


# ***LCR 2018/D5 - First Home Super Saver Scheme***

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This document has been finalised by LCR 2018/5.



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Page status: **draft only – for comment**

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## First Home Super Saver Scheme

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### Relying on this draft Ruling

This Law Companion Ruling is a draft for consultation purposes only. When the final ruling issues, it will have the following preamble:

*This Ruling (with the exception of statements made about the first home super saver tax) is a public ruling for the purposes of the Taxation Administration Act 1953.*

*This Ruling describes how the Commissioner will apply the amendments made by the [Treasury Laws Amendment \(Reducing Pressure on Housing Affordability Measures No. 1\) Act 2017](#) to entities that rely on it in good faith. To the extent that it is a public ruling, if you rely on this Ruling in good faith, you will not have to pay any underpaid tax, penalties or interest in respect of matters covered by the Ruling if it does not correctly state how a relevant provision applies to you.*

*Statements about first home super saver tax in this Ruling are not legally binding on the Commissioner. However, if you act in accordance with the view expressed in good faith, the Commissioner will endeavour to stand by these statements in applying the law.*

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### **What this draft Ruling is about**

1. This draft Ruling provides guidance on the operation of the First Home Super Saver Scheme (the FHSS Scheme).
2. All references are to Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953), unless otherwise stated.

### **Overview of the FHSS Scheme**

3. The FHSS Scheme is designed to allow individuals who make voluntary contributions into the superannuation system on or after 1 July 2017, to withdraw those contributions (up to certain limits) and an amount of associated earnings for the purpose of purchasing their first home.
4. Eligible individuals can apply to access the FHSS Scheme from 1 July 2018. A withdrawal under the FHSS Scheme is made by application to the ATO, and the amount withdrawn under the FHSS Scheme will attract concessional tax treatment.

### **Eligibility for the FHSS Scheme**

5. To be eligible for the FHSS Scheme, you must:
  - never have held a stipulated property interest in Australia<sup>1</sup> (unless specific financial hardship requirements are met)<sup>2</sup>
  - be over the age of 18<sup>3</sup>, and
  - not have requested a release authority under the FHSS Scheme previously.<sup>4</sup>
6. A stipulated property interest in Australia includes:
  - a freehold interest in real property in Australia
  - a lease of land in Australia (including a renewal or extension of such a lease) that is for at least 50 years and
    - i) at the time of the grant, renewal or extension of the lease, it was reasonable to expect that it would continue for at least 50 years, and
    - ii) the terms of the lease, renewal or extension as they apply to the lessee are substantially the same as those under which the lessor owned the land or held a lease of the land<sup>5</sup>
  - a company title interest (within the meaning of Part X of the *Income Tax Assessment Act 1936*) (ITAA 1936) in land in Australia. This form of interest provides for the right to occupy land (or a building or part of a building erected on the land) that arise by virtue of holding shares in a company that owns the land or building.
7. In broad terms, a ‘freehold interest’ in real property is ownership of the property. A ‘freehold interest’ entitles the owner to exclusive possession for an indefinite period of time.

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<sup>1</sup> Paragraph 138-10(2)(a).

<sup>2</sup> Subsections 138-10(2A) and (2B).

<sup>3</sup> Paragraph 138-10(2)(b).

<sup>4</sup> Paragraph 138-10(2)(c).

<sup>5</sup> See subparagraph 138-10(2)(a)(ii) and paragraph 104-115(1)(b) of the *Income Tax Assessment Act 1997* (ITAA 1997).

8. Entering into a contract to acquire real property may mean that the individual acquires equitable proprietary rights in the real property.

9. However, an individual will not have obtained a freehold interest in property where the individual has entered into a contract to purchase the real property and the contract does not subsequently complete.

### **Eligible contributions**

10. A contribution must be an ‘eligible contribution’ in order for it to be released under the FHSS Scheme.<sup>6</sup>

11. An eligible contribution is a contribution<sup>7</sup> made in respect of you in a financial year and must be a concessional or non-concessional contribution that is either:

- an employer contribution that is not a mandated employer contribution (within the meaning of Part 5 of the *Superannuation Industry (Supervision) Regulations 1994*), or
- a member contribution that is made by you.<sup>8</sup>

12. Some contributions are specifically excluded from being eligible contributions, including:

- any part of a contribution to the extent it is required to be made because of the law of the Commonwealth or of a State or Territory, or the rules of the relevant superannuation fund<sup>9</sup>
- contributions made in respect of defined benefit interests<sup>10</sup>, and
- contributions made to constitutionally protected funds.<sup>11</sup>

13. Where the rules of the relevant superannuation fund require a member to make either a concessional or non-concessional contribution within a particular range (for example 1 to 5% of the member’s salary), only the proportion of the concessional or non-concessional contribution that equals the ‘minimum’ contribution amount is excluded from being an eligible contribution. For example where a member is required under the rules of the superannuation fund to make a contribution between 1% to 5% of the member’s salary, and the member contributes 5%, an amount equal to 1% of the salary is excluded from being an eligible contribution and the remaining amount of the contribution is an eligible contribution under the FHSS Scheme.

