FHSA holders included in a particular class of FHSA holders**;

Interest in a First Home Saver Account trust

.8 Under the fourth application rule, all the requirements that apply in relation to an interest in a public offer superannuation fund will apply in relation to an interest in an FHSA trust. ***[Paragraph 114(2)(d)]***

.1

Section 152 prohibits the issuing of an interest in a public offer entity unless the trustee and the fund satisfy certain criteria.
Subsection 152(1) applies to conduct including:

(a) issuing **superannuation interests** *in* **a public offer entity**;

By applying this rule, the requirements relating to issuing 'superannuation interests' will apply to the issue of an interest in an FHSA trust. Subsection 152(1) will apply to conduct including:

(a) issuing **interests in an FHSA trust**;

Disapplication provision

.9 Section 115 disapplies particular sections of the SIS Act so that these sections do not apply in the FHSA Bill 2008.

.10 Some provisions of the SIS Act should not be applied to FHSAs, because the concepts, regulations or procedures in those provisions are only relevant under the superannuation framework.

.11 For some other matters, such as trustees' obligations in relation to FHSA holders' tax file numbers (TFNs), the FHSA Bill 2008 contains specific rules which would overlap with SIS Act rules. In relation to other matters, such as investments in instalment warrants, the Government has determined that the current rules in the superannuation regulation framework should not apply to FHSA trusts.

.12 Where these sections would otherwise be 'caught' by the basic application provision, section 115 is used to disapply these sections from the prudential framework that is applied to FHSAs. Where these sections are automatically excluded under the basic application rule, because they do not apply to a public offer superannuation fund or a trustee of such funds, there is no need to also disapply these concepts or requirements using section 115.

.13 The provisions of the SIS Act that will not apply are as follows.

Provisions of the Superannuation Industry (Supervision) Act 1993 that will not apply	***Explanation***
Sections 1 to 4 ***[paragraph 115(a)]***	Matters that are dealt with under these sections are dealt with by Part 1 of the FHSA Bill 2008.
Section 10A ***[paragraph 115(a)]***	This section defines interdependency for the purposes of determining release of superannuation benefits. As there is no early release of FHSA benefits unless the benefits are first transferred to superannuation, this definition is not necessary. To avoid confusion or unintended consequences, this section will not apply.

Provisions of the Superannuation Industry (Supervision) Act 1993 that will not apply	***Explanation***
Parts 2A and 2B ***[paragraph 115(b)]***	Parts 2A and 2B relate to licensing of trustees and registration of superannuation entities respectively. Trustees are separately authorised under Division 1, Part 7 of the FHSA Bill 2008, after already having met the requirements of Part 2A of the SIS Act. Therefore, Part 2A is not necessary. Trustees are not required to register their FHSA trusts, therefore Part 2B will not apply (trustees are required to notify APRA when they establish a new trust under subsection 254(1) of the SIS Act, as it applies under the FHSA Bill 2008).
Part 3 ***[paragraph 115(b)]***	Part 3 relates to operating standards. APRA will have the power to create prudential standards that apply to FHSA trusts and their trustees. To avoid duplication and complexity, there will be no operating standards under the FHSA Bill 2008.
Part 5 ***[paragraph 115(c)]***	Part 5 relates to complying fund status. There will be no requirement for FHSA trusts to maintain a complying fund status.
Section 54 ***[paragraph 115(d)]***	Section 54 relates to approved deposit funds and is not relevant for FHSA trusts.
Section 55A and subsection 59(1A) ***[paragraph 115(d)]***	Section 55A and subsection 59(1A) relate to cashing out benefits after a member's death. It is intended that general trust law and estate law will govern the payment of benefits after a member's death, rather than make specific rules on this issue. As such section 55A and subsection 59(1A) will not apply.

Provisions of the Superannuation Industry (Supervision) Act 1993 that will not apply	***Explanation***
Part 7 (except for sections 65 and 66, subsections 67(1), (2), (3) and (7) and section 68) ***[paragraph 115(e)]***	Some provisions in Part 7 will not apply. This is because these provisions of Part 7 relate to superannuation-specific requirements, and these are not relevant for FHSAs. Only sections 65 and 66, subsections 67(1), (2), (3) and (7) and section 68 will apply. Section 65 prohibits lending to members of the fund. Section 66 prohibits trustees from acquiring certain assets from members of the fund. Section 67 prohibits trustees from borrowing, subject to certain exceptions. The exception relating to instalment warrants, in subsection 67(4A), will not apply as FHSA trustees will not be permitted to invest in instalment warrants. Section 68 prohibits victimising trustees that are trustees of employer-sponsored funds. If a trustee of an FHSA trust is also trustee of an employer-sponsored fund, it is still necessary to protect the trustee from victimisation under the FHSA Bill 2008.
Part 8 (except for sections 69, 70B, 70C, 70D, 70E, 71D, 71E, 73, 75, 83, 84 and 85; and section 71) However, paragraph 71(1)(c) will not apply ***[paragraph 115(f)]***	Some provisions of Part 8, which relates to in-house assets, will not apply to FHSA trusts. The provisions that will not apply are historical or transitional provisions, and have no current application. As such, these 'spent' provisions have been disapplied. All other relevant provisions of Part 8 will apply, as these provisions establish the prohibition against acquiring in-house assets and certain exemptions from this prohibition. For example, section 71 defines in-house assets, section 75 provides the formula for calculating the level of in-house assets and section 83 establishes the maximum level of new in-house assets that a fund can hold. These provisions are relevant where an FHSA trust holds an asset that would be an in-house asset. Paragraph 71(1)(c) will not apply, as it relates to superannuation funds investing through pooled superannuation trusts. As an FHSA trust is not a superannuation fund, trustees of FHSA trusts

Provisions of the Superannuation Industry (Supervision) Act 1993 that will not apply	***Explanation***
	will not be able to invest through pooled superannuation trusts. To avoid doubt, this paragraph will not apply to FHSA trusts.
Part 9 ***[paragraph 115(g)]***	Part 9, which establishes equal representation rules for trustees of employer-sponsored fund, will not apply. If an FHSA trustee is also a trustee of an employer-sponsored fund, the rules under Part 9 would already apply under the SIS Act, and it is not necessary to replicate these rules under the FHSA Bill 2008.
Parts 10 and 11 ***[paragraph 115(g)]***	Part 10, containing provisions that only apply to approved deposit funds, and Part 11, containing provisions that only apply to pooled superannuation trusts, will not apply. Neither Part is relevant for FHSA trusts.
Sections 104, 107, 108 of Part 12 and sections 117 and 118 of Part 14 ***[paragraph 115(h)]***	Section 104 imposes the requirement to maintain records of change of trustees. Sections 107 and 108 establish rules for appointing member representatives and independent directors to trustees of employer-sponsored funds. Section 118 requires all individuals who are appointed as a trustee to consent to the appointment. As these requirements already apply to trustees under the SIS Act, there is no need to replicate these requirements under the FHSA Bill 2008. Section 117 establishes when amounts may be paid out of an employer-sponsored fund to an employer-sponsor. As FHSA trusts will not have employer sponsors, this section is not relevant for FHSA trusts.
Parts 24 and 24A ***[paragraph 115(i)]***	Part 24 establishes a facility for superannuation funds to pay benefits to eligible rollover funds. As FHSAs are not superannuation products, eligible rollover funds will not be able to accept payment of benefit from an FHSA trust without breaching the sole purpose test. Part 24A establishes transitional arrangements for payment into eligible rollover funds and has no meaning in relation to FHSA trusts.

Provisions of the Superannuation Industry (Supervision) Act 1993 that will not apply	***Explanation***
Part 24B ***[paragraph 115(i)]***	Part 24B establishes a regulatory framework for small APRA funds, and has no meaning in relation to FHSA trusts that are subject to the same regulatory framework as public offer superannuation funds.
Part 25A ***[paragraph 115(i)]***	Part 25A, which contains provisions in relation to TFNs, will not apply because the FHSA Bill 2008 applies common requirements relating to TFNs to all FHSA providers.
Sections 337A, 342, 349, 349A and 353 of Part 30 ***[paragraph 115(j)]***	Section 337A requires trustees to give effect to arbitration agreements. Section 342 creates transitional arrangements for pre-1998 funding credits and debits. Section 349 provides that 'this Act and regulations' are subject to superannuation orders, which allow the Government to recover superannuation benefits where an individual has been charged with a fraud offence. These sections are not relevant for FHSAs. Section 349A establishes that superannuation benefits are subject to the *Bankruptcy Act 1966*, and section 353 enables the Governor-General to make regulations under 'this Act'. As the FHSA Bill 2008 already contains provisions that allows payment out of FHSAs in accordance with the *Bankruptcy Act 1966* and allows the Governor-General regulation-making powers, these provisions are not necessary.
Part 32 ***[paragraph 115(k)]***	Part 32 creates transitional arrangements in relation to TFNs, which is not relevant for FHSAs opened on or after 2008.

Modification provision

.1 Section 116 modifies references and concepts in the SIS Act so that they become references and concepts that are relevant for the FHSA Bill 2008.

.2 While the basic application provision applies the SIS Act requirements to the equivalent persons or entities under the FHSA Bill 2008, references within the SIS Act to requirements, functions or duties imposed by other sections of the SIS Act or by the *Superannuation*

Industry (Supervision) Regulations 1994 (SIS Regulations) are not affected by the application provision, and so will still refer to the requirements, functions or duties under the SIS Act or the SIS Regulations.

.3 For provisions of the SIS Act that apply in accordance with sections 114 and 115, these modification rules will ensure these provisions apply correctly. In the following paragraphs and examples, the term 'FHSA Act' is used to explain how the modification rules would operate if the FHSA Bill 2008 is passed and comes into force. Likewise, the term 'FHSA Regulations' is used to explain how the modification rules would operate in relation to the regulations that are proposed to be made under the FHSA Bill 2008, if the FHSA Bill 2008 is passed and comes into force.

2 The first modification rule ensures that references to the SIS Act become references to the 'FHSA Act' ***[paragraph 116(a)]***.

3 The second modification rule ensures that references to the SIS Regulations become references to the 'FHSA Regulations' ***[paragraph 116(b)]***.

4 The third modification rule ensures that references to a calendar year become references to a financial year ***[paragraph 116(c)]***.

.1 In addition, APRA will have the power to make prudential standards in relation to the FHSA trusts ***[sections 121 and 122]***. Some modification rules ensure that prudential standards are reflected in the regulatory framework, and breaches of prudential standards will be enforceable under the regulatory framework.

5 The fourth modification rule ensures that breaches of prudential standards will be enforced in the same way as breaches of the 'FHSA Act' ***[paragraph 116(d)]***;

6 The fifth modification rule ensures that conduct (including functions and powers) that are required or authorised by, or otherwise performed in connection with, the prudential standards are treated in the same way as conduct (including functions and powers) that are required or authorised by, or otherwise performed in connection with the 'FHSA Act' ***[paragraph 116(e)]***.

References to 'this Act'

.1 Without modification, references to 'this Act', as they apply under the basic application provision, will still refer to the SIS Act. As such, the first modification rule changes these references so that they refer to the 'FHSA Act'. ***[Paragraph 116(a)]***

.2 Under this modification rule, all references to persons or entities performing their functions or duties under or in accordance with 'this Act' will refer to performance of functions or duties under or in accordance with the 'FHSA Act'. Likewise, all references to breaches of 'this Act' will refer to breaches of the 'FHSA Act'.

.1

Section 35A requires trustees to keep accounts of the fund in specific ways. Paragraph 35A(1)(d) requires trustees to ensure that:

(d) the accounting records of the FHSA trust are kept in a way that enables those accounts, statements and returns to be conveniently and properly audited in accordance with **this Act**.

Without modification, the reference 'this Act' still refers to the SIS Act. By applying this modification rule, 'this Act' will refer to the 'FHSA Act' and paragraph 35A(1)(d) will require trustees to ensure that:

(d) the accounting records of the FHSA trust are kept in a way that enables those accounts, statements and returns to be conveniently and properly audited in accordance with **the 'FHSA Act'**.

.2

Section 131A allows the Regulator to refer matters to professional associations of auditors or actuaries, where specific triggers are met. Paragraph 131A(1)(d) allows the Regulator to refer matters where the Regulator is of the opinion that the approved auditor or actuary:

(d) is otherwise not a fit and proper person to be an approved auditor or an actuary for the purposes of **this Act**.

By applying this modification rule, the reference 'this Act' will become a reference to the 'FHSA Act' and paragraph 131A(1)(d) will allow the Regulator to refer matters where the Regulator is of the opinion that the approved auditor or actuary:

(d) is otherwise not a fit and proper person to be an approved auditor or an actuary for the purposes of **the 'FHSA Act'**.

References to ‘the Regulations’

.3 Without modification, references to ‘the regulations’, as it is applied under the basic application provision, will still refer to the SIS Regulations. As such, the second modification rule changes these references so that they refer to the ‘FHSA Regulations’. ***[Paragraph 116(b)]***

.1

> Section 301 provides a definition of ‘SIS officer’ as:
>
> *a person exercising powers or performing functions under or in relation to* **this Act** *or* **the regulations**.
>
> By applying the first and second modification rules, ‘this Act’ will become a reference to the ‘FHSA Act’ and ‘the regulations’ will become a reference to ‘FHSA Regulations’. The definition will become:
>
> *a person exercising powers or performing functions under or in relation to* **the ‘FHSA Act’** *or* **the ‘FHSA Regulations’**.
>
> Also refer to the fourth and fifth modification rules.

Reference to *‘year of income’*

.4 Under the third modification rule, references to a ‘year of income’ in the SIS Act will be treated as references to a ‘financial year’, as this ensures trustees will comply with audit and accounting requirements, as well as requirements relating to in-house assets, in accordance with the financial year. ***[Paragraph 116(c)]***

Other modification rules

.5 The fourth and fifth modification rules relate to APRA’s power to determine prudential standards that apply to trustees that are FHSA providers. ***[Paragraphs 116(d) and (e)]***

.6 APRA’s power to make prudential standards in relation to FHSA trusts and trustees, and the modifications that ensure the prudential standards become part of the regulatory framework for FHSA trusts and trustees, are explained below.

Prudential standards in relation to trustees and related modifications

.7 APRA will have the power to make prudential standards in relation to FHSA trusts ***[section 121]***. This enables APRA to apply consistent

prudential standards to FHSA providers, where necessary. Prudential standards made under this Division would only apply to the FHSA trusts operated by an FHSA provider and not to their superannuation entities.

