

client alert | explanatory memorandum

March 2009

One-off Bonuses

On 12 February 2009, the Government introduced the Tax Bonus for Working Australian Bill (No 2) 2009 and the Household Stimulus Package Bill (No 2) 2009 into Parliament. The Bills were passed by the House of Representatives without any amendments on 12 February 2009. The Senate passed the Bills without amendment on 13 February 2009. The Bills are awaiting Royal Assent.

The Bills implement the one-off bonuses which were announced in the Government's Nation Building and Jobs Plan released on 3 February 2009. A discussion of the Bills follows.

Tax Bonus for Working Australians Bill (No 2) 2009

The Bill authorises the Commissioner to pay the Tax Bonus for Working Australians (the Bonus) to eligible taxpayers who have paid tax for the 2007/08 income year after taking into account available tax offsets and imputation credits. The amount of bonus payable will depend on a taxpayer's taxable income for that income year:

- \$900 if the taxpayer's taxable income was up to \$80,000;
- \$600 if the taxpayer's taxable income was between \$80,001 and \$90,000;
- \$250 if the taxpayer's taxable income was between \$90,001 and \$100,000; and
- \$0 if the taxpayer's taxable income was more than \$100,000.

Eligibility requirements


Eligibility for the Bonus will be automatically determined by the Tax Office. A taxpayer will be eligible to receive the Bonus if the following conditions are satisfied:

- the taxpayer has lodged or will lodge her or his 2007/08 tax return before 30 June 2009 (or by the deferred date granted by the Tax Office);
- the taxpayer's taxable income for 2007/08 is not more than \$100,000 (see above);
- the taxpayer's adjusted tax liability for 2007/08 is greater than zero; and
- the taxpayer was an Australian resident for tax purposes (or was an Australian resident at some stage) during the 2007/08 income year.

A minor (ie a person who is less than 18 years of age) will be eligible for the Bonus if the minor is an excepted person or an excepted assessable income. The list of excepted persons includes a minor engaged in a full-time occupation on the last day of an income year and a minor in receipt of a disability support pension. The categories of excepted assessable income include employment income, business income, income from deceased estates and partnership income.

The adjusted income tax liability is determined by the sum of a taxpayer's income tax liability, plus the Medicare levy and the Medicare levy surcharge reduced by any tax offsets and imputation credits available to the taxpayer.

(or to address on envelope if barcoded)
GPO BOX 9990
Sydney NSW 2001

 Australian Government
Australian Taxation Office

Ms Your Name
PO Box 1111
Anywhere NSW 1001

Your Tax File Number is
123 456 789

Date of Issue
3 SEP 08

Sequence Number
SYD 123456 / 789

Income Tax Assessment Act 1936 and Income Tax Assessment Act 1997

NOTICE OF ASSESSMENT
For the year ending 30 June 2008 (or substituted accounting period)

Your Taxable Income is \$46621

Tax on Taxable Income	A	8586.30DR
Medicare Levy	O	699.31DR
PAYG Withholding Credits	E	9524.11CR
Tax Offsets and Other Credits	G	423.16CR
Balance of this Assessment	L	661.66CR

A refund cheque for this amount is being

***** Additional Information *****

Label G includes an amount of \$85.16 for Low Income Tax Offset

PLEASE SEE THE REVERSE FOR IMPORTANT INFORMATION ABOUT YOUR ASSESSMENT.

STEP 1
Is this figure equal to or less than \$100,000?

If YES, go to STEP 2.

If NO, you are not eligible.

STEP 2
A + O - G (If G is present)
If greater than \$0 you are eligible.

Raelene Vivian
Deputy Commissioner of Taxation

Source: Tax Bonus Fact Sheet released by the Tax Office

Treatment of the Bonus

The Bonus is not included in a taxpayer's assessable income, ie non-assessable non-exempt income. It is also not included in the taxpayer's income for social security and veterans' entitlements purposes.

A taxpayer who receives a payment to which he or she is not entitled, or a payment that is greater than his or her entitlement, will be required to pay that money back to the Commissioner. Any debts arising from an overpayment will be subject to GIC. The taxpayer will not be able to use the Bonus to offset her or his tax debts or liabilities.