14. Examples of contributions that are not eligible contributions as they do not meet the conditions in paragraph 12 of this draft Ruling include:

- amounts that reduce an employer’s potential liability for the superannuation guarantee charge
- amounts required to be made by an employer under an industrial agreement (such as an enterprise agreement or an award)
- member contributions made in respect of you by another person (such as a friend, spouse or other family member)
- Government co-contributions

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<sup>6</sup> Subsection 138-35(2).

<sup>7</sup> The Commissioner’s view on what a contribution is and when it is made is set out in Taxation Ruling TR 2010/1 *Income tax: superannuation contributions*.

<sup>8</sup> Subsection 138-35(2).

<sup>9</sup> Paragraph 138-35(2)(b).

<sup>10</sup> Paragraph 138-35(2)(c).

<sup>11</sup> Paragraph 138-35(2)(d).

- contributions that relate to structured settlements or orders for personal injuries
- certain CGT-related payments to the extent they do not exceed your CGT cap amount when made, and
- amounts paid due to a contributions splitting arrangement.

15. Where you have exceeded either your concessional contributions cap or your non-concessional contributions cap, the amount of the excess contribution is not eligible to be released under the FHSS Scheme. Ordering rules apply to ensure that an excess concessional contribution for a financial year is first applied against an 'ineligible' concessional contribution with any excess reducing the amount of an 'eligible' concessional contribution for that financial year. Similarly, an excess non-concessional contribution for a financial year is first applied against an 'ineligible' non-concessional contribution with any excess reducing the amount of an 'eligible' non-concessional contribution for that financial year.<sup>12</sup> For the purposes of the FHSS Scheme, an excess concessional contribution is not treated as a non-concessional contribution.<sup>13</sup>

### **Withdrawals under the FHSS Scheme**

16. Where you are entitled to withdraw an amount from your superannuation account under the FHSS Scheme, you can apply to the ATO in the approved form for the ATO to make a first home super saver determination.<sup>14</sup>

17. The first home super saver determination sets out the maximum amount<sup>15</sup> that can be released under the FHSS Scheme to you (the FHSS maximum release amount).<sup>16</sup> This amount comprises your FHSS releasable contributions amount and associated earnings calculated by reference to those contributions. The FHSS releasable contributions amount is the sum of:

- eligible non-concessional contributions you made on or after 1 July 2017, and
- 85% of eligible concessional contributions you made on or after 1 July 2017.<sup>17</sup>

18. When the ATO issues the first home super saver determination, you can request the ATO to issue a release authority to a superannuation provider for the release of an amount up to the maximum amount set out in the determination from superannuation interests held by the superannuation provider.<sup>18</sup>

19. The ATO may amend or revoke a FHSS determination at any time before a release authority is issued to a superannuation provider.<sup>19</sup>

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<sup>12</sup> Subsections 138-35(3) and (4).

<sup>13</sup> Subsection 138-35(5).

<sup>14</sup> Subsection 138-10(2).

<sup>15</sup> Subsection 138-10(1).

<sup>16</sup> Section 138-25.

<sup>17</sup> Subsection 138-30(1).

<sup>18</sup> Paragraph 131-10(1)(a) and item 4 in the table in subsection 131-10(1).

<sup>19</sup> Subsection 138-10(4).

20. You can withdraw a maximum amount of \$15,000 of eligible contributions made in a particular financial year, to a total of \$30,000 of contributions across all years.<sup>20</sup> Whilst the full amount of eligible concessional contributions count towards the limit, only 85% of the concessional contributions are releasable. For example, if you contribute \$20,000 eligible concessional contributions in a financial year you only have \$12,750 of FHSS releasable concessional contributions (85% of \$15,000). You can also withdraw associated earnings in respect of each of these contributions.<sup>21</sup>

21. An amount is included in your assessable income (assessable FHSS released amount) for the year in which you request the ATO to issue a release authority.<sup>22</sup> Your assessable FHSS released amount includes the eligible concessional contributions and the associated earnings set out in the first home super saver determination.<sup>23</sup> However, this amount is reduced if you requested that a lesser amount be released under the release authority, or a lesser amount is released from your superannuation provider than you requested. In this situation, it is reduced by the difference between the eligible concessional contributions and the associated earnings set out in the FHSS determination and the amounts that have been released under a release authority.<sup>24</sup>

22. The assessable FHSS released amount is included in your assessable income in the year in which you request the ATO to issue a release authority even if the amount is released from the superannuation provider in the following income year.