.8 Prudential standards assist to improve the clarity and certainty of prudential regulation by providing additional detail on prudential matters set out in the enabling legislation. Currently, standards complement and reinforce the prudential requirements set out in the *Banking Act 1959*, *Insurance Act 1973* and *Life Insurance Act 1995* by specifying how the regulatory framework is intended to operate in practice and APRA's expectations in overseeing that framework. Standards enable key minimum requirements to be articulated at a level of detail that would not be appropriate within principles-based, enabling legislation.

.9 Standards introduce greater flexibility into the prudential framework as they can be more readily adjusted over time to respond to developments in both domestic and international conditions, industry best practice and broader structural changes in the market. This enhances the effectiveness of prudential regulation by ensuring that regulation remains relevant over time.

.10 APRA will have the flexibility to make, vary or revoke prudential standards that apply to a single trustee that is an FHSA provider, a class of trustees that are FHSA providers or all trustees that are FHSA providers. This flexibility allows APRA to make discretionary decisions under its prudential standards, including discretions to approve, impose, adjust or exclude specific prudential requirements in relation to one or more specified trustees that are FHSA providers. ***[Subsections 121(1), (2) and (4)]***

.11 A prudential standard must be consistent with the 'FHSA Act', the 'FHSA Regulations' and the *Financial Sector (Collection of Data) Act 2001*. ***[Subsection 121(3)]***

.12 Generally, prudential standards that do not apply to one or more specified trustees are legislative instruments, and are therefore subject to the requirements of the *Legislative Instruments Act 2003*. This Act requires prudential standards that are legislative instruments to be registered on the Federal Register of Legislative Instruments. ***[Subsection 121(8)]***

.13 However, a standard, variation or revocation of the standard that applies to one or more specified trustees is not a legislative instrument for the purposes of section 5 of the *Legislative Instruments Act 2003*. This is because it is an administrative decision that applies the law to an entity and not to a class of entities, it does not create an exemption from the requirements of the *Legislative Instruments Act 2003*. ***[Subsection 121(7)]***

.14 APRAs decisions in relation to a standard, variation or revocation of the standard that applies to one or more specified trustees that are FHSA providers are subject to merits review. ***[Section 74]***

.15 The modification rules in sections 116 and 117 modify the prudential framework that applies to trustees that are FHSA providers, by specifying how the new prudential standards will apply to these trustees and how breaches of these prudential standards will be enforced. These are explained below.

'conduct (including an omission) that is inconsistent with the prudential standards'

.16 Under the fourth modification rule in section 116, a breach of prudential standards made under section 121 will be enforced in the same way as a breach of the FHSA Bill 2008. Other conduct contrary to prudential standards will also be treated in the same way as conduct contrary to the FHSA Bill 2008. ***[Paragraph 116(d)]***

.17 This modification rule ensures that if a person fails to fulfil any functions or duties imposed under the prudential standards, or breaches a requirement in the prudential standards, the failure or breach can be enforced in the same way as breaches of the FHSA Bill 2008. In effect, all provisions that refer to breaches of the 'FHSA Act' or circumstances inconsistent with the 'FHSA Act' will refer to breaches of the 'FHSA Act' and prudential standards, or circumstances inconsistent with the 'FHSA Act' and prudential standards.

.1

> Paragraph 131A(1)(a) enables the Regulator to refer matters to professional associations where the Regulator is of the opinion that the approved auditor or actuary has failed to carry out or perform adequately and properly:
>
> *(i) the duties of an auditor or an actuary under* **this Act** *or* **the regulations**;
>
> Applying this modification rule, if a person failed to perform their functions under the prudential standards, it would be treated in the same way as a breach of the 'FHSA Act'. In effect, paragraph 131(1)(a) would allow the Regulator to refer matters where the Regulator is of the opinion that an approved auditor or actuary has failed to carry out or perform adequately and properly:
>
> *(i) the duties of an auditor or an actuary under* **the 'FHSA Act'**, **the prudential standards** or **the 'FHSA Regulations'**;

'conduct (including an omission) that is required or authorised by, or otherwise performed in connection with, the prudential standards'

.18 Under the fifth modification rule, functions, obligations and powers imposed by prudential standards will apply to persons and entities in the same way as functions, obligations and powers imposed by the FHSA Bill 2008. Likewise, where a prudential standard authorises or permits particular conduct, this will apply as though the conduct is authorised or permitted by the FHSA Bill 2008.

.19 The concept 'conduct (including an omission) that is required or authorised by, or otherwise performed in connection with, the prudential standards' is a broad one, which includes all provisions that refer to persons or entities' functions, duties and powers. It includes provisions that enable (but do not require) a person to take action, such as:

7 an auditor or actuary may report certain information to APRA under section 130 of the SIS Act;

8 APRA may accept enforceable undertakings in connection with a matter that is related to APRA's functions and powers under section 262A of the SIS Act; and

9 a person or an entity that takes action in accordance with the prudential standards, the entity would not be liable in civil proceedings under section 341 of the SIS Act and section 127 of the FHSA Bill 2008.

Additional references to prudential standards

.1 Other provisions of the SIS Act, when applied to FHSAs, should also refer to prudential standards. Section 117 makes the following modifications to the SIS Act.

.2 The first modification inserts a reference to 'prudential standards' in paragraph 130A(a), so that the section will relevantly read, the auditor or actuary of an FHSA trust may give to the Regulator information about the FHSA trust or a trustee of the FHSA trust obtained in the course of, or in connection with, the performance by the person of audit or actuarial functions under the 'FHSA Act' and the prudential standards. ***[Subsection 117(2)]***

.3 The second modification inserts a new paragraph 133(1)(d), referring to the prudential standards, so that the section will relevantly read, the Regulator may suspend or remove a trustee of an FHSA trust, if the trustee has breached a prudential standard or the trustee's authorisation as an FHSA provider has been cancelled. ***[Subsection 117(3)]***

.4 The third modification inserts a new paragraph 135(1)(ca), referring to the prudential standards, so that the section will relevantly read, the Regulator may determine the terms and conditions of the appointment of the acting trustee, despite anything in the prudential standards. ***[Subsection 117(4)]***

.5 The fourth modification inserts a reference to 'prudential standards' in paragraph 139(b), so that the section will relevantly read, while a person is acting as a trustee under Part 17 of the SIS Act (as it applies in the 'FHSA Act'), the entity's governing rules, the 'FHSA Act', the prudential standards, the 'FHSA Regulations' and any other law apply in relation to the person as if the person were the trustee. ***[Subsection 117(5)]***

.6 The fifth modification inserts a reference to 'prudential standards' in subsection 320(1), so that the section will relevantly read, the Regulator may intervene in any proceeding relating to a matter arising under the 'FHSA Act' or the prudential standards. ***[Subsection 117(6)]***

.7 The last modification inserts a reference to 'prudential standards' in section 341, so that the section will relevantly read, a person is not liable in civil action or civil proceedings in relation to an act done in fulfilment of an obligation imposed by the 'FHSA Act', the prudential standards or the 'FHSA Regulations'. ***[Subsection 117(7)]***

Capital requirements for custodians

.8 Section 118 modifies the capital requirement for custodians of FHSA trusts, to ensure that the custodian's approved guarantee can also cover their activities as custodian of FHSA trusts. This mirrors the modifications to trustee's capital requirements in subsections 93(3) and (4).

.9 A custodian would satisfy its capital requirements under paragraph 123(1)(b) of the SIS Act (as it applies under subsection 114(2)) if it has an approved guarantee of $5 million ***[Regulation 13.19 of the SIS Regulations]*** and the trustee of the FHSA trust is also entitled to the benefit of the approved guarantee in relation to the custodian's FHSA activities.

.10 In effect, the custodian would be required to amend its deed of approved guarantee to ensure that the guarantee also applies to its activities as a custodian of FHSA trusts, but is not required to obtain an additional amount under its approved guarantee. ***[Subsection 114(2) and section 118]***

Transfer of First Home Saver Account trusts

.11 Section 119 modifies the transfer of fund (or successor fund) mechanism under the SIS Act, as it applies under subsection 114(2).

.12 An FHSA trust cannot be transferred to an approved deposit fund, because an FHSA is not a superannuation product. ***[Subsection 114(2) and paragraph 119(b)]***

.13 The receiving FHSA trust must have a trustee that is also an authorised FHSA provider. ***[Subsection 114(2) and paragraph 119(c)]***

Other aspects of the prudential regulation framework for trustees

.14 Some other aspects of the prudential framework for FHSA trustees are explained below.

Civil penalty provisions and criminal offences

.15 Part 21 of the SIS Act, and criminal offences in the SIS Act, apply to FHSA trusts and their trustees in accordance with the basic application rules in section 114 and modification rules in section 116.

.16 If these provisions are not automatically excluded by the rules in section 114 or disapplied by section 115, they would continue to be a civil penalty provision or a provision carrying a criminal offence in relation to the FHSA Bill 2008.

.17 In effect, a contravention civil penalty provisions would entail the consequences of breaching a civil penalty provision under Part 21 of the SIS Act, as it applies in the FHSA Bill 2008; and trustees and other persons can commit an offence if they breach a provision of the SIS Act, as it applies in the FHSA Bill 2008, and the provision carries an offence.

Review of decisions

.18 The definition of 'reviewable decision' and review procedures in sections 10, 344 and 355 of the SIS Act apply to FHSA trusts and their trustees, in accordance with the basic application rules in section 114 and the modification rules in section 116. As such, if these provisions are not automatically excluded by section 114 or disapplied by section 115, APRA continues to be able to make decisions in relation to the FHSA Bill 2008 and these decisions continue to be subject to review.

.19 APRA's decisions in relation to authorisation and prudential standards that apply to specified trustees are not listed in the definition of 'reviewable decisions' in section 10 of the SIS Act. These decisions are subject to review under Subdivision 4, Division 2A of Part 5. The review

procedures for these decisions are consistent with the review procedures under the SIS Act.

.20 Arrangements for the review of decisions made by the Commissioner of Taxation are outlined in Chapter 8.

Disqualification

.21 Parts 15 and 16 of the SIS Act apply to trustees of FHSA trusts, their responsible persons, as well as auditors, actuaries, custodians and investment managers of FHSA trusts.

.22 Individuals and bodies corporate may be disqualified under these Parts, in accordance with the basic application rules in section 114 and the modification rules in section 116. These will be disqualifications under the FHSA Bill 2008 rather than under the SIS Act.

.23 However, some disqualification criteria, in relation to personal or corporate bankruptcy and conviction for an offence in respect of dishonest conduct, will be common under the FHSA Bill 2008 and the SIS Act. As such, an individual or body corporate disqualified because of bankruptcy or conviction for such an offence will be disqualified under both the FHSA Bill 2008 and the SIS Act.

.24 A disqualification under the FHSA Bill 2008 carries consequences for the disqualified person. For example, an individual commits an offence if the individual acts as a responsible person of a trustee, investment manager or custodian while disqualified ***[section 126K of the SIS Act, as it applies under subsection 114(2)]***; where a trustee becomes a disqualified person, APRA may cancel its authorisation as an FHSA provider ***[paragraph 107(2)(b)]***; and a person that acts as the custodian or investment manager of an FHSA trust while disqualified also commits an offence ***[section 126 of the SIS Act, as it applies under subsection 114(2)]***.

Exemptions and modifications

.25 Part 29 applies to FHSA trusts and their trustees, in accordance with the basic application rules in section 114 and modification rules in section 116. As such, APRA can determine exemptions and modifications in relation to FHSA trusts and trustees under the FHSA Bill 2008 independently of exemptions and modifications determined under the SIS Act.

Reporting under the Financial Sector (Collection of Data) Act 2001

.26 The *Financial Sector (Collection of Data) Act 2001* requires an entity that is a 'body regulated by APRA', within the meaning of the APRA Act,

to report data in accordance with the *Financial Sector (Collection of Data) Act 2001*. ADIs and life insurance companies are already bodies regulated by APRA within the meaning of the APRA Act, and trustees of FHSA trusts are also defined as a 'body regulated by APRA' ***[Schedule 3, item 6, FHSA (Consequential Amendments) Bill 2008].*** As such, all FHSA providers will be required to report data in accordance with reporting standards determined under section 13 of the *Financial Sector (Collection of Data) Act 2001.*

Investment management for investment-linked First Home Saver Accounts

.27 Investment-linked FHSAs differ from other investment-linked products generally offered by trustees and life insurance companies. FHSAs are likely to be much shorter term investment products and have less predictable withdrawal patterns. In addition, given that the purpose of FHSAs is to save for a first home, account holders are likely to have a greater aversion to risk and lower tolerance for capital losses, relative to superannuation and life insurance customers.

.28 Principles-based investment rules will apply to investment-linked FHSAs to ensure that FHSA investments reflect the purpose and nature of the accounts. These rules will not apply to accounts that are offered by banks, building societies and credit unions as these must be capital-guaranteed and do not carry the same risks as investment-linked accounts.

First Home Saver Accounts offered by trustees

.29 The investment rules established under paragraph 52(2)(f) of the SIS Act apply by reference to FHSA trusts operated by trustees in accordance with subsection 114(2) ***[subsection 120(1)].*** Additional investment rules have also been imposed to reflect the purpose and nature of FHSAs.

.30 The investment rules require that the investment strategy has regard to the entire circumstances of the entity. The trustee must have regard to the risk of capital loss, the likely return from the underlying investments, the liquidity requirements, and the ability to discharge financial liabilities.

.31 As FHSAs can be withdrawn within four financial years after opening, they are likely to be much shorter term investment products than superannuation. Unlike most superannuation accounts, FHSAs will generally be less able to recover financial losses caused by short-term market fluctuations prior to the savings being withdrawn for a first home deposit. A new covenant, subparagraph 52(2)(f)(v), is inserted into the SIS Act covenants as they apply to trustees in the FHSA Bill 2008, requiring investment strategies to have regard to the risk of capital loss

given the relatively shorter term investment horizon of FHSAs as reflected in the FHSA payment rules. ***[Subsection 120(3)]***

.32 In having regard to the risk of capital losses, these requirements should not prevent trustees from formulating investment strategies that may be suited to individuals with a longer investment horizon than the minimum contemplated by the payment rules, provided that strategies take into account the possibility that savings could be withdrawn once the minimum requirements are met.

Investment choice

.33 Providers may develop more than one investment option and allow FHSA holders to choose between options. Providers offering FHSA holders a choice between different investment options must formulate an investment strategy for each option, in place of a single strategy for the entity ***[subsection 120(2)]***, that separately complies with subparagraphs 52(2)(f)(i) to (v) of the SIS Act as it applies under subsection 114(2) ***[subsection 120(4)]***. As a consequence of these amendments, subsection 52(4) of the SIS Act becomes redundant and is omitted ***[subsection 120(5)]***.