Payment of the Bonus

The Bonus will be paid from April 2009.

The Tax Office will credit the payment into a taxpayer's bank account which is stated in the taxpayer's 2007/08 tax return. If no bank account details exist, the Tax Office will mail a cheque for the payment to the taxpayer.

Date of effect

The Bill will commence on Royal Assent.

Tax Office announcement

The Tax Office has advised tax practitioners that if they have clients who have not already lodged their returns and are concerned that this will put pressure on meeting their lodgment program, they should call the Tax Office urgently on 13 72 86 (Fast Key Code 1 3 2). The Tax Office said clients will be eligible for the bonus if an extension of time to lodge beyond 30 June 2009 has been granted 'before the measure becomes law'. According to the Tax Office, 'once the measure is law, any client who receives an extension to lodge after 30 June 2009 will not be entitled to the payment'.

The Tax Office said it is aware that some practitioners process and manage payments for their clients. The Tax Office said it is working on the best way to ensure payments are made to clients, if that is the client's

wish. The Tax Office has set up a special phone number for taxpayers who use tax agents, but want to receive the payments directly. Clients can register their personal bank account details for this payment. The number is 1300 686 636.

The Tax Office reminded tax practitioners and their clients that all changes of address and bank account details should be made by the middle of March to ensure taxpayers' money goes into the right bank account or the cheque is delivered to the correct address in early April 2009.

Thomson Reuters worked example one

Mary derived dividend income of \$25,000 for the 2007/08 income year. The dividends were fully franked. Therefore, the imputation credits attached to the dividends were \$10,714. She did not have any other source of income for the income year. She incurred \$2,000 of allowable deductions. Mary's taxable income for the 2007/08 financial year was \$33,714 (\$25,000 + \$10,714 - \$2,000).

Mary's adjusted tax liability is calculated as follows:

Taxable income	–	\$33,714
Tax payable	–	\$4,714
Medicare levy	–	\$505
Low-income offset	–	(\$750)
Imputation credits	–	<u>(\$10,714)</u>
Adjusted tax liability	–	(\$6,245)

Prima facie, Mary's taxable income qualifies her for the maximum amount of the Bonus, ie \$900. However, as her adjusted tax liability is less than 'zero', Mary does not qualify for the Bonus.

Thomson Reuters worked example two

Bradley derived \$30,000 in employment income for the 2007/08 income year. He also derived \$7,000 in dividend income. The dividends were fully franked. Therefore, the imputation credits attached to the dividends were \$3,000. He had allowable deductions of \$2,500. Bradley's taxable income for the income year was \$37,500 (\$30,000 + \$7,000 + \$3,000 - \$2,500)

Bradley's adjusted tax liability is calculated as follows:

Taxable income	–	\$37,500
Tax payable	–	\$5,850
Medicare levy	–	\$562
Low-income offset	–	(\$750)
Imputation credits	–	<u>(\$3,000)</u>
Adjusted tax liability	–	\$2,662

As Bradley adjusted tax liability is greater than 'zero', he will receive a Bonus of \$900.

Household Stimulus Package Bill (No 2) 2009

The Bill implements the four one-off bonuses which were announced in the Nation Building and Jobs Plan:

- Single Income Family Bonus;
- Farmers Hardship Bonus;
- Back to School Bonus; and
- Training and Learning Bonus.

The Bonuses will not count as income for social security, family assistance, farm household support and veterans' entitlements purposes, and will be income tax-free.

Single Income Family Bonus

Families who were entitled to Family Tax Benefits Part B (FTB-B) on 3 February 2009 will be eligible for the one-off bonus payment of \$900.

For families receiving fortnightly instalments of FTB-B, the Bonus will be paid automatically by Centrelink in the fortnight commencing 11 March 2009. For families who claim FTB-B as a lump sum, the Bonus will be paid by Centrelink in the financial years 2009/10 and 2010/11 after their 2008/09 tax returns have been lodged and processed by the Tax Office.