23. You are entitled to a non-refundable tax offset that is equal to 30% of the assessable FHSS released amount.<sup>25</sup>

24. The amount released by the superannuation fund will be paid to the ATO. The Commissioner will withhold a pay as you go (PAYG) amount from the FHSS released amount before releasing the balance amount to you. This is to assist in meeting any increased tax burden that you face as a result of having the assessable FHSS released amount included in your assessable income for the financial year you requested the release under the FHSS Scheme.

### **Obligations following the release of an amount under the FHSS Scheme**

25. The FHSS Scheme broadly requires the released amount to be used to purchase your first home. Therefore, the following conditions must be met after the release of funds under the Scheme<sup>26</sup> :

- you enter into a contract to purchase or construct a CGT asset that is a residential premises<sup>27</sup> within 12 months after the release of the first FHSS released amount (or further period allowed by the ATO). This will **not** be satisfied where the contract is entered into before the FHSS release amount is released to you

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<sup>20</sup> Section 138-35.

<sup>21</sup> Determined under section 138-40.

<sup>22</sup> Division 131 refers to a release authority being issued for a financial year. The FHSS released amount is included in your assessable income in the income year that corresponds to the financial year that you request the release authority under subsection 313-20(1) of the ITAA 1997.

<sup>23</sup> Subsection 313-20(1) of the ITAA 1997.

<sup>24</sup> Subsection 313-20(2) of the ITAA 1997.

<sup>25</sup> Section 313-25 of the ITAA 1997.

<sup>26</sup> See sections 313-35, 313-40 and 313-60 of the ITAA 1997.

<sup>27</sup> The term 'residential premises' is defined under section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* as meaning land or a building that is occupied as a residence or for residential accommodation or is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation (regardless of the term of the occupation or intended occupation). See Goods and Services Tax Ruling GSTR 2012/5 *Goods and services tax: residential premises* for the Commissioner's views as to when premises qualify as residential premises.

- the price for the purchase or construction of the premises is at least equal to the sum of the FHSS released amounts
- you have occupied the premises, or intend to occupy the premises as soon as practicable
- you intend to occupy the premises for at least six months of the first 12 months after it is practicable to occupy the premises. Determining when it is 'practicable' to occupy the premises will depend on the facts and circumstances of a particular case. However, it is necessary for the individual's intention to occupy the premises for the requisite period of time to be genuine<sup>28</sup>, and
- you notify the ATO in the approved form of the matters outlined above within 28 days (or further period allowed by the ATO) after you enter into the contract to purchase or construct the residential premises.

26. The Commissioner may extend the period for entering into a contract by up to 12 months.<sup>29</sup>

27. Where you do not meet the conditions in paragraph 25 of this draft Ruling following the release of an amount under the FHSS Scheme, you will be subject to first home super saver tax (FHSS tax)<sup>30</sup> unless you:

- make non-concessional contribution(s) within 12 months after the release of the first FHSS released amount (or further period allowed by the ATO)
- the amount of the non-concessional contributions is at least equal to your assessable FHSS released amount less any PAYG amount withheld from the assessable FHSS released amount, and
- you notify the ATO in the approved form that you made the non-concessional contributions within 12 months after the release of the first FHSS released amount (or further period allowed by the ATO).<sup>31</sup>

### **FHSS tax**

28. Where you do not notify the ATO in the approved form that you have entered into a contract to purchase or construct residential premises, or made the required non-concessional contributions within the stipulated time periods, you will be subject to FHSS tax at a rate of 20% of the assessable FHSS released amount.<sup>32</sup> Your assessed FHSS tax is due and payable at the end of 21 days after the Commissioner gives you notice of the assessment of the amount of the FHSS tax.<sup>33</sup>

29. Where the requirements referred to in paragraph 25 of this draft Ruling are not satisfied because you entered into a contract to purchase or construct a residential premises before the FHSS released amount was released, you must make a non-concessional contributions as referred to in paragraph 27 of this draft Ruling in order to avoid being subject to the FHSS tax.

<sup>28</sup> See paragraphs 1.181 to 1.183 of the Explanatory Memorandum to the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Bill 2017.

<sup>29</sup> Subsection 313-35(2) of the ITAA 1997.

<sup>30</sup> Sections 313-50 and 313-60 of the ITAA 1997.