.34 FHSA holders may choose between investment options formulated by the FHSA provider in accordance with the investment rules. Where an FHSA holder directs the trustee to adopt a particular investment option for the FHSA holder's investments, the trustee is exempted from the requirement not to be subject to direction. ***[Subsection 120(7)]***

.35 In accordance with section 55 of the SIS Act, the trustee has a defence to an action for loss or damage suffered by a person as a result of an investment made by the trustee, if the investment is made in accordance with paragraph 52(2)(f) of the SIS Act. For FHSAs this defence is extended to loss or damage suffered by a person as a result of an investment made by the trustee, if the investment is made in accordance with paragraph 52(2)(fa) of the SIS Act as it applies under subsection 114(2). ***[Subsection 120(6)]***

Accounts offered by life insurance companies

.36 Further investment rules will apply to FHSAs that are offered as investment-linked life policies in addition to those already in place for statutory funds under the *Life Insurance Act 1995*. ***[Section 124]***

.37 These additional investment rules apply only to life policies that are offered as investment-linked contracts, within the meaning of section 14 of the *Life Insurance Act 1995* ***[subsection 124(1)]***. Balances of FHSAs offered as investment account policies, by definition, cannot reduce in value otherwise than by amounts withdrawn by the account holder or by

charges payable under the contract. Accordingly, they are not subject to additional investment rules due to their low risk nature.

.38 Providers of investment-linked life policies must have regard to the diversification of the class or group of assets underlying the policies ***[paragraph 124(2)(a)]***. Consideration of diversification both within and among asset classes is important to manage the investment risk associated with investment-linked accounts.

.39 Investment-linked life policies are required to have particular regard to the risk of capital loss given the relatively shorter term investment horizon of FHSAs. ***[Subparagraph 124(2)(b)(i)]***

.40 The liquidity of the class or group of assets underlying investment-linked life policies is required to have regard to the unpredictability in cash flow of FHSAs. ***[Subparagraph 124(2)(b)(ii)]***

.41 If an investment-linked life policy allows an account holder to choose between different investment options, each option must conform with the additional investment rules specified in section 124. ***[Subsection 124(3)]***

Protection of small balances

.42 FHSA providers are required to ensure that fees do not exceed investment earnings in any given year for accounts that have small balances.

.43 The provisions are modelled on the 'member protection' rules that protect small superannuation balances from being eroded by fees and charges outlined in the SIS Regulations.

.44 If an FHSA balance is less than $1,000 an FHSA provider must not make a payment of fees if that payment would exceed the total earnings for that FHSA for the period. ***[Subsection 125(1)]***

.45 An FHSA provider is not required to limit fees if the:

10 FHSA holder consents in writing;

11 the fees are calculated based on the FHSA holder's units in an FHSA trust; or

12 the FHSA is an FHSA policy issued by a life insurance company.

[Subsection 125(2)]

.1 An FHSA provider is also not required to limit fees for the period if the fees are apportioned based on the FHSA provider's total:

13 earnings for all FHSAs it provides; or

14 balances for all FHSAs it provides.

[Subsection 125(3)]

.1 FHSA providers are not able to avoid the small balance rules by delaying fees until a subsequent period. For example, by charging fees in a later period where the FHSA balance will have increased to above $1,000.

.2 An FHSA provider commits an offence if it fails to comply with these requirements. The penalty is up to 100 penalty units. ***[Subsection 125(1)]***

.3 If an FHSA provider fails to comply with these rules, the fees paid are still valid. ***[Subsection 125(4)]***

• Chapter 6 Taxation

Outline of chapter

– Schedule 1 to the First Home Saver Accounts (Consequential Amendments) Bill 2008 (FHSA (Consequential Amendments) Bill 2008) amends the *Income Tax Assessment Act 1936* (ITAA 1936), the *Income Tax Assessment Act 1997* (ITAA 1997), the *Taxation Administration Act 1953* (TAA 1953) and the *Income Tax Rates Act 1986* to establish the tax treatment of First Home Saver Accounts (FHSAs), which has the following main features:

- individual contributions to FHSAs are not taxed because they can only be made out of post-tax income;
- Government contributions into accounts are not taxed;
- earnings on FHSAs are taxed to the account provider at the statutory rate of 15 per cent rather than to the individual account holders at their marginal income tax rates; and
- withdrawals to purchase a first home are not taxed and other withdrawals are generally not taxed.

– There is also a tax, called the FHSA misuse tax, which applies to clawback benefits obtained by individual account holders who improperly use the accounts. The tax is imposed by the Income Tax (First Home Saver Accounts Misuse Tax) Bill 2008 (Income Tax (FHSA Misuse Tax) Bill 2008).

Context

– Under the existing law, where an individual invests money while saving for a first home, the earnings on the investments are normally assessable income of the individual investor and consequently taxed according to the normal rate scale applying to the individual. The amounts that an individual puts in (or contributes) to an investment such as a bank account are, under ordinary income tax principles, normally capital in character and not deductible. Similarly, the amounts that an

individual withdraws from a mere investment are also normally capital receipts and, therefore, not assessable income.

– The Government proposes that earnings on FHSAs be taxed in a similar way to the earnings of superannuation funds. The earnings of superannuation funds are generally taxed to the trustee of the fund at a rate of 15 per cent. Authorised deposit-taking institutions (ADIs) and life companies are currently taxed on a similar basis to superannuation funds on their superannuation or retirement savings account business.

Current taxation of authorised deposit-taking institutions and life companies

– ADIs do not currently conduct superannuation business but may provide retirement savings accounts, which are accounts that provide benefits on retirement or death and that are treated, for various purposes, similarly to superannuation funds. The earnings on the retirement savings accounts that ADIs offer are taxed in a special way that has the object of treating retirement savings account activities similarly to those of superannuation funds. The retirement savings account earnings are calculated separately from earnings from standard activities and taxed to the ADI, instead of the retirement savings account holder, at 15 per cent.

– The superannuation activities of life insurance companies are taxed under special provisions that have the object of treating those activities in a broadly comparable way to those of superannuation funds. The complying superannuation class of taxable income is calculated separately and taxed at 15 per cent. The special provisions segregate the assets of the superannuation business from the other business of the life insurance company through a feature called the virtual pooled superannuation trust (virtual PST).

Summary of new law

– Schedule 1 to the FHSA (Consequential Amendments) Bill 2008 sets out the taxation treatment of FHSAs.

– Individual contributions into accounts are only from post-tax income and consequently are not taxed to the account provider. A Government contribution for an individual account holder, is not assessable income and is not exempt income.

– The earnings on the account are not assessable income and are not exempt income in the hands of the account holder. An amount withdrawn from an FHSA to purchase a first home is also not assessable income of

the individual account holder. Finally, an FHSA holder does not make any capital gain or loss from a capital gains tax (CGT) event happening to their interest in the account.

– The earnings on FHSAs are taxed to FHSA providers at 15 per cent. For each of the three types of providers — trustees of FHSA trusts, ADIs and life companies — this is done by applying broadly the same rules that currently apply to superannuation or retirement savings account activities.

– Accordingly, the earnings of an FHSA trust are taxed similarly to those of superannuation funds. The FHSA earnings of ADIs are taxed like their earnings from retirement savings account activities. The FHSA earnings of life companies are taxed like their superannuation earnings, on a 'virtual PST' basis.

– Where an account holder does not meet conditions of eligibility, withdrawal or occupancy of the home they purchase, a misuse tax applies to ensure that they do not improperly benefit from their use of an FHSA. The tax claws back Government contributions paid for their benefit. It also includes a component that is designed to broadly neutralise the maximum benefit they may have obtained from having the earnings of the FHSA taxed at 15 per cent instead of at their own individual tax rates.

Detailed explanation of new law

Individual contributions into accounts

– During the 2007 Federal election campaign it was proposed that individuals would be able to contribute to FHSAs through 'salary sacrifice'; that is, by making pre-tax contributions. After the election the Government formally approved the establishment of FHSAs. It also decided to deliver a streamlined up-front Government contribution directly into accounts rather than through a more complex system of salary sacrificing. (The Treasurer's and Minister for Housing's joint Press Release No. 004 of 4 February 2008; and the Treasurer's Press Release No. 040 of 13 May 2008.)

– All individual contributions are post–tax. That is, an individual is not able to reduce their income tax by making contributions to an FHSA through salary sacrificing arrangements.

– No amendment of the income tax law is necessary to produce this result. The constructive receipt rule in subsection 6-5(4) of the ITAA 1997 is designed to ensure that if an amount is applied or dealt with in any way on an entity's behalf or at an entity's direction, the entity is

taken to have received the amount (ordinary principles of tax accounting are not limited by subsection 6-5(4) and would ensure the same result). This provision ensures that money paid to an individual's bank account (at the individual's direction or on the individual's behalf) are treated as received by the entity and therefore as ordinary income if the money is a reward for employment. Similarly, if any money was paid to an FHSA under a salary sacrifice agreement, they would be treated as received by an entity and therefore as ordinary income.

– Nor is any amendment to the fringe benefits tax law necessary. The definition of ***fringe benefit*** in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* excludes (in paragraph (f)) '…a payment of salary or wages…'. The definition of ***salary or wages*** includes a payment from which an amount must be withheld under section 12-35 (payment to an employee) of Schedule 1 to the TAA 1953. The pay as you go (PAYG) withholding provisions include a constructive payment provision (section 11-5) that corresponds to the constructive receipt rules in Division 6 of the ITAA 1997. The result is that an amount paid by an employer to an employee's FHSA as a reward for employment would be subject to PAYG withholding and not be a fringe benefit — even if it purported to be by way of salary sacrifice.

– Where the FHSA is a bank account or FHSA trust, individual contributions are not assessable income in the hands of the account provider. No amendment is needed to achieve this result. Under ordinary principles the contributions are capital receipts.

– For individual contributions where the FHSA is a life policy, the existing law produces an equivalent result, so again no amendment is needed. All premiums received by a life insurance company are included in assessable income (paragraph 320-15(1)(a) of the ITAA 1997). In the case of policies held in the life insurance company's virtual PST, this amount of assessable income is allocated to the complying superannuation/FHSA class of taxable income (paragraph 320-137(2)(a)). However, for investment-type policies, a deduction is allowed for the capital component of the premium. In the case of a policy that is held in the life insurance company's virtual PST, the amount of the deduction is *equal* to the amount of the premium that is transferred to the virtual PST, *less* any risk component of that premium (section 320-55). This deduction is allocated to the complying superannuation/FHSA class of taxable income (paragraph 320-137(4)(a)).

Government contributions

– As explained in Chapter 3 — Government Contributions, the Commissioner of Taxation (Commissioner) may pay a Government

contribution to an individual's FHSA, to their interest in a complying superannuation plan, to the individual themselves or to the individual's legal personal representative. In all these cases the amount of the contribution is neither assessable income nor exempt income of the individual. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; subsection 345-50(3) of the ITAA 1997]***

– Government contributions are also not assessable income of an FHSA provider. No specific provision is needed to produce this outcome because the contributions are not ordinary income of the account provider.

Withdrawals

– A payment from an FHSA is neither assessable income nor exempt income of the individual account holder. The amount withdrawn is essentially the accumulated capital of the account holder and, therefore, not ordinary income. However, it is possible that the amount could be assessable by virtue of a specific provision about assessable income (eg section 26AH of the ITAA 1936, which is about bonuses and other amounts received on certain short-term life insurance policies). Consequently, a specific provision has been included to ensure that a payment from an FHSA is non-assessable non-exempt income. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; subsection 345-50(2) of the ITAA 1997]***

– In some circumstances (eg, where the FHSA is in the form of an interest in a trust), the withdrawal of money from an FHSA may involve a CGT event. No capital gain or capital loss is brought to account in those circumstances. To ensure that result, there is a specific rule that any capital gain or loss which the holder of an FHSA makes from a CGT event happening to the FHSA is disregarded. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; subsection 345-50(4) of the ITAA 1997]***

– However, if the account holder has used an FHSA to obtain benefits to which they were not properly entitled and an amount is paid from the FHSA to the account holder, an FHSA misuse tax may apply (see discussion of the FHSA misuse tax later in this chapter).

Payment from a First Home Saver Account contributed to superannuation

– A payment made from an FHSA as a contribution to a superannuation fund is not assessable income of the recipient superannuation fund. The amounts in an FHSA are all post-tax, so there is no justification to include contributions from the FHSA in the superannuation fund's assessable income. Also, any Government contributions paid directly to a superannuation interest of the holder in a superannuation fund are not

assessable income of the superannuation fund. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 24; section 295-171 of the ITAA 1997]***

– A contribution from an FHSA to a superannuation fund is included in an individual's non-concessional contributions (under section 292-90 of the ITAA 1997). This follows automatically from excluding the contributions from assessable income, so there is no need for further amendment.

– No deduction or tax offset is available to either the account holder or the FHSA provider for a contribution from an FHSA to a superannuation fund. The existing law may already achieve this result without amendment, but Division 290 of the ITAA 1997 (contributions to superannuation funds) is amended to put the matter beyond doubt. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 22; paragraphs 290-5(d) and (e) of the ITAA 1997]***

– Amounts contributed from FHSAs to superannuation funds are not eligible for the superannuation co-contribution for low income earners. These amounts may already have benefited from a Government contribution, so it would not be appropriate for the individual to receive another. The definition of ***eligible personal superannuation contribution*** in the *Superannuation (Government Co-Contribution for Low Income Earners) Act 2003* is amended to exclude a payment made from an FHSA as a contribution to a superannuation fund and any Government contributions. ***[Schedule 3 to the FHSA (Consequential Amendments) Bill 2008, item 37; section 7 of the Superannuation (Government Co-Contribution for Low Income Earners) Act 2003]***

Earnings

– Earnings on FHSAs are taxed to the account provider at the statutory rate of 15 per cent rather than to individual account holders at their marginal income tax rates. Accordingly, an amount of earnings on an FHSA is not assessable income and is not exempt income of the individual account holder. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; subsection 345-50(1) of the ITAA 1997]***

– Each of the three types of account providers (FHSA trusts, ADIs and life companies) has their own set of rules about taxation of earnings. The provisions tax the earnings of an FHSA trust similarly to those of superannuation funds. The FHSA earnings of ADIs are taxed like their earnings from retirement savings account activities and the FHSA earnings of life companies are taxed like their superannuation earnings, on a virtual PST basis.

First Home Saver Accounts trusts

– The trustee of an FHSA trust is liable to pay income tax on the taxable income of the trust. The tax payable is worked out under the core income tax rules (section 4-10 of the ITAA 1997) making two assumptions. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; subsections 345-5(1) and (2) of the ITAA 1997]***

– The first assumption is that the trust is an Australian resident. Consequently, ordinary and statutory income from sources both within and outside Australia are taken into account and any tax offsets dependent on being an Australian resident are also taken into account.