Note that if the FTB-B was shared between two people under the usual rules for that payment, the payment will be similarly shared. The example below is modified from the Explanatory Memorandum accompanying the Bill:

An individual has three FTB children (with no shared care percentage for at least one of those children) on 3 February 2009 and the specified percentage for each child under s 28 of the *A New Tax System (Family Assistance) Act 1999* (the FAA) is 50%. The individual is eligible for a single income family bonus of \$450 (that is \$900 x 50%). If the individual has a shared care percentage of 50% for the individual's only FTB child (due to s 59 of the FAA), plus a specified percentage under s 28 of 50% for the child, the individual is eligible for \$225 (that is, \$900 x 50% x 50%).

Farmers Hardship Bonus

The Bonus is a one-off payment to farmers and rural-dependent small business owners receiving exceptional circumstances related income support.

A lump-sum payment of \$950 will be made to farmers and rural-dependent small business owners who, on 3 February 2009, were receiving:

- Exceptional Circumstances Relief Payment;
- Interim Income Support;
- Transitional Income Support; or
- Farm Help Income Support.

The payments will be made in the fortnight commencing 24 March 2009.

Back to School Bonus

The \$950 Back to School Bonus will provide a one-off payment to be paid to families who were eligible for Family Tax Benefit Part A (FTB-A) on 3 February 2009 for each eligible child of school age (ie aged 4 to 18 on 3 February 2009).

The Bonus will also be available to individuals who received disability support pension or carer payment on 3 February 2009 where the recipient was aged less than 19 years old on that date.

If FTB-A for 3 February 2009 was shared between two people under the usual rules for that payment, the relevant payment will be similarly shared. The following example is from the Explanatory Memorandum accompanying the Bill:

If an individual is eligible for three FTB children aged four or more and less than 19 on 3 February 2009 and the specified percentage for each child under s 28 of the FAA is 50%, the individual is eligible for \$1,425 (that is, \$950 x 50% x 3).

Training and Learning Bonus

This Bonus will provide a one-off payment to assist eligible students with costs for the 2009 academic year. It will also provide a temporary additional incentive (until June 2010) for social security recipients to return to education and training.

One-off Bonus

A one-off \$950 bonus is available for recipients who, on 3 February 2009, were receiving the following social security payments:

- Youth Allowance;

- Austudy;
- ABSTUDY and related payments;
- Sickness Allowance; or
- Special Benefit (under age pension age on 14 October 2008).

A recipient receiving Youth Allowance only qualifies if, on 3 February 2009, the recipient was undertaking full-time study or was qualified for the allowance as a new apprentice.

The Bonus will be paid automatically by Centrelink in the fortnight commencing 24 March 2009.

If a recipient attracts the Back to School Bonus, the recipient is not eligible for the Training and Learning Bonus.

Temporary supplement

A temporary additional supplement of \$950 for eligible social security recipients to return to education and training for the period 1 January 2009 to 30 June 2010 will be provided. This is in addition to the existing Education Entry Payment (EdEP) of \$208, which provides assistance with the costs of training courses, for income support recipients who are returning to study.

The EdEP requirement that recipients must have been receiving social security payments for 12 months will be temporarily relaxed to one month for the period 1 January 2009 to 30 June 2010. The EdEP will also be temporarily extended to Youth Allowance (other) for the same period. Youth Allowance (other) is the youth allowance payable to a person who is not undertaking full-time study and who is not a new apprentice.

Date of effect

Generally, the amendments contained in the Bill will commence on Royal Assent.

Thomson Reuters examples

Couple with no children

Wayne and Teresa are married with no children. Their taxable income for the 2007/08 income year were \$60,000 and \$68,000 respectively. Neither Wayne nor Teresa had any dividend income for that income year.

Wayne and Teresa will each receive \$900 under the Tax Bonus for Working Australians. (Assuming the requirements of the Bonus are satisfied.)

Couple with one child

Kevin and Jennet are married with one child who is currently attending primary school. Jennet is a homemaker. Kevin's taxable income for the 2007/08 income year was \$75,000 and he did not derive any dividend income. Jennet had no taxable income for that income year. Their household qualified for Family FTB-A and FTB-B on 3 February 2009.