<sup>31</sup> While it is not a statutory requirement that you must notify the ATO, there may be FHSS tax consequences that apply if you do not notify the ATO.

<sup>32</sup> Section 3 and 4 of the *First Home Super Saver Tax Act 2017*.

<sup>33</sup> Section 313-65 of the ITAA 1997.

### **Ordering rule for release of contributions**

30. When you make eligible contributions to a superannuation provider, the order and type of the contributions can make a difference to the amount that can ultimately be released under the FHSS Scheme.

31. Subsections 138-30(2) and (3) set out specific rules governing which eligible contributions will be included in your FHSS releasable contributions amount. The rules are based on when a contribution was made and whether it is a concessional or non-concessional contribution.

32. Your contributions are counted towards your release amount in the following order:

- contributions are counted in the order in which they are made to your superannuation fund (from earliest to latest)<sup>34</sup>
- if an eligible concessional contribution and an eligible non-concessional contribution are made in respect of you to your superannuation fund at the same time (for example in the same payroll process), your non-concessional contributions are taken to be made first<sup>35</sup>, and
- where you personally make both eligible non-concessional and eligible concessional contributions in a year, for example because you claim a deduction for only part of the contributions you make in that year, the resulting eligible non-concessional contributions are taken to be made before the eligible concessional contribution.<sup>36</sup>

### **Example 1: Ordering rule – contributions across multiple years**

33. *William makes regular \$1,000 contributions on the first day of each month during the 2017–18, 2018–19 and 2019–20 financial years. William does not claim a tax deduction in respect of any of the contributions. The contributions are accordingly non-concessional contributions.*

34. *In July 2020, William applies for a FHSS determination.*

35. *The contributions are all eligible contributions under the FHSS Scheme. As they are all non-concessional contributions, 100% of each contribution is eligible to be released under the Scheme.*

36. *However, William can only release a maximum of \$30,000 of his contributions under the FHSS Scheme. The determination will count the contributions in the order in which they were made as follows:*

- *\$12,000 from the 2017–18 financial year (12 contributions from 1 July 2017 to 1 June 2018)*
- *\$12,000 from the 2018–19 financial year (12 contributions from 1 July 2018 to 1 June 2019) and*
- *\$6,000 from the 2019–20 financial year (6 contributions from 1 July 2019 to 1 December 2019).*

37. *William's determination will also include associated earnings in respect of each of these contributions determined under section 138-40.*

<sup>34</sup> Subsection 138-30(2).

<sup>35</sup> Paragraph 138-30(3)(a).

<sup>36</sup> Paragraph 138-30(3)(b).



**Example 2: Ordering rule – simultaneous contributions**

38. *Nicholas works for a company that pays their employees on the first day of each month.*

39. *Nicholas has an effective salary sacrifice agreement with the employer. The employer also makes voluntary after tax contributions on behalf of Nicholas as part of the same payroll process. He has an agreement with his employer to make the following voluntary contributions on his behalf during the 2017–18, 2018–19 and 2019–20 financial years:*

- *\$550 per month under the salary sacrifice arrangement, and*
- *\$550 per month as an after tax superannuation contribution.*

40. *In total, Nicholas has \$6,600 a year in concessional contributions (those made under the salary sacrifice arrangement) and \$6,600 in non-concessional contributions (those made after tax) made on his behalf in each financial year.*

41. *In July 2020, Nicholas applies for a FHSS determination.*

42. *Subject to the restrictions set out in paragraph 43 of this draft Ruling, the FHSS releasable contributions includes 85% of the concessional contributions (under the salary sacrifice arrangement) and 100% of the non-concessional contributions.*

43. *Nicholas can only have a maximum of \$30,000 of eligible contributions made across all years under the FHSS Scheme. The FHSS determination will count the contributions in the order in which they were made as follows:*

- *All of the voluntary contributions he made for the 2017–18 financial year (\$6,600 non-concessional contributions and \$5,610 concessional contributions will be releasable contributions).*
- *All of the voluntary contributions he made for the 2018–19 financial year (\$6,600 non-concessional contributions and \$5,610 concessional contributions will be releasable contributions).*
- *All of the voluntary contributions he made for July 2019 to September 2019 will be counted (\$1,650 non-concessional contributions and \$1,650 concessional contributions will count towards the limit). However, for October only \$300 of further contributions can be released until he reaches his \$30,000 limit. This means that the simultaneous contribution rule will apply for the contributions made in October and the amount released from the fund will include \$300 of non-concessional contributions for that month. This means for the 2019–20 financial year the releasable contributions amount will be \$1,950 non-concessional contributions and \$1,402.60 concessional contributions (where the eligible concessional contribution is determined as \$1,650 multiplied by 85%).*