– The second assumption is that the trust is liable to pay income tax (under the main liability provision in section 4-1 of the ITAA 1997) for the financial year. Without this assumption it would be doubtful that the core income tax rules could apply to work out the tax payable by a trustee on the trust's taxable income — a specific provision setting out how to work out the liability would be needed. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; subsection 345-5(2) of the ITAA 1997]***

– This approach produces a similar result to the provisions for superannuation entities but is more streamlined because, unlike superannuation entities, there is only one component of taxable income. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; subsections 345-5(2) and (3) of the ITAA 1997]***

– In working out the FHSA trust's assessable income and deductions it is necessary to take into account the special rules for FHSA trusts. The gross tax payable on the taxable income is worked out by applying the applicable rate, currently 15 per cent. The total tax offsets of the FHSA trust are *subtracted* from the gross tax payable on the taxable income to give the tax payable by the trustee. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; subsection 345-5(3) of the ITAA 1997]***

– There are far fewer special rules for FHSA trusts than there are for superannuation funds. A major reason for this is that, unlike superannuation funds, there are no assessable contributions to an FHSA.

– However, there is an important special rule, which also applies in calculating the liability of the trustee of a superannuation entity. The capital gains and losses provisions are to be the primary code for calculating gains and losses on CGT assets owned by the FHSA trust. There are the same specified exceptions from the primary code as for superannuation entities, which include foreign exchange gains or losses, bank deposits, securities and loans. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; section 345-10 of the ITAA 1997]***

– A trustee of an FHSA trust is added to the list of entities in section 9-1 of the ITAA 1997 that work out their liability to pay income tax in a

special way. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 8; section 9-1 of the ITAA 1997]***

Relationship with other trust provisions

– The trustee of an FHSA trust is not liable to pay tax under the standard trust rules in Division 6 of Part III of the ITAA 1936. Similarly, those standard trust rules do not apply to include amounts in the assessable income of an account holder that is a beneficiary of an FHSA trust. Also, the trust loss rules in Schedule 2F to the ITAA 1936 do not apply to FHSA trusts. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, items 4 and 7; sections 95AA and 272-100 of Schedule 2F to the ITAA 1936]***

CGT discount

– Assets held by an FHSA trust are eligible for the CGT discount of one third. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, items 10 and 11; section 115-100 of the ITAA 1997]***

– Where an FHSA trust is a shareholder in a listed investment company it will obtain a similar benefit to the discount capital gain (through a deduction). ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, items 12 to 16; section 115-280 of the ITAA 1997]***

Dividend imputation

– Subdivision 207-A outlines the effect of receiving a franked dividend for most taxpayers (including complying superannuation funds). If the Subdivision applies, the taxpayer must include the amount of the franking credit in its assessable income and is entitled to a tax offset equal to the amount of that franking credit (section 207-20).

– Subdivision 207-B outlines the effect of receiving a franked dividend for most trusts (other than complying superannuation funds) and partnerships. If the Subdivision applies, franking credits essentially flow through to the partners of the partnership or the beneficiary of the trust.

– Subject to some specified exceptions, a tax offset available under Division 207 is a refundable tax offset (section 67-25).

– For an FHSA trust, amendments are necessary to ensure that Subdivision 207-A applies and Subdivision 207-B does not. To ensure that Subdivision 207-A applies, paragraph 207-15(2)(a) is amended so that it covers the trustee of a trust that is an FHSA trust. Paragraph 207-35(1)(c) and section 207-45 are amended so Subdivision 207-B does not cover the trustee of a trust that is an FHSA

trust. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, items 19 to 21; paragraphs 207-15(2)(a) and 207-35(1)(c) and section 207-45 of the ITAA 1997]***

– Section 67-25 operates appropriately to make a tax offset available under Division 207, a refundable tax offset.

Income Tax Rates Act 1986

– The *Income Tax Rates Act 1986* is amended so that the taxable income of the FHSA trust is taxed at 15 per cent. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008; item 52, section 30 of the Income Tax Rates Act 1986]***

Other amendments for First Home Saver Account trusts

– To ensure that FHSA trusts receive treatment similar to superannuation funds, there are also amendments to:

- the pooled development fund provisions ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 5; section 124ZM of the ITAA 1936]***;
- the tracing rules for tax losses of companies ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, items 17 and 18; section 166-245 of the ITAA 1997]***; and
- the PAYG instalment provisions ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, items 58 to 61; subsections 45-120(2), 45-290(2), 45-330(2) and 45-370(2) in Schedule 1 to the TAA 1953].***

Authorised deposit-taking institutions

– FHSA activities of ADIs are to be taxed on a similar basis to retirement savings account activities. The earnings on the retirement savings accounts that ADIs offer are taxed in a special way that has the object of treating retirement savings account activities similarly to those of superannuation funds. The retirement savings account earnings are calculated separately from earnings from standard activities (the retirement savings account component of taxable income) and taxed to the ADI, instead of the retirement savings account holder, at 15 per cent.

– Similarly, an ADI that is an FHSA provider needs to calculate an FHSA component of taxable income, to be taxed at 15 per cent. The FHSA component is a separate component from the retirement savings account component, although both are taxed at 15 per cent.

– For an ADI that is a retirement savings account provider the method of working out the liability of the retirement savings account provider is modified to include the working out of the FHSA component (as well as the retirement savings account and standard components). ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 23; subsection 295-10(2) of the ITAA 1997]***

– For an ADI that is an FHSA provider but not a retirement savings account provider, the income tax liability is worked out by reference to its taxable income under the core provision of the income tax law (Division 4 of the ITAA 1997). The ADI's taxable income has two components, the FHSA component and standard component of taxable income. The gross tax payable is calculated by applying the applicable tax rates from the *Income Tax Rates Act 1986*. A 15 per cent rate is applied to the FHSA component and the standard company tax rate (currently 30 per cent) applied to the standard component. Finally the ADI's tax offsets are subtracted from the gross tax payable to give the tax payable by the ADI. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; section 345-15 of the ITAA 1997]***

Calculating the First Home Saver Account component

– The method of calculating the FHSA component is similar to that for calculating the retirement savings account component but is simpler because there is no need to include any contributions in assessable income (for FHSAs, contributions are not taxed to the provider because there are only post-tax contributions). The object of this method is to work out the net earnings of the FHSA account holders, so that they can be taxed at the rate of 15 per cent. The calculation of the liability of the ADI on its normal activities — including investing the funds obtained from FHSAs — is done in the normal way.

– The first step in working out the ***FHSA component*** is to add up all the earnings (normally interest) credited to the FHSAs provided by the provider during the year. It is then necessary to calculate total fees and then subtract them from the total earnings to give the FHSA component. Total fees are intended to cover any fee or charge that the account holder must pay the ADI on the FHSA, whatever its description or form, but not to cover taxes. The standard component is the remaining part to the provider's taxable income. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; section 345-20 of the ITAA 1997]***

– The ADI's FHSA component cannot exceed its taxable income. If the amount worked out would otherwise exceed the provider's taxable income, the taxable income is equal to the FHSA component. Any excess is treated as a tax loss of the ADI. An effect of this is that the FHSA provider cannot offset losses against its FHSA income. ***[Schedule 1 to the***

FHSA (Consequential Amendments) Bill 2008, item 31; subsection 345-15(2) of the ITAA 1997]

– Consistent with the retirement savings account approach, ADIs do not get a CGT discount in relation to their FHSA activities. No amendment is needed to achieve this result. The gains and losses that ADIs make on investments in the ordinary course of their banking business are on revenue account.

Income Tax Rates Act 1986

– The *Income Tax Rates Act 1986* is amended so that the FHSA component is taxed at 15 per cent. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, items 49 to 51; section 23 of the Income Tax Rates Act 1986]***

Life insurance companies

– The FHSA earnings of life companies are to be taxed like their superannuation earnings, on a virtual PST basis. There is one virtual PST for both superannuation and FHSA business. Earnings from both FHSA activities and superannuation activities are to be taxed at 15 per cent. The major objective of the virtual PST is to separate assets relating to the activities taxed at 15 per cent from those taxed at normal company rates (currently 30 per cent).

– This approach avoids having to create a separate virtual PST for FHSA activities but requires significant amendments to Division 320 (life insurance companies) of the ITAA 1997. A separate virtual PST for FHSA activities would have imposed high compliance costs on life companies providing FHSAs. The approach does require numerous changes in terminology in Division 320, including a change in the name of the virtual PST (see detailed explanation under Consequential amendments).

– The substantive changes needed to various Subdivisions in Division 320 are described below. In Subdivision 320-E (No-TFN contributions of life insurance companies that are retirement savings account providers), Subdivision 320-H (Segregation of assets) and Subdivision 320-I (Transfers of business), no substantive changes are needed, only changes in terminology.

Subdivision 320-D — income tax, taxable income and tax loss of life insurance companies

– The central provisions for working out a life insurance company's liability are in Subdivision 320-D. These still operate in the same way. However, the complying superannuation class of taxable income becomes

a single composite class — complying superannuation/FHSA class. This name reflects the two different types of activities that are covered by the class.

Subdivision 320-F — virtual PST

– The key concept underlying the operation of the virtual PST rules in the current Subdivision 320-F is the definition of ***virtual PST life insurance policy*** in subsection 995-1(1). That definition is replaced by a new definition, ***complying superannuation/FHSA life insurance policy,*** which includes a life insurance policy that is an FHSA. This amendment allows a life insurance company to segregate assets in its virtual PST (renamed as the complying superannuation/FHSA asset pool) for the purpose of discharging FHSA liabilities. ***[Schedule 7 to the FHSA (Consequential Amendments) Bill 2008, item 28; subsection 320-170(6) of the ITAA 1997]***

– Another key concept in the current Subdivision 320-F is the concept of virtual PST liabilities in section 320-190. This section specifies the amount of liabilities that can be supported by virtual PST assets. For most types of life insurance policies, the amount of virtual PST liabilities is the current termination values of those policies (as worked out by an actuary). The ***current termination value*** is defined in subsection 995-1(1) by referring to prudential standards. In practical terms, the current termination value at a particular time is generally the amount standing in a policy holder's account at that time, and therefore is appropriate for FHSAs. The replacement of the definition of a 'virtual PST life insurance policy' and the consequent expansion of the concept of virtual PST allows section 320-190 to apply without substantive amendment.

Subdivision 320-C — Deductions and capital losses

– An FHSA policy does not have an insurance (risk) component — that is, in the event of the policyholder's death, the amount payable to the estate or beneficiary is limited to the balance in the FHSA. Consequently, an amendment is necessary to ensure that no amount relating to an FHSA policy is deductible under section 320-80 or 320-85, which specify the deductibility of certain amounts relating to risk policies. This is achieved by amending paragraph 320-80(2)(b) and subsection 320-85(2) to include a reference to an FHSA policy. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, items 29 and 30; sections 320-80 and 320-85]***

– Otherwise, this Subdivision is able to continue to apply in the same way, with necessary terminology changes.

Guide to Division 320

– Two amendments are required to the Guide. First, the dot point relating to the taxable income of the complying superannuation class is modified to reflect the new term for the composite class and to refer to FHSA business. Second, the dot point relating to segregating assets that relate to complying superannuation business is modified so that it also refers to assets that relate to FHSA business.

CGT discount

– Assets held in the virtual PST to meet FHSA liabilities are eligible for the CGT discount of one third. No amendment is needed to achieve this result. Paragraph 115-10(d) already accords a CGT discount treatment to '…a *life insurance company in relation to a *discount capital gain from a *CGT event in respect of a *CGT asset that is a*virtual PST asset.'.

Income Tax Rates Act 1986

– Amendments to paragraph 23A(b) of the *Income Tax Rates Act 1986* are needed to accurately describe the class of taxable income to be taxed at 15 per cent.

Dividend imputation

– Life companies are eligible for refundable imputation credits in relation to their FHSA business and no amendments are needed to the imputation provisions to achieve this result.

First Home Saver Accounts misuse tax

– If an individual account holder improperly uses an FHSA and money is paid from the FHSA to the individual for the purchase of a first home, the individual is liable to pay a tax called the FHSA misuse tax. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; section 345-100 of the ITAA 1997]***

– The Commissioner assesses the FHSA misuse tax. So, neither the account holder nor the account provider is required to calculate it.

Purpose of the tax

– The purpose of the tax is to deter people from improperly using FHSAs by ensuring that individuals do not benefit in those circumstances. Individuals can obtain two main benefits from improperly using an FHSA: Government contributions and a lower rate of tax on earnings than their normal individual marginal rate(s). The FHSA misuse tax is designed to:

- clawback all the Government contributions improperly obtained; and
- neutralise the maximum benefit the individual may have obtained from having earnings taxed at 15 per cent. This can be greater than the actual benefit for an individual on less than the top marginal tax rate.

– Importantly, criminal or administrative penalties may also apply to the individual subject to the FHSA misuse tax. For example, if an individual made a false or misleading statement in applying to open an account or to withdraw money from an account, they may commit an offence or be liable to an administrative penalty under the TAA 1953. There is a range of offences under the Criminal Code that could also apply.

Circumstances in which the tax applies

– For the tax to apply, the account holder must withdraw money from their FHSA on the basis that they are to use the money to purchase a first home in Australia. The tax does not apply if the money is transferred from the FHSA to superannuation, or paid in other specified circumstances (eg, to another FHSA or because of family law obligations). The rationale for the tax not applying to transfers to superannuation is that if the individual had originally made their contribution to superannuation by way of salary sacrifice instead of to an FHSA they would, in most cases, have obtained similar or greater benefits to that obtained under the FHSA. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; section 345-100]***

– Where there is a payment as described, the two types of improper use that attract the tax are:

- failing eligibility conditions — in this case the payment is called an ***FHSA ineligibility payment***; and
- failing payment conditions — called ***FHSA payment conditions***, about the use of the payment or the occupancy of the home purchased.