Therefore, their household will receive the following Bonuses:

Tax Bonus for Working Australians (Kevin) ¹	–	\$900
Single Income Family Bonus	–	\$900
Back to School Bonus	–	<u>\$950</u>
		\$2,750

1. Assuming the requirements of the Bonus are satisfied

Couple with two children

Peter and Lucy are married with two children, Gladys and Keith. Gladys is currently attending primary school. Keith is currently in secondary school. Both Gladys and Keith do not have any taxable income. Peter's taxable income for the 2007/08 was \$65,000. Lucy's taxable income for that income year was \$55,000. Their household qualified for FTB-A on 3 February 2009.

Therefore, their household will receive the following Bonuses:

Tax Bonus for Working Australians (Peter) ¹	–	\$900
Tax Bonus for Working Australians (Lucy) ¹	–	\$900
Back to School Bonus (Gladys)	–	\$950
Back to School Bonus (Keith)	–	<u>\$950</u>
		\$3,700

1. Assuming the requirements of the Bonus are satisfied

Small Business and General Tax Bonus

In the Nation Building and Jobs Plan released on 3 February 2009, the Government announced that it would amend the temporary investment allowance (the Allowance), which was announced in December 2008.

The basic requirements to qualify for the Allowance remain the same. The Treasury has said that it will release draft legislation on these changes for public consultation. It is anticipated that the draft legislation will provide clarification on the operation of the investment allowance and the additional temporary tax break.

Changes to the rate

The Allowance rate will increase to 30% (from 10% as previously announced) for eligible assets that are acquired between 13 December 2008 and 30 June 2009, and installed ready for use by 30 June 2010.

Businesses will also be able to claim the Allowance for assets acquired between 1 July 2009 and 31 December 2009, providing the assets are installed by 31 December 2010. For eligible assets acquired during this period, the rate is 10%. (Previously, the allowance only applied to eligible assets acquired by 30 June 2009.)

The rates apply to both small businesses and general businesses.

Cost of eligible asset threshold

Small businesses can claim the Allowance for eligible assets costing \$1,000 or more. General businesses can claim the allowance for eligible assets costing more than \$10,000.

Note that the \$10,000 minimum threshold previously applied to all businesses.

Calculation of allowance

The Allowance is 30% (or 10% if after 30 June 2009) of a qualifying asset's first element of cost, to the extent that the asset will be used for a taxable purpose.

If expenditure is capitalised into an existing asset as a second element of cost, the allowance will be 30% (or 10% if after 30 June 2009) of that expenditure.

Qualifying assets

The Allowance applies to tangible assets used in the carrying on of a business for which a deduction is available under the core provisions of Div 40 of ITAA 1997 (i.e. Subdiv 40-B). Specifically, these assets are prescribed in s 40-30 of ITAA 1997, except for intangibles and rights that would otherwise be included by ss 40-30(2), (5) and (6).

Broadly, the following assets will **not** qualify for the allowance:

- land;
- trading stock; and
- intangible assets, including:

- mining, quarrying or prospecting rights;
- mining, quarrying or prospecting information;
- items of intellectual property;
- in-house software;
- indefeasible right to use a telecommunications cable system;
- spectrum licences;
- datacasting transmitter licences; and
- telecommunications site access rights.

Cars will not be disqualified from the allowance merely because a business uses the 12 % method.

The Treasurer's Media Release accompanying the Government's announcement of the Allowance states that 'assets for which deductions can be obtained under other Subdivisions will not qualify for the investment allowance'. Therefore, an asset that qualifies for a deduction under Subdivs 40-E, 40-F, 40-G and 40-H potentially will not attract the allowance.

Small business entities and the Allowance

Uncertainty exists in whether small businesses entities that elected to use the capital allowance concessions contained in Subdiv 328-D of ITAA 1997 will be eligible for the Allowance.

The Treasurer's Media Release accompanying the Small Business and General Business Tax Break stated that:

The deduction will be available to the taxpayer who is entitled to the capital allowance deduction under Division 40 of ITAA 1997 in respect of the asset.

Potentially, a small business entity that chooses to apply the Subdiv 328-D capital allowance rules may possibly be excluded from the Allowance. Depreciating assets acquired by the small business entity are automatically allocated to either a general small business pool or long life small business pool: s 328-185(3) of ITAA 1997.