44. *Nicholas' determination will also include associated earnings in respect of each of these contributions determined under section 138-40.*

**Example 3: Ordering rule – deduction for personal superannuation contributions**

45. *Bianca makes regular \$2,000 contributions on the first day of each month during the 2017–18, 2018–19 and 2019–20 financial years.*

46. *For the 2017–18 financial year, Bianca does not lodge a notice of intent to claim a deduction with her fund in relation to the superannuation contributions, and does not claim a tax deduction. This means all of the \$24,000 contributions are non-concessional contributions.*

47. *In September 2019 Bianca lodges a notice of intent to claim \$10,000 as a deduction with respect of her personal contributions made in the 2018–19 financial year. She claims the tax deduction in her tax return lodged in October 2019. This will mean that for the 2018–19 year she made \$10,000 in concessional contributions and \$14,000 in non-concessional contributions.*

48. *In July 2020, Bianca applies for a FHSS determination.*

49. *Subject to the restrictions set out in paragraph 50 of this draft Ruling, the FHSS releasable contributions includes 85% of the concessional contributions and 100% of the non-concessional contributions made by Bianca.*

50. *However, Bianca can only receive a maximum of \$15,000 of the contributions in one financial year and \$30,000 of the contributions in total. The determination will show Bianca is eligible to receive:*

- *the maximum yearly limit of \$15,000 of her voluntary contributions made for the 2017–18 financial year (non-concessional contributions)*
- *the maximum yearly limit of \$15,000 of her voluntary contributions made for the 2018–19 financial year. The ordering rule for personal deductions will apply so that \$14,000 of non-concessional contributions and \$850 of concessional contributions are eligible to be released. The eligible concessional contribution is \$850 determined by reference to \$15,000 less \$14,000 multiplied by 85%.*

51. *Bianca’s determination will also include associated earnings in respect of each of these contributions determined under section 138-40.*

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**Commissioner of Taxation**

24 May 2018

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### **Your comments**

52. You are invited to comment on this draft Ruling. Please forward your comments to the contact officer by the due date.

53. A compendium of comments is prepared for the consideration of the relevant Public Advice and Guidance Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on the ATO website at [www.ato.gov.au](http://www.ato.gov.au).

Please advise if you do not want your comments included in the edited version of the compendium.

**Due date:** **21 June 2018**

Contact officer details have been removed following publication of the final ruling.

**References**

ATOlaw topic(s)	Superannuation ~~ Income tax - individuals (superannuation) ~~ Other
Legislative references	<p> TAA 1953  TAA 1953 Div 131  TAA 1953 131–10(1)  TAA 1953 131–10(1)(a)  TAA 1953 138  TAA 1953 138–10(1)  TAA 1953 138–10(2)  TAA 1953 138–10(2)(a)  TAA 1953 138–10(2)(a)(ii)  TAA 1953 138–10(2A)  TAA 1953 138–10(2B)  TAA 1953 138–10(2)(b)  TAA 1953 138–10(2)(c)  TAA 1953 138–10(4)  TAA 1953 138–25  TAA 1953 138–30(1)  TAA 1953 138–30(2)  TAA 1953 138–30(3)  TAA 1953 138–30(3)(a)  TAA 1953 138–30(3)(b)  TAA 1953 138–35  TAA 1953 138–35(2)  TAA 1953 138–35(2)(b)  TAA 1953 138–35(2)(c)  TAA 1953 138–35(2)(d)  TAA 1953 138–35(3)  TAA 1953 138–35(4)  TAA 1953 138–35(5)  TAA 1953 138–40  TAA 1953 138–40 Sch 1  ANTS (GST)A 1999  ANTS (GST)A 1999 195–1  ITAA 1936  ITAA 1936 Pt X  ITAA 1997  ITAA 1997 104–115(1)(b)  ITAA 1997 313–20(1)  ITAA 1997 313–20(2)  ITAA 1997 313–25  ITAA 1997 313–35  ITAA 1997 313–35(2)  ITAA 1997 313–40  ITAA 1997 313–50  ITAA 1997 313–60  ITAA 1997 313–65  First Home Super Saver Tax Act 2017 3 </p>

	First Home Super Saver Tax Act 2017 4 Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Act 2017
Related Rulings/Determinations	GSTR 2012/5 TR 2010/1
Other references	Explanatory Memorandum to the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Bill 2017 First Home Super Saver Scheme Superannuation Industry (Supervision) Regulations 1994
ATO references	1-CPOSNRL
BSL	SPR

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