[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; section 345-100]

FHSA ineligibility payment

– An individual account holder fails the eligibility conditions if they are not eligible to open an account or if they become ineligible and do not notify the account provider (and thus have the money transferred to

superannuation). The eligibility conditions (discussed in Chapter 1) are that the individual be aged at least 18 and under 65 years, not previously have owned their home in Australia and (except in limited circumstances) never held another FHSA. It is not intended that an individual fail the eligibility conditions if, as part of the process of acquiring their first home, they acquire a qualifying interest in a dwelling and move into it shortly before receiving a payment from their FHSA. ***[First Home Saver Accounts Bill 2008 (FHSA Bill 2008), section 16]***

FHSA payment conditions

– The individual fails the FHSA payment conditions if, within six months of the payment, the individual does not use an amount equal to the payment in acquiring a qualifying interest in a dwelling. The individual makes a declaration in the approved form when withdrawing money about the purpose for which they will be used. Under the approved form mechanism, the Commissioner has the power to ask for evidence and further details about that usage. It is not necessary to trace whether the actual payment is used to acquire the home. ***[FHSA Bill 2008, section 17]***

– The individual also fails the FHSA payment conditions if they fail to occupy the acquired dwelling as their main residence for a continuous period of least six months starting within a designated period. For a dwelling that is complete when the payment is made, the designated period starts when the person acquires the dwelling (see Chapter 1 for a discussion of when an individual acquires a qualifying interest in a dwelling). For a dwelling that is not complete when the payment is made, the period starts when the construction is complete. Whether a dwelling is complete is a matter of evidence and a building completion certificate (eg, a certificate of occupancy) would be relevant (and normally sufficient) evidence. ***[FHSA Bill 2008, section 17]***

– The period ends 12 months after the period starts or at a later time that the Commissioner considers reasonable in the circumstances. ***[FHSA Bill 2008, subsection 17(2)]***

– The individual also fails the FHSA payment conditions if they withdrew the money to construct a dwelling and the construction is not complete with a reasonable period after the payment is made. This ensures that the individual cannot defeat the occupancy rules by delaying the completion of their home. The FHSA payment conditions are discussed in more detail in Chapter 2. ***[FHSA Bill 2008, subsection 17(1)]***

Re-contributing an amount to an FHSA

– An individual is treated as satisfying the FHSA payment conditions even though they would otherwise fail the conditions if, within six months of the payment, the individual contributes to an FHSA, an amount equal to the payment or, if it is reasonable in the circumstances, a lesser reasonable amount. In some circumstances it would be reasonable for the individual not to re-contribute any amount. In determining whether it is reasonable to pay a lesser amount, it is necessary to have regard to:

- whether the failure to satisfy a condition was beyond the individual's control;
- whether the failure was reasonably foreseeable;
- any previous failure by the individual; and
- any other relevant matter.

[FHSA Bill 2008, subsections 17(3) and (4)]

1

Wendy is the holder of an FHSA and withdraws the balance and uses the whole balance to purchases her first home. After living in the home for two months Wendy is unexpectedly transferred in her work to another city for a term of two years. Although Wendy fails the occupancy condition, it is reasonable in the circumstances that she contributes a nil amount to an FHSA. So, she still satisfies the FHSA payment conditions.

2

Danny and Mary are a married couple who each has an FHSA. They both withdraw the balance of their accounts to purchase a first home jointly. After living in the home for four months, the couple separate with Mary leaving the home permanently. Although Mary fails the occupation condition, it is reasonable in the circumstances that she contributes a nil amount to an FHSA. So, she still satisfies the FHSA payment conditions.

3

Kate is the holder of an FHSA and orally agrees to purchase a dwelling that she intends to live in. Kate withdraws the balance of her account to pay as a deposit on the purchase. However, before paying a deposit Kate changes her mind about purchasing the house and uses the money to finance her living expenses while she studies full-time at university. She contributes no amount to an FHSA within six months of the withdrawal. Kate has failed the FHSA payment conditions and has not contributed (within the six months) an amount equal to the

payment (or a lesser amount reasonable in the circumstances) to an FHSA. Consequently, she is liable to pay the FHSA misuse tax.

4

Kim withdraws $20,000 from her FHSA to purchase her first home. The vendor withdraws the home from sale. Kim has already incurred $4,000 in legal costs in attempting to acquire the home. Six weeks after withdrawing the money, Kim contributes $16,000 to an FHSA. In the circumstances, it was reasonable for Kim to contribute an amount less than $20,000, and $16,000 was a reasonable amount for her to contribute. So, she satisfies the FHSA payment conditions and is not liable to the misuse tax.

The amount of the tax

– The FHSA misuse tax is designed to clawback all the Government contributions improperly obtained and broadly to neutralise the maximum benefit the individual may have obtained from having earnings taxed at 15 per cent (ie, if they were on the top marginal tax rate).

– If the payment is an FHSA ineligibility payment (but satisfies the FHSA payment conditions), the tax payable by the individual is the *sum* of two components:

- the ***clawback tax amount***, which approximates the maximum earnings benefit of the individual to be taxed; and
- the sum of the ***non-recognised Government contributions*** payable for the FHSA holder for a financial year that begins before the payment was made.

[Subsection 5(1) of the Income Tax (FHSA Misuse Tax) Bill 2008)]

– A Government contribution that is payable for a financial year is a ***non-recognised Government contribution*** if the holder of the FHSA did not satisfy the eligibility requirements for the FHSA throughout that financial year. Thus, if an account holder becomes ineligible part-way through a financial year (eg, because they bought their first home in Australia), any Government contribution that is payable for that financial year is a non-recognised Government contribution and therefore subject to the misuse tax. However, any Government contribution payable for an earlier year is not affected. ***[Section 7 of the Income Tax (FHSA Misuse Tax) Bill 2008]***

– The Income Tax (FHSA Misuse Tax) Bill 2008 was this approach because reporting of personal FHSA contributions to the Commissioner is to be for the whole financial year. On the basis of that reporting the

Commissioner would not know whether particular contributions were made before or after the account holder became ineligible.

– If the payment fails the FHSA payment conditions (whether or not it is an FHSA ineligibility payment), the tax payable by the individual is similarly the *sum* of two components:

- the clawback tax amount; and
- the sum of all the Government contributions that the account holder has obtained.

[Subsection 5(2) of the Income Tax (FHSA Misuse Tax) Bill 2008]

– The difference between the two formulas is that where FHSA payment conditions are failed, all the Government contributions are taxed (and thus clawed back) whereas for an FHSA ineligibility payment Government contributions are taxed (and clawed back) for those years starting when the individual first failed the eligibility requirements.

The clawback tax amount

– The clawback tax amount is calculated by *multiplying* the earnings component by the payment fraction and then *multiplying* by a grossing-up factor. The final step is to *multiply* by a percentage. ***[Section 6 of the Income Tax (FHSA Misuse Tax) Bill 2008]***

– The earnings component is designed to be a proxy for the individual's earnings on the FHSA and is calculated by *subtracting* from the balance of the FHSA the *total* of personal contributions, Government contributions and contributions paid under a family law order. To save compliance and administration costs, the earnings component does not attempt to precisely calculate or trace earnings. For example, it does not add fees charged to the balance, which favours the individual being taxed. ***[Section 6 of the Income Tax (FHSA Misuse Tax) Bill 2008]***

– In the usual case where the whole of the balance is paid to the individual, the payment fraction is one. Otherwise, it is the *balance* of the earnings component just before the payment is made *divided* by the balance of the FHSA just before that time. ***[Section 6 of the Income Tax (FHSA Misuse Tax) Bill 2008]***

– Multiplying by the grossing-up factor reflects that the earnings component has already been reduced by tax paid on FHSA earnings. The grossing-up factor is 1 *divided* by (1-FHSA tax rate). The FHSA tax rate is the tax payable on FHSA earnings, which is 15 per cent. ***[Section 6 of the Income Tax (FHSA Misuse Tax) Bill 2008]***

– The percentage is the top marginal tax rate for Australian resident individuals *plus* the Medicare levy *less* the FHSA tax rate. The percentage represents the maximum tax rate advantage the individual could have obtained by having their earnings taxed at the FHSA earnings rate instead of individual rates. This is currently equal to 31.5 per cent. ***[Section 6 of the Income Tax (FHSA Misuse Tax) Bill 2008].***

1

Litsa opened her account while eligible to do so. However, one year later, she purchased a house and moved into it without notifying the account provider and closing her account. Four years later, Litsa made a false declaration to withdraw her entire account balance, and used it to buy shoes and clothes.

Her final account balance was $15,000, her personal contributions were $12,000, and total Government contributions were $2,000.

As the payment to Litsa has failed the FHSA payment conditions (although the payment is also an ineligibility payment), the amount of the tax is *equal* to the sum of the clawback tax amount *plus* the total of Government contributions payable for a financial year that begins before the payment was made.

In the formula for the clawback tax amount, the amount of the payment is $15,000.

The 'earnings component' is the balance of the FHSA reduced by personal and Government contributions and family law payments paid to the account. In Litsa's case, this is simply:

$15,000 – $14,000 = $1,000

As Litsa withdrew the whole of her balance the 'payment fraction' is 1.

The formula is then $1,000 × 1 × [100/(100 – 15)] = $1,176.47.

This amount is then multiplied by the percentage, which is currently 31.5 per cent.

So $1,176.47 × 31.5 per cent = $370.59, the clawback tax amount.

The sum of Litsa's Government contributions is $2,000.

Litsa's total misuse tax is therefore $2,370.59.

Nature of the First Home Saver Account misuse tax

– The FHSA misuse tax is an income tax, and is formally imposed in respect of a payment from an FHSA to the individual account holder. Consistent with the general nature of income tax, the tax is a tax on a gain, being the gain made by the individual from the improper use of the account. To ensure that the misuse tax is constitutionally valid, the tax is imposed by a separate imposition Bill called the Income Tax (FHSA Misuse Tax) Bill 2008. ***[Section 4 of the Income Tax (FHSA Misuse Tax) Bill 2008]***

– The Commissioner assesses the FHSA misuse tax; it is not self assessed. The Commissioner's assessing power is in existing section 169 of the ITAA 1936, which contains the power for the Commissioner to assess income tax where the liability is calculated on a basis other than taxable income. The definition of 'assessment' in subsection 6(1) of the ITAA 1936 is amended so that it covers ascertaining the amount of FHSA misuse tax payable. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 2; subsection 6(1) of the ITAA 1936]***

– As the FHSA misuse tax liability is income tax assessed under section 169, the standard rules in Part IV of the ITAA 1936 applying to assessments apply automatically. For example, the rules about service of notice of assessment (section 174), objections (section 175A), validity not affected by not following procedures (section 175), conclusive evidence (section 177) and amendment of assessments (section 170).

– The due and payable date for the misuse tax is 21 days after the Commissioner gives the individual notice of the assessment. The general interest charge applies in the standard way if the individual does not pay the assessed tax on time. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 31; sections 345-110 and 345-115]***

– Liability to pay the misuse tax is a tax-related liability within the definition in section 255-1 of Schedule 1 to the TAA 1953, allowing the generic tax collection and recovery rules to apply. The non-operative list of tax-related liabilities in the generic collection and recovery provisions is amended to include the FHSA misuse tax. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 63; subsection 250-10(2) of Schedule 1 to the TAA 1953]***

Consequential amendments

Income Tax Act 1986

– The main imposition Act for income tax, the *Income Tax Act 1986*, is amended to ensure that it does not cover the FHSA misuse tax, which is imposed by the Income Tax (FHSA Misuse Tax) Bill 2008. The trustee is

taxed at the rate of 15 per cent rather than at the top marginal rate, which usually applies where the trustee of a trust estate is liable to pay the income tax. ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 1; subsection 5(2B) of the Income Tax Act 1986]***

Life insurance companies — terminology

– As explained above, the FHSA earnings of life companies are to be taxed like their superannuation earnings, on a virtual PST basis. There is one virtual PST for both superannuation and FHSA business. Earnings from both FHSA activities and complying superannuation activities are to be taxed as a single class of taxable income at 15 per cent.

– The extension of the virtual PST to cover FHSA business and the creation of the 'composite' class of taxable income for complying superannuation/FHSA activities require changes in terminology to better reflect the new scope of the concepts. Accordingly:

- the virtual PST is renamed the complying superannuation/ FHSA asset pool ***[Schedule 5 to the FHSA Bill 2008, items 1 to 26]***;
- the complying superannuation class of taxable income is renamed the complying superannuation/FHSA class ***[Schedule 6 to the FHSA Bill 2008, items 1 to 21]***;
- references that incorporate the words 'virtual PST' as part of a longer term (eg, virtual PST assets) are changed by substituting 'complying superannuation/ FHSA' for 'virtual PST' ***[Schedule 4 to the FHSA Bill 2008, items 1 to 64]***; and
- there are various other related consequential amendments flowing from these changes in terminology (eg, to various definitions and formulas) ***[Schedule 7 to the FHSA Bill 2008, items 1 to 56]***.

Inclusion of definitions

– The amendments to the taxation law discussed in this chapter have necessitated the inclusion of various new definitions in the taxation law and the amendment of some others. The substantive effects of these changes are discussed in the course of this chapter. The definitions included (or amended) are in the:

- ITAA 1936 ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, items 2 and 3; subsection 6(1) of the ITAA 1936)]***;

- ITAA 1997 ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, items 32 to 44; subsection 995-1(1) of the ITAA 1997]***; and
- *Income Tax Rates Act 1986* ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, items 45 to 48; subsection 3(1) of the Income Tax Rates Act 1986].***

Amendment of checklists

– The amendments to the taxation law discussed in this chapter have necessitated the amendment of various checklists in the taxation law. Some of the notable changes are discussed in the course of this chapter. Other changes are in the:

- ITAA 1997 ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, item 9; section 11-55 of the ITAA 1997]***; and
- TAA 1953 ***[Schedule 1 to the FHSA (Consequential Amendments) Bill 2008, items 53, 54, 62 and 63; subsection 8AAB(5) and subsection 250-10(2) of Schedule 1 to the TAA 1953].***

44 Chapter 7 Financial services licensing, conduct, advice and disclosure

Outline of chapter

.1 Schedule 2 to the First Home Saver Accounts (Consequential Amendments) Bill 2008 (FHSA (Consequential Amendments) Bill 2008) amends the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to ensure that the financial services licensing, conduct, advice and disclosure rules apply appropriately to First Home Saver Accounts (FHSAs).

Context

.2 The Corporations Act and the ASIC Act provide for the regulation of financial products and services. The First Home Saver Accounts Bill 2008 (FHSA Bill 2008) introduces a new kind of financial product — FHSAs. FHSAs come within the existing general definition of 'financial product' in section 763A of the Corporations Act. Consequently, the licensing, conduct, advice and disclosure provisions of the Corporations Act and the *Corporations Regulations 2001* will apply to FHSAs unless expressly modified by legislation or regulations. In some cases the Corporations Act applies differently to different kinds of financial products.

.3 As noted in Chapter 1, FHSAs can have different legal forms depending on the account provider offering them. They may be a deposit account, a life policy or an interest in a trust. This can have implications for the way the Corporations Act and the ASIC Act apply to them. The amendments in Schedule 2 ensure that the Corporations Act and the ASIC Act apply appropriately to FHSAs.

.4 In addition to the amendments made to the Corporations Act and the ASIC Act in the FHSA (Consequential Amendments) Bill 2008, a number of other changes will be made to the *Corporations Regulations 2001* to accommodate FHSAs. In particular, the *Corporations Regulations 2001* are to be amended to introduce shorter and simpler product disclosure statements for FHSAs and to deal with the financial services licensing requirements for trustees of public offer superannuation funds. These

amendments to the *Corporations Regulations 2001* will also ensure that existing trustees of public offer superannuation funds will not need to seek a licence variation to offer FHSAs.