It seems odd that the Allowance, which has been proposed to be small business entities 'friendly', would not be accessible by small business entities. It is expected that the draft legislation to be released by Treasury will provide clarification on this issue.

Early Access to Superannuation Benefits

The Tax Office has released Taxpayer Alert TA 2009/1 in which it describes arrangements incorrectly offering people early release of their preserved superannuation benefits prior to retirement without meeting statutory conditions for such release. The Alert reiterates the Tax Office's concerns about similar arrangements to those described in Taxpayer Alert TA 2002/3.

Description of arrangements

The Alert applies to arrangements which have the following features:

1. A group of Australian residents have existing superannuation benefits held in funds.
2. A person or group of persons (the organiser) approaches such Australian residents, either directly or indirectly, to enter into an early release arrangement. The group may be composed of members of an ethnic community or share a common employer.
3. The organiser incorrectly informs such Australian residents that they can use the early release arrangement to gain immediate access to their superannuation contributions for use for personal or investment purposes.

4. The organiser purports to establish and operate a self-managed superannuation fund (SMSF) for retirement purposes as prescribed under the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).
5. The organiser arranges the rollover of superannuation benefits of the individual into the SMSF.
6. The superannuation benefits of the Australian residents are subsequently released from the SMSF by the organisers of the arrangement without satisfying the conditions of release.
7. A significant fee is normally charged upon the release of benefits, as much as 30% of the benefits improperly released.

Features of concern to the Tax Office

The Tax Office considers that arrangements as described above potentially will give rise to a number of income tax and superannuation regulatory issues, including whether:

- the organiser of the arrangement, the trustee of the SMSF or any other person may have committed a criminal offence, such as those prescribed in the SIS Act;
- the arrangement, or certain steps within it, may constitute a sham at general law;
- the purported SMSF used in the arrangement was properly established for the provision of superannuation benefits upon retirement, as prescribed under the SIS Act;
- the release of the superannuation benefits under the arrangement was properly authorised by meeting a relevant condition of the release;
- any amounts received by the Australian resident that breach the preservation requirements have been properly included in their assessable income for the relevant income year; or
- any penalties or interest charges should be applied to any understatement of such assessable income for the Australian resident.

Tax Office view

The Tax Office says it has reviewed these arrangements and considers they are ineffective because of some or all of the above features.

The Tax Office notes that, in addition to conducting its own income tax, regulatory and criminal investigation which may involve breaches of the sole purpose test and misleading or deceptive conduct, it is also working very closely with ASIC in relation to charges brought by ASIC and other investigations by ASIC concerning early release matters.

Legal status of the Alert

The Alert is only intended to be an ‘early warning’ of a tax planning arrangement that the Tax Office has under risk assessment. However, it is expected that a Taxation Ruling or Taxation Determination will be issued by the Tax Office following the release of the Alert.

Taxpayers who have entered into or are contemplating entering into an arrangement similar to that described in the Alert can seek a formal determination of the Tax Office’s position through a Private Ruling.

Preservation of superannuation benefits

Certain categories of benefits which are contributed to a regulated superannuation fund or accrue in the fund on behalf of a member must be ‘preserved’, ie they cannot be paid out to the member until the member satisfies a condition of release, eg the member permanently retires from gainful employment after reaching her or his preservation age.

Broadly, all superannuation contributions (whether made by a member or by an employer) and all investment earnings accruing in a regulated superannuation fund must be preserved. The preservation rules are contained in regs 6.02 to 6.16A and Sch 1 of the SIS Regs.

There are three categories of superannuation benefits for preservation purposes:

- preserved;
- restricted non-preserved; and
- unrestricted non-preserved.

Benefits, whether preserved or not, can still be rolled over from a regulated superannuation entity into another superannuation entity without breaching the preservation rules. Accordingly, the rules provide that benefits that are rolled over into another regulated fund retain their status and remain subject to the preservation rules.

Preserved benefits

Preserved benefits are required to be retained in the fund until satisfying a condition of release, eg permanent retirement after a member reaches her or his preservation age.

A member's preserved benefit is the member's total benefit less the member's restricted non-preserved benefits and unrestricted non-preserved benefits. Benefits rolled over or transferred to a regulated superannuation fund are taken to be preserved benefits