Summary of new law

.5 These amendments to the Corporations Act and the ASIC Act ensure that FHSAs:

45 are accompanied by appropriate disclosure documents (including a product disclosure statement and periodic statements);

46 are not subject to unnecessary regulation;

47 are subject to a mandatory cooling-off period; and

48 are treated the same under the Corporations Act, regardless of the issuing entity and the legal nature of the accounts.

Detailed explanation of new law

.1 While an FHSA is a 'financial product' under the general definition in section 763A of the Corporations Act, in some cases the provisions apply differently depending on the type of financial product and there are also some provisions that apply only to certain specified financial products. The amendments to the Corporations Act and the ASIC Act clarify the way in which those Acts apply to FHSAs.

Coverage of First Home Saver Accounts under the ASIC Act and the *Corporations Act 2001*

.2 As the financial services regulator, the Australian Securities and Investments Commission (ASIC) is responsible for licensing and monitoring financial services markets and businesses in Australia. To enable ASIC to perform this role, under the ASIC Act, it is given functions and powers under the corporations legislation (section 11) and various other Acts related to financial products and services (section 12A). This list has been amended to provide that ASIC has functions and powers under the 'First Home Saver Accounts Act 2008'. ***[Schedule 2 to the FHSA (Consequential Amendments) Bill 2008, item 1; paragraph 12A(1)(h)]***

.3 ASIC will also be provided with the functions and powers conferred on it by section 3 of the FHSA Bill 2008. Those functions and powers include regulating when trustees can offer an interest in the FHSA trust (ie, offer a FHSA), and requiring trustees to comply with the prescribed rules in relation to commission and brokerage payments, and rules on fair dealing when issuing or redeeming an interest in an FHSA trust. ***[Part 1, Division 1, section 3 of the FHSA Bill 2008]***

First Home Saver Accounts are a financial product

.4 The regulatory arrangements for financial services under the Corporations Act and the ASIC Act rely on the definition of 'financial product' in those Acts. Although FHSAs come within the general definitions of financial product in section 763A of the Corporations Act and subsection 12BAA(1) of the ASIC Act, to avoid any doubt, and to enable FHSAs to be regulated consistently under the Acts, a definition of 'FHSA product' is inserted into sections 9 and 761A of the Corporations Act ***[Schedule 2 to the FHSA (Consequential Amendments) Bill 2008, items 3 and 6; sections 9 and 761A]***, and FHSA products are included in the specific things that are financial products in subsection 12BAA(7) of the ASIC Act ***[Schedule 2 to the FHSA (Consequential Amendments) Bill 2008, item 2; paragraph 12BAA(7)(ga)]*** and section 764A of the Corporations Act ***[Schedule 2 to the FHSA (Consequential Amendments) Bill 2008, item 9; paragraph 764A(1)(ha)].***

First Home Saver Accounts are not managed investment schemes

.5 As FHSAs will have a different legal nature depending on the type of product provider, there is also the potential for FHSAs to fall within other definitions in the Corporations Act that apply to those different types of products.

.6 In particular, FHSAs offered by public offer licensees could come within the definition of 'managed investment scheme' in section 9 of the Corporations Act. The regulatory regime for managed investment schemes as set out in Chapter 5C of the Corporations Act is not intended to cover institutions which are regulated by the Australian Prudential Regulation Authority (APRA). As all FHSA providers will be regulated by APRA, all FHSAs are excluded from the definition of 'managed investment scheme' in section 9 of the Corporations Act. ***[Schedule 2 to the FHSA (Consequential Amendments) Bill 2008, item 4; section 9, paragraph (ha) of the definition of 'managed investment scheme']***

First Home Saver Accounts are not a basic deposit product

.7 It is arguable that FHSA provided by authorised deposit-taking institutions (ADIs) could be regarded as coming within the definition of 'basic deposit product' in section 761A of the Corporations Act.

.8 Issuers of basic deposit products are exempt from many of the advice and disclosure obligations of the Corporations Act. As regards disclosure, the issuer is not obliged to give the client a financial services guide, a statement of advice or a product disclosure statement (provided certain other information is given to the client). Also, ASIC regards basic deposit products as 'Tier 2' (lower level) products for the purposes of its financial advice training standards.

.9 FHSAs have a number of features that are not normally associated with basic deposit products such as eligibility and withdrawal requirements, Government contributions and concessional taxation treatment that make it inappropriate for them to be treated as basic deposit products. There are also considerations of competitive neutrality, as issuers of FHSAs which are not banks, building societies or credit unions will not be subject to the same exemptions.

.10 To resolve any doubt, all FHSAs are expressly excluded from the definition of 'basic deposit product'. ***[Schedule 2 to the FHSA (Consequential Amendments) Bill 2008, item 5; section 761A, paragraph (da) of the definition of 'basic deposit product']***

Providing First Home Saver Accounts is not a custodial or depository service

.11 Sections 766A and 766E of the Corporations Act bring within the definition of 'financial service' a custodial or depository service. This category was included in the Act to capture certain financial activities which would not otherwise come within the definition of 'financial service'. *Providing a custodial or depository service* occurs where, under an arrangement between the provider and the client, a financial product, or a beneficial interest in a financial product, is held by the provider in trust for, and on behalf of, the client or another person nominated by the client.

.12 FHSAs provided by public offer licensees, as interests in a trust, could potentially come within the definition of 'custodial or depository service'. Given that FHSAs will be regulated under the First Home Saver Accounts Bill 2008, and to avoid unnecessary cost and compliance burdens, the provision of FHSAs (offered by public offer licensees) is excluded from the meaning of 'providing a custodial or depository service' (section 766E). ***[Schedule 2 to the FHSA (Consequential Amendments) Bill 2008, item 10; paragraph 766E(3)(cb)]***

Statement of advice requirements

.13 Normally, when personal advice is given about a financial product to a retail client, the person providing the advice must give the client a statement of advice. (In the vast majority of cases, a person will acquire

an FHSA as a retail client.) However, there is an exception, under section 946AA of the Corporations Act, for advice about 'small investments'. The relevant conditions are:

49 the total value of all investments in relation to which the advice is provided does not exceed the 'threshold amount' (currently $15,000); and

50 the advice does not relate to a derivative, a general insurance product or a life risk product, or to a superannuation product or a retirement savings account product unless the client already has an interest in the product.

However, the providing entity must keep, and provide to the client, a record of advice.

.1 To avoid doubt, the section is amended to specify that the providing entity does not have to give the client a statement of advice where the advice relates to an FHSA product and the total value of all investments in relation to which the advice is provided does not exceed the 'threshold amount'. ***[Schedule 2 to the FHSA (Consequential Amendments) Bill 2008, item 11; subsection 946AA(1A)]***

Financial product disclosure

.2 Generally a product disclosure statement is required to be given to a person when a financial product is issued or sold and when personal advice is given recommending a particular financial product. The product disclosure statement content requirements for FHSAs will be outlined in regulations made under the Corporations Act. The circumstances in which a product disclosure statement must be given in the Corporations Act will apply to FHSAs.

Meaning of 'issue of a financial product'

.3 Section 761E of the Corporations Act defines when a financial product is 'issued' to a person. Subsection 761E(3A) broadly provides that further contributions to financial products that are already held by the client are not an 'issue of a financial product'.

.4 There is some doubt that all FHSAs (especially those issued by public offer licensees) are covered by the existing exclusions in subsection 761E(3A). The provision is amended to ensure that all FHSAs are treated the same, by:

51 inserting a new item 2A into the table in subsection 761E(3) to specify when an FHSA product is issued ***[Schedule 2 to the***

FHSA (Consequential Amendments) Bill 2008, item 7; subsection 761E(3), item 2A in the table]; and

52 providing that a further contribution into an FHSA product is not considered an issue of a financial product ***[Schedule 2 to the FHSA (Consequential Amendments) Bill 2008, item 8; paragraph 761E(3A)(ba)].***

Application forms to be included in or accompany product disclosure statements

.1 In general, an FHSA product only can be issued or sold in response to an application form that is attached to or accompanies the product disclosure statement. The Corporations Act does not specify the requirements for an application form. For FHSAs, an application to open an account will need to be made in a form approved by the Commissioner of Taxation. ***[Part 3, Division 1, section 5 of the FHSA Bill 2008]***

.2 Under section 1016A of the Corporations Act, a 'restricted issue' or 'restricted sale' of an FHSA to a retail client may only be made using an application form. (In practice, a 'restricted issue' or 'restricted sale' will cover most situations where a product is sold or offered to a retail client.)

.3 A 'relevant financial product' may only be issued or sold if the client fills out an application form that is included with, or accompanies, a product disclosure statement. Those products are managed investments, superannuation, retirement savings accounts or any other product specified in regulations which are made for the purposes of the definition.

.4 The definition of 'relevant financial product' is amended to include an FHSA product. ***[Schedule 2 to the FHSA (Consequential Amendments) Bill 2008, item 12; paragraph 1016A(1)(da)]***

Periodic statements for retail clients

.5 Account providers will be required to provide a periodic statement to an FHSA holder who is a retail client.

.6 Under section 1017D of the Corporations Act, issuers of financial products that have an investment component are required to provide periodic statements to each holder of such a product for each reporting period during which the holder holds the product. The list of products currently includes managed investments, superannuation, retirement savings accounts, investment life insurance products and deposit products.

.7 The list of products in paragraph 1017D(1)(b) is amended to include an FHSA product. ***[Schedule 2 to the FHSA (Consequential Amendments) Bill 2008, item 13; subparagraph 1017D(1)(b)(iiia)]***

Cooling-off periods

.8 A 14 day cooling-off period will apply when an individual who is a retail client opens an FHSA. The individual will be able to withdraw the funds deposited and close the account within the earlier of 14 days of receiving confirmation that the account has been opened or five days after the account was opened. (See also paragraph 5(3)(eb) of the FHSA Bill 2008.) They will not be required to transfer the funds to another FHSA.

.9 Sections 1019A and 1019B of the Corporations Act provide that certain financial products are subject to a 14 day cooling-off period. Those products are risk insurance products, investment life insurance products, managed investment products, superannuation products and retirement savings account products.

.10 The list in paragraph 1019A(1)(a) is amended to include FHSA products. ***[Schedule 2 to the FHSA (Consequential Amendments) Bill 2008, item 14; subparagraph 1019A(1)(a)(iiia)]***

53 Chapter 8
Administration and other issues

Outline of chapter

.1 Schedule 4 of the First Home Saver Accounts (Consequential Amendments) Bill 2008 (FHSA (Consequential Amendments) Bill 2008) amends:

54 the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* so that First Home Saver Accounts (FHSAs) are not taken into account for the income and assets tests that apply to various Commonwealth benefits;

55 the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* so that Act applies to the provision of FHSAs regardless of the type of entity providing the account; and

56 various other Commonwealth Acts to make changes consequential upon the introduction of FHSAs.

.1 Parts 5 and 6 of the First Home Saver Accounts Bill 2008 (FHSA Bill 2008) and Schedule 1 to the FHSA (Consequential Amendments) Bill 2008 establish administrative arrangements for FHSAs including:

57 who administers various provisions;

58 providing information to the Commissioner of Taxation (Commissioner);

59 rights of review of decisions;

60 enforcement powers; and

61 tax file numbers and secrecy rules to protect the confidentiality of information provided.

Context

Significant amendments to other Commonwealth Acts

.1 As is usual with the introduction of a significant new measure, the enactment of the FHSA legislation necessitates consequential amendment to other Commonwealth legislation to ensure that the new legislation interacts with existing legislation as the Government intends. In this case, significant amendments are required to:

62 the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986*; and

63 the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

Working out social security and veterans' entitlements

.1 Currently, in working out a person's eligibility for social security income support payments and veterans' entitlements, a person's income and assets are assessed. The Government intends that FHSAs are not to be taken into account in working out entitlements.

Anti-Money Laundering and Counter Terrorism Financing Act 2006

.2 The Government proposes that FHSA providers be required to comply with the requirements in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, including identifying customers when opening an FHSA. This is to ensure consistency of regulation across similar financial products which are already captured under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

.3 For authorised deposit-taking institutions (ADIs) and life insurance companies the requirements will be the same as those currently applying to other products they provide. However, public offer superannuation licensees are not currently required to comply with the initial customer identification obligations (subsection 39(6) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*).

Administration

.4 Administrative arrangements are necessary to allow for the effective operation and administration of FHSAs. Where possible, the arrangements are designed to align with the operational obligations that are currently imposed on entities that are eligible to provide FHSAs. For

example, the tax file number (TFN) quotation arrangements that apply to FHSAs reflect the arrangements of the superannuation system.

.5 In addition, where possible, these arrangements have been designed to mirror the existing administrative arrangements for similar laws (eg, superannuation and taxation laws). For example, the use of the general interest charge and approved forms.

.6 Regulatory responsibility for administering the FHSA legislation is divided along functional lines between the Commissioner, the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC). This division of responsibility is consistent with the Regulators' respective current responsibilities.

Summary of new law

Important amendments to other Commonwealth Acts

Income and assets test for benefits

.7 The income and assets tests under the *Social Security Act 1991* and *Veterans' Entitlements Act 1986* are amended to ensure that FHSAs are not taken into account in working out entitlements under those Acts.

.8 This has been achieved by amending the definitions of:

64 'return on a person's investments';

65 'financial investment';

66 'investment'; and

67 'designated private trust'.

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

.1 FHSA providers are required to comply with the requirements in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, including identifying customers when opening an FHSA, regardless of the type of entity providing the FHSA.

Administration

Responsibility for administering the new law

.2 The general administration of the FHSA Bill 2008 is divided between the Commissioner, APRA and ASIC.

.3 The Commissioner is responsible for the provisions about individual transactions (opening accounts, contributions into accounts and payments from accounts) and Government contributions. The Commissioner also has administration of the relevant taxation law (including the FHSA misuse tax).

.4 APRA is responsible for the prudential regulation of FHSAs. In particular, APRA is responsible for authorising Registrable Superannuation Entity (RSE) licensees (trustees) as FHSA providers, and is responsible for the prudential regulation of trustee providers and FHSA trusts under Division 2, Part 7 of the FHSA Bill 2008. Division 2 of Part 7 of the FHSA Bill 2008 applies relevant provisions of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) to FHSA providers that are trustees and FHSA trusts, subject to any provisions of the SIS Act that is administered by ASIC.

.5 ASIC is responsible for the administration of provisions of the SIS Act as they apply in Division 2 of Part 7 of the FHSA Bill 2008. These provisions apply to FHSA providers that are trustees and FHSA trusts, and establish when trustees may offer, issue and redeem an interest in an FHSA trust, the circumstances in which trustees may pay commission and brokerage, and requirements in relation to members' or beneficiaries' reports.

Information and access to premises

.6 The FHSA (Consequential Amendments) Bill 2008 contains information gathering and access powers for the Commissioner in relation to administration of the Government contribution. For FHSA matters contained in the income tax law (eg, the FHSA misuse tax in the *Income Tax Assessment Act 1997* (ITAA 1997)) the Commissioner can rely on the normal information gathering and access powers under the income tax law.

.7 The FHSA (Consequential Amendments) Bill 2008 also contains reporting obligations for FHSA providers, requiring them to provide the Commissioner with certain information relating to FHSAs they provide. All FHSA providers are required to report data to APRA in accordance with the *Financial Sector (Collection of Data) Act 2001* (discussed in more detail in Chapter 5).

Rights of review of decisions

.8 Decisions of the Commissioner in relation to Government contributions are subject to merits-based review by an officer of the Australian Taxation Office (ATO).

.9 APRA's decisions relating to the authorisation of trustees as FHSA providers, and decisions to make, vary or revoke prudential standards that apply to specific trustees, are subject to merits review by the Administrative Appeals Tribunal.

Secrecy and Tax File Numbers

.10 The FHSA Bill 2008 contains secrecy provisions, to protect the confidentiality of information received by the Regulators in relation to an individual's FHSA received by the regulators. These provisions have been modelled on the secrecy arrangements that currently apply to the superannuation co-contribution for low income earners. As such, to facilitate the effective administration of the FHSA Bill 2008 and other related legislation, specific disclosure of protected information are permitted. For example, disclosing information necessary to perform duties under the Bill.

68 The privacy obligations of FHSA providers are regulated by the *Privacy Act 1988*

.1 The FHSA Bill 2008 also contains provisions that require an individual to quote their TFN in order to open, be issued with or hold an FHSA. This is explained in Chapter 1. These arrangements are necessary to ensure that only one account is opened per individual, and to assist the Commissioner in paying the Government contribution. To ensure that this TFN information is used appropriately, this Bill contains provisions which regulate the quotation, use and storage of TFNs. These are modelled on the arrangements which currently apply to superannuation.

Detailed explanation

Income and assets test for benefits

.2 The income and assets tests under the *Social Security Act 1991* and *Veterans' Entitlements Act 1986* are amended to ensure that FHSAs are not taken into account in working out entitlements under those Acts.

Social Security Act 1991

.3 The value of an individual's FHSA is not taken into account when calculating the value of a person's assets as the funds are not readily accessible to the individual. This is because the funds in an FHSA must be used to purchase a first home or contributed to superannuation. ***[Schedule 3, item 35, FHSA (Consequential Amendments) Bill 2008; paragraph 1118(1)(fa) of the Social Security Act 1991]***

.4 The definition of 'investment' has been amended to define an investment in an FHSA as having benefits in an FHSA, regardless of whether the benefits are attributable to amounts contributed by the FHSA holder. ***[Schedule 3, items 30, and 33, FHSA (Consequential Amendments) Bill 2008; paragraph 9(1)(c) and subsection 9(9B) of the Social Security Act 1991]***

.5 An investment in an FHSA has also been excluded from the definition of 'financial investment', 'managed investments' and 'designated private trust'. ***[Schedule 3, items 29, 32 and 36, FHSA (Consequential Amendments) Bill 2008; subsection 9(1), paragraphs 9(1C)(cb) and 1207P(1)(d) of the Social Security Act 1991]***

.6 For the purposes of the Youth Allowance Rate Calculator at the end of section 1067G of the *Social Security Act 1991,* 'trust' does not include an FHSA. ***[Schedule 3, item 34, FHSA (Consequential Amendments) Bill 2008; paragraph 10B(2)(ca) of the Social Security Act 1991]***

.7 A return on an individual's investment in an FHSA has been excluded from the definition of 'income'. 'Return' in relation to an FHSA, means any increase in the value of the FHSA. ***[Schedule 3, items 28 and 31, FHSA (Consequential Amendments) Bill 2008; paragraphs 8(8)(ba) and 9(1)(c) of the Social Security Act 1991]***

Veterans' Entitlements Act 1986

.8 The value of a person's FHSA is not taken into account when calculating the value of a person's assets. The definition of 'investment' has been amended to define an investment in an FHSA as having benefits in an FHSA, regardless of whether the benefits are attributable to amounts contributed by the account holder. ***[Schedule 3, items 41, 44 and 45, FHSA (Consequential Amendments) Bill 2008; subsections 5J(1)(c) and 5J(6B) and paragraph 52(1)(faa) of the Veterans' Entitlements Act 1986]***

.9 An investment in an FHSA has also been excluded from the definition of financial investment, managed investments and designated private trust. ***[Schedule 3, items 40, 43 and 46, FHSA (Consequential Amendments) Bill 2008; subsection 5J(1), paragraphs 5J(1C)(cb) and 52ZZB(1)(d) of the Veterans' Entitlements Act 1986]***

.10 A return on a person's investment in an FHSA has been excluded from the definition of 'income'. 'Return' in relation to an FHSA, means any increase in the value of the FHSA. ***[Schedule 3, items 39 and 42, FHSA (Consequential Amendments) Bill 2008; paragraphs 5H(8)(ia) and 5J(1)(aa)) of the Veterans' Entitlements Act 1986]***

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

.11 FHSA providers are required to comply with the requirements in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, including identifying customers when opening an FHSA. This is to ensure consistency of regulation across similar financial products, such as deposit accounts, life insurance policies and superannuation accounts, which are already captured under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. ***[Schedule 3 to the FHSA (Consequential Amendments) Bill 2008, items 1 to 4]***

.12 The amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* ensure that the acceptance of contributions to the FHSA and the cashing out of an interest in an FHSA (either to purchase a home, to transfer the balance to another FHSA provider or to transfer the balance into superannuation) (to the FHSA holder) are captured as a 'designated service'. Providers of a 'designated service' are a reporting entity under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and must, amongst other things, carry out procedures to verify a customer's identity before providing a designated service to a customer. ***[Schedule 3 to the FHSA (Consequential Amendments) Bill 2008; items 1 to 4, sections 5 and 6 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2008]***

.13 Upfront customer identification requirements for FHSAs are different to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* obligations that trustees of superannuation funds are currently required to comply with relation to superannuation products. This reflects the higher money laundering and terrorist financing risk associated with the shorter term of FHSAs and their use for real estate purchases.

Administration

Responsibility for administering the new law

.14 An FHSA is a financial product, offered by certain prudentially regulated financial institutions, which provides incentives to save through the taxation system. As a result, like superannuation, the general administration of the FHSA Bill 2008 is divided between the Commissioner, APRA and ASIC. ***[Section 3]***

.15 Depending on which institution administers the particular provision being applied, the Regulator of the Bill will vary. ***[Section 18]***

The Commissioner of Taxation

.16 The Commissioner has the general administration of most of the regulatory activities for FHSAs including: the eligibility rules for opening, issuing and holding an FHSA; rules relating to contributions to an FHSA; administration and payment of the Government contribution; the taxation of earnings; payment rules; the FHSA misuse tax; and TFNs. The Commissioner has the general administration of:

69 Part 3, which relates to eligibility, contribution and payment rules;

70 Part 4, which relates to Government contributions;

71 Part 5, which relates to the administration of the FHSA system, except where it relates to the review of certain APRA decisions under Subdivision B of Division 4; and

72 Part 6, which relates to enforcement activities.

[Subsection 3(1)]

Australian Prudential Regulation Authority

.1 APRA has administration of provisions about establishing and enforcing prudential standards and practices for FHSA providers. These provisions are designed to operate alongside APRA's current regulatory activity of potential FHSA providers (public offer superannuation fund trustees, ADIs, life insurance companies and friendly societies). APRA has general administration of:

73 Part 7, which relates to the prudential regulation of FHSA providers, except where ASIC has general administration; and

74 Subdivision B of Division 4 of Part 5, which relates to the review of certain APRA decisions.

[Subsection 3(2)]

Australian Securities and Investment Commission

.1 ASIC has general administration of provisions which relate to ensuring that consumer protection arrangements apply for the benefit of FHSA holders and potential FHSA holders. These provisions are designed to operate parallel to ASIC's current licensing, conduct, advice and disclosure regulation under the Corporations Act.

.2 To ensure consistency with the SIS Act the main Bill provides ASIC with the general administration of the same provisions it has general administration of in the SIS Act as they apply to FHSA providers. ASIC has general administration of:

75 section 101 (duty to establish arrangements for dealing with inquiries or complaints) and section 103 (duty to keep minutes and records); and

76 Part 19 (public offer entities: provisions relating to superannuation interests).

[Subsection 3(3)]

Powers and duties of the Regulators

.1 In order to allow the Regulators to administer the provisions for which they are responsible, they are provided with powers and duties for the purposes of provisions they respectively administer ***[subsection 3(4)]***.

77 Where a function is performed under the FHSA Bill 2008 it also refers to a duty being performed. ***[Section 18]***.

Reporting by providers

.1 For FHSAs they provide, FHSA providers are required to report certain information to the Commissioner. This includes:

78 personal contributions made to FHSAs during the period;

79 payments made from FHSAs during the period;

80 the balances of FHSAs during the period; and

81 the opening and closing of FHSAs during the period.

[Schedule 1, item 66, FHSA (Consequential Amendments) Bill 2008; subsection 391-5(1) of Schedule 1 to the Taxation Administration Act 1953 (TAA 1953)]

.1 This does not apply in relation to FHSAs that have been transferred to another FHSA provider during the specified period. ***[Schedule 1, item 66, FHSA (Consequential Amendments) Bill 2008; subsection 391-5(2) of Schedule 1 to the TAA 1953]***

.2 Unless the Commissioner determines otherwise, the specified period is a financial year. The Commissioner is able to specify different periods for different information. ***[Schedule 1, item 66, FHSA (Consequential Amendments) Bill 2008; subsections 391-5(3) and (4) of Schedule 1 to the TAA 1953]***

.3 The statement must be in the form approved by the Commissioner, and must be given to the Commissioner on or before the date determined by the Commissioner. ***[Schedule 1, item 66, FHSA (Consequential Amendments) Bill 2008; subsections 391-5(5) to (9) of Schedule 1 to the TAA 1953]***

.4 The approved form may require the statement to contain the TFN of the provider, the FHSA holder, and if the FHSA is a trust, that trust. This does not limit the information which the approved form may require the statement to provide. ***[Schedule 1, item 66, FHSA (Consequential Amendments) Bill 2008; subsections 391-5(10) and (11) of Schedule 1 to the TAA 1953]***

Information gathering and access powers

Information gathering

.5 The FHSA Bill 2008 contains information gathering and access powers for the Commissioner in relation to his administration of the Government contribution. For FHSA matters contained in the income tax law (eg, the FHSA misuse tax in the ITAA 1997) the Commissioner can rely on his standard information gathering and access powers under the income tax law.

.6 The information gathering and access powers in the FHSA Bill 2008 for the Commissioner are broadly the same as in the *Superannuation (Government Co-Contribution for Low Income Earners) Act 2003*.

.7 APRA and ASIC will be able to rely on their existing information gathering powers under the existing Acts.

From the FHSA holder

.8 The Commissioner may require a person or their legal personal representative, through a written notice, to give the Commissioner information to enable the Commissioner to determine:

82 whether a Government contribution is payable;

83 the amount of any Government contribution;

84 where the Government contribution should be paid in respect of the FHSA holder;

85 whether an overpayment amount is recoverable under section 50 in respect of the person;

86 the amount overpaid; and

87 any other matters prescribed by the regulations.

[Paragraphs 77(1)(a) to (d)]

.1 Notices can be given at any time, however, they must specify the period (not less than 21 days after the notice is given) in which compliance with the notice is required. ***[Subsections 77(1) and (3)]***

.2 Failure to comply with such a notice (in relation to overpayments) is an offence with a penalty of 30 penalty units. ***[Subsection 77(2)]***

From the FHSA provider

.3 The Commissioner has the same powers and obligations when seeking information from an FHSA provider relating to an FHSA holder as they do from an FHSA holder. ***[Section 78]***

.4 Failure to comply with any such notice is an offence with a penalty of 30 penalty units. ***[Subsection 78(2)]***

Self-incrimination

.5 A person is not excused from providing a statement to the Commissioner (as required by sections 77 and 78) on the grounds that the statement might tend to incriminate the person, or make them liable to a penalty. ***[Subsection 79(1)]***

.6 However, if the person is an individual, neither the statement or anything obtained as a direct result of the statement, is admissible against the individual in any criminal proceedings, other than against:

88 section 77 or 78 of the FHSA Bill 2008; or

89 section 137.1 or 137.2 of the *Criminal Code Act 1995* that relates to this Bill.

[Subsection 79(2)]

Access to premises

General

.1 The Commissioner requires powers for authorised persons to be able to enter the premises of persons. These powers may be used to ensure that an FHSA provider (or other person) has reported the correct information and where it may be necessary to inspect documents which might otherwise not be available for inspection if access powers were not available.

.2 The issues that the Commissioner may be seeking to resolve through the use of these access powers may be in relation to more than one person's Government contribution and as such there may be a significant revenue risk involved.

.3 The Commissioner may only appoint ATO employees to be authorised persons for the purposes of the access to premises provisions in sections 81 to 85. ***[Section 80]***

.4 An authorised person may, with the consent of the occupier, or in accordance with a warrant issued under section 87, enter the premises. ***[Paragraphs 81(1)(a) and (b)]***

.5 They must enter the premises only for the purposes of determining:

90 whether a Government contribution is payable;

91 the amount of any Government contribution;

92 whether an overpayment amount is recoverable under section 3-50 in respect of the person;

93 the amount overpaid; and

94 whether a person has contravened a provision of this Bill.

[Paragraphs 81(1)(c) and (d)]

.1 If an authorised person enters any premises they may search the premises for, inspect, examine, take extracts from, and make copies of, any examinable documents. ***[Subsection 81(2)]***

.2 In all cases, authorised officers must only enter premises if they have shown their identity cards if requested and given the occupier a written statement of the occupiers' rights and obligations. If, after an authorised person has entered the premises, they fail to produce their identity card when requested by the occupier to do so, they are unable to exercise their powers under Division 2 of the main Bill. ***[Subsections 82(1) and (2)]***

Obligations of authorised person — entry by consent

.3 An authorised person is only able to enter premises with the consent of the occupier (under paragraph 81(1)(a)) if they have informed the occupier that the occupier is entitled to refuse consent and that the authorised person must leave if asked to do so. If the occupier does request the authorised person to leave, the authorised person must do so. ***[Section 83]***

Obligations of authorised person — entry under warrant

.4 An authorised person is only able to enter premises under a warrant (under paragraph 81(1)(b)) if they have:

95 announced that they are authorised to enter the premises; and

96 given any person on the premises an opportunity to allow entry to the premises.

[Subsection 84(1)]

.1 However, an authorised person is not required enter the premises where they believe on reasonable grounds that immediate entry to the premises is required to ensure the effective execution of the warrant is not frustrated. ***[Subsection 84(2)]***

.2 If the occupier, or any person who appears to represent the occupier, is present when the warrant is being executed, an authorised person must identify themselves and make a copy of the warrant available to the occupier. The warrant need not include the signature of the authorising magistrate. ***[Subsections 84(3) to (5)]***

.3 A person must not obstruct or hinder an authorised person in the exercise of the authorised person's power under section 81, and the authorised person exercises that power in accordance with a warrant issued under section 44. Doing so is an offence with a penalty of 30 penalty units. ***[Section 85]***

.4 If an authorised person enters any premises under section 41 in accordance with a warrant issued under section 87, the occupier or person in charge must, if requested to do so by the authorised person, provide reasonable assistance to the authorised person in the exercise of his or her powers. Failure to do so is an offence with a penalty of 30 penalty units. ***[Section 86]***

Issue of warrants

.5 Warrants are only able to be issued in relation to the premises of an FHSA provider. Magistrates are only able to issue warrants, on application by an authorised person, if they are reasonably satisfied based on information on oath or affirmation that there are reasonable grounds for believing there are examinable documents on particular premises of an FHSA provider. The magistrate must also be satisfied the warrant is reasonably required for the purposes of ascertaining:

97 whether a Government contribution is payable;

98 the amount of any Government contribution;

99 whether an overpayment amount is recoverable under section 3-120 in respect of the person;

100 the amount overpaid; and

101 whether a person has contravened a provision of this Bill.

[Paragraphs 87(1)(a) and (b)]

.1 These warrants may authorise an authorised person to enter particular premises with such assistance as is necessary and reasonable, and during the hours that the warrant specifies. However, these warrants do not authorise for the use of force, unlike the corresponding power in the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*. ***[Paragraphs 87(1)(c) and (d)]***

.2 The warrant must specify the purpose of the warrant, the powers exercisable under subsection 81(2) and the day on which the warrant ceases to have effect. ***[Subsection 87(2)]***

.3 The function of issuing a warrant is conferred on a magistrate in their personal capacity, rather than as a court or member of a court. The magistrate does not need to accept the conferral of this function. ***[Subsection 87(3)]***

.4 The Commissioner may cause an identity card to be issued to an authorised person. This card must contain a recent photograph of the authorised person and be in a form approved by the Commissioner. A person who ceases to be an authorised person and does not immediately return the card to the Commissioner commits an offence with a penalty of one penalty unit. ***[Section 88]***

Secrecy

.5 Secrecy provisions have been inserted into the FHSA Bill 2008 to protect the confidentiality of an individual's information in relation to their FHSA. These provisions are modelled on arrangements that currently apply to superannuation and impose strict obligations on tax officers who receive FHSA information.

.6 In relation to an individual's FHSA it is an offence for particular people to communicate information to others unless it is for the purposes of, or in performing duties under the FHSA Bill 2008, regulations made under the main Bill or a taxation law. This protection applies even if communicating information to a Minister or in a court. ***[Section 70]***

Tax file numbers

.7 Under section 19 an FHSA provider is not able to open or issue an FHSA unless the person has quoted their TFN. This is necessary as the quotation of TFNs is vital to the integrity of FHSAs to:

102 ensure that only one account is opened per person;

103 facilitate the payment of the Government contribution; and

104 allow the balance of an FHSA to be contributed to superannuation.

.1 The use of TFN information is restricted by the *Privacy Act 1988* and the Privacy Commissioner's *Tax File Number Guidelines* issued under section 17 of the *Privacy Act 1988.*

.2 In line with these requirements, provisions have been inserted into the FHSA Bill 2008 which are designed to restrict the use of a person's TFN information and ensure compliance with the *Privacy Act 1988* and the Privacy Commissioner's *Tax File Number Guidelines* issued under

section 17 of the *Privacy Act 1988*. They have been modelled on the TFN arrangements that currently apply for superannuation. They apply to the Commissioner, FHSA providers and persons applying to open or be issued with an FHSA.

Obligation to quote a tax file number

.3 An individual may quote their TFN if they inform another person of the number in the approved form. ***[Paragraph 56(a)]***

.4 To open or be issued with an FHSA an individual must quote their TFN in relation to the main Bill and the 'Superannuation Acts' as defined in section 18.

105 The *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations) require an individual to quote their TFN to allow them to make a post-tax contribution. An individual must quote their TFN in relation to the Superannuation Acts, in addition to the FHSA Bill 2008, to ensure that a superannuation provider is able to accept post-tax contributions from an FHSA.

.1 To assist in the process of opening and issuing FHSAs, the approved form to be completed by an individual may request they quote their TFN ***[subsection 68(3)].***

106 An individual is not required to quote their TFN, and if they choose not to, they have not committed an offence under section 137.1 of the *Criminal Code Act 1995* ***[sections 59 and 69].***

107 However if they choose not to quote their TFN they will not be able to hold an FHSA.

Request of a TFN

.1 If an FHSA provider inadvertently opens or issues an FHSA where a TFN has not been quoted the FHSA provider must request the TFN in the approved form within 28 days of becoming aware of this fact ***[subsections 58(1) and (2)].***

108 The FHSA provider may request a person's TFN at any time ***[section 57].***

.1

> On 15 July 2010 Kristen opened an FHSA with ABC Bank. On 18 November 2010, ABC Bank identified that Kristen had not supplied a TFN. ABC Bank must request Kristen to quote her TFN within 28 days.

Deemed quotation of a TFN

.2 A person does not have to quote their TFN personally. They may be deemed to have quoted their TFN in connection with the operation or future operation of the FHSA Bill 2008 and the Superannuation Acts if:

109 the Commissioner gives notice of a person's TFN. This may occur where the Commissioner assesses a TFN quoted to either be cancelled, withdrawn or wrong and the Commissioner is satisfied that the person has a TFN ***[section 66]***;

110 an FHSA provider transfers a holder's FHSA to a second FHSA provider and informs it of the person's TFN in the approved form;

111 an FHSA provider contributes an amount in a person's FHSA to a superannuation provider and informs it of the person's TFN in the approved form:

.1 however, where an FHSA provider contributes an FHSA balance to a complying superannuation plan that is not in the name of the FHSA holder, the provider is not required to provide the FHSA holder's TFN to that superannuation provider; and

112 after the commencement of the main Bill the person quotes their TFN under a provision of: the TAA 1953, the *Income Tax Assessment Act 1936* (ITAA 1936), the ITAA 1997 or the Superannuation Acts:

.1 if the quotation is made before the commencement of this Bill, the FHSA provider must request that person to quote a TFN in relation to this Bill and the Superannuation Acts. This is to ensure that when a person quotes their TFN they are aware that they are quoting it for the purposes of administering FHSAs.

[Sections 62 to 65]

Incorrect quotation of a tax file number

.2 An FHSA provider may record a TFN which when reported to the Commissioner is assessed to be cancelled, withdrawn or wrong.

.3 If the Commissioner is satisfied that the FHSA holder has a TFN, the Commissioner may provide the person's TFN to the FHSA provider. ***[Section 66]***

.4 If the Commissioner is not satisfied that the FHSA holder has a TFN, the Commissioner may provide a notice to the FHSA provider and the FHSA holder stating that they are not satisfied that the FHSA holder has a TFN and that the FHSA provider will be:

113 unable pay any amounts to the FHSA under section 26;

114 unable to pay any amount from the FHSA under section 31; and

115 required to close the FHSA and contribute the balance to a complying superannuation plan under section 22.

[Section 67]

Provider's obligations to retain and destroy an individual's tax file number

.1 An FHSA provider is also required to record and retain the TFN of an FHSA holder (and an FHSA applicant who becomes an FHSA holder). It must destroy the TFN as soon as reasonably practicable after:

116 the FHSA holder ceases to hold an FHSA; or

117 the FHSA provider no longer requires the TFN:

.1 an FHSA provider must record and retain a TFN that has been quoted or taken to have been quoted by an applicant and destroy it as soon as reasonably practicable after the application ceases; and

.2 this obligation does not apply if a TFN has been quoted for another purpose and it is still required for that purpose.

[Section 60]

Provider's obligations when using a tax file number to locate amounts

.3 To protect the privacy of an individual's TFN information FHSA providers are only permitted to use a TFN to identify amounts it holds in an FHSA for a person, if it first uses other information to locate the amounts. It may then use the TFN where the other information is insufficient or to confirm the identification of that FHSA resulting from the use of that other information. ***[Subsection 60(6)]***

Provider's obligations when transferring FHSA savings

.4 If a person chooses to transfer their FHSA to another FHSA provider, the other FHSA provider requires the person's TFN to open or issue them an FHSA. In addition, if an FHSA provider is required to contribute the FHSA to superannuation, the complying superannuation plan will require the person's TFN to be able to accept it as a post-tax contribution.

.5 To assist with the administration of these provisions, where an FHSA is transferred to another FHSA provider or contributed to superannuation the FHSA provider must quote the FHSA holder's TFN in the approved form ***[section 61]***.

118 This obligation only applies to where an FHSA provider transfers or contributes the FHSA for the benefit of the FHSA holder (ie, if the FHSA is contributed for the benefit of another individual, for example, under a family law obligation, the FHSA provider is not required to quote a TFN).

.1

Jack and Jill are filing for divorce. Under the *Family Law Act 1975* Jill is entitled to half of Jack's assets, including his FHSA balance. Jack's FHSA provider, the Australian Bank, receives a request from Jack to contribute half of his FHSA balance to Jill's superannuation plan. When the Australian Bank makes this contribution, it is not required to provide Jack's TFN to Jill's superannuation plan.

Offence

.2 If the FHSA provider fails to comply with its TFN obligations there are alternative offences depending on the level of culpability of the FHSA provider. These offences and the applicable penalties are essentially the same as those in the SIS Act.

.3 Where the relevant fault element in the *Criminal Code Act 1995* is proven, the FHSA provider is liable and a penalty of up to 100 penalty

units applies. This penalty reflects the serious nature of breaches of a person's privacy. ***[Subsections 58(4) and 60(8), and 61(4)]***

.4 Where an offence of strict liability (requiring no fault element) is proven the FHSA provider is liable for a penalty of up to 50 penalty units. ***[Subsections 58(5), 60(9), and 61(5)]***

Provision of tax file numbers in forms etc.

.5 To assist with the administration of FHSAs, certain forms to be submitted to the Regulator may require an FHSA provider's TFN. These are:

119 the approved form to apply for authorisation as an FHSA provider which must be submitted to APRA under section 89; and

120 a financial return form which must also be submitted to APRA under section 13 of the *Financial Sector (Collection of Data) Act 2001.*

[Section 68]

Facilitation of the administration

.1 Section 202 of the ITAA 1936 creates a system of TFNs to assist with the administration of various pieces of legislation including the SIS Act.

.2 This system of TFNs will also be used to facilitate the administration of individual's TFNs in Division 2 of Part 5 of the main Bill. It will also be used to facilitate the administration of FHSA providers in relation to the main Bill. ***[FHSA (Consequential Amendments) Bill 2008, Schedule 1, item 6, subsection 202(ka)]***

Other administrative matters

External territories

.3 The FHSA Bill 2008 applies to all external territories. It is intended that people living in Norfolk Island, Christmas Island and Cocos (Keeling) Islands be eligible to open an FHSA to acquire a first home in the territory in which they live. Where they do this, the associated legislation (eg, about taxation treatment) is intended to apply in the same way it does for residents of mainland Australia. ***[Section 5]***

Commissioner's annual report

.4 As is usual for Acts administered by the Commissioner, the Commissioner is required to prepare an annual report. The report is about the working of those parts of the Bill for which the Commissioner has general administration. It is envisaged that the Commissioner will include the report in his annual report about the various taxation laws the Commissioner administers. ***[Section 126]***

.5 APRA and ASIC will also include information about their administration of FHSAs in their annual reports under existing obligations in the APRA and ASIC Acts.

Approved form

.6 For provisions of the Bill administered by the Commissioner, the standard approved form provisions (in section 388-50 of Schedule 1 to the TAA 1953) for taxation laws apply. Although these provisions empower the Commissioner to require the use of a particular form in the sense of a standard document he makes available (eg, an annual income tax return), it is expected that under most provisions requiring an approved form the Commissioner would not require this. Rather, he would stipulate the particular information that must be provided and leave the design of the document (if one is required) to the entity providing the required information.

.7 The application of the approved form provisions also means that where an approved form is not given on time, the generic administrative penalties for failing to notify on time (in Division 286 of Schedule 1 to the TAA 1953) apply. ***[Section 55]***

Decisions about Government contributions to be in writing

.8 A decision by the Commissioner about Government contributions must be recorded in writing, but this can include electronic recording. Computer programs may be used to make these decisions, which are taken to be decisions of the Commissioner. ***[Part 4, Division 1, sections 53 and 54]***

Miscellaneous matters

Application of the main Bill not to be excluded or modified

.9 The operation of the main Bill can not be excluded or modified by the terms and conditions of the FHSA including any provisions that seek to substitute provisions of other law for all or any of the provisions of that Bill. ***[Section 4]***

Civil liability of an FHSA holder

.10 An FHSA provider is not subject to any civil liability where it performs an action required under the FHSA legislation. This provision is included to avoid doubt. ***[Section 127]***

Bankruptcy

.11 If an FHSA holder becomes bankrupt, the FHSA legislation does not prevent the FHSA holder paying to the trustee in bankruptcy an amount out of the FHSA to be property divisible among the FHSA holder's creditors. See Chapter 2 for a more detailed discussion of these issues. ***[Section 128]***

Constitutional savings provisions

.12 The main Bill includes provisions (as a matter of caution) to prevent any contravention of the Constitution that could result from:

121 the acquisition of property on unjust terms; or

122 the main Bill applying to State insurance not extending beyond the State in question ***[sections 129 and 130]***.

Regulations

.1 The main Bill includes a standard power permitting the Governor-General to make regulations. ***[Section 131]***

Application and transitional

.2 The amendments formally commence on the day after the date of Royal Assent to the Bills. ***[Section 2 of the FHSA Bill 2008; section 2 of the FHSA (Consequential Amendments) Bill 2008; section 2 of the Income Tax (FHSA Misuse Tax) Bill 2008]***

.3 However, their practical effect is in relation to FHSAs, which can only be opened on or after 1 October 2008 (or a later dater specified by regulation). ***[Section 8 of the FHSA Bill 2008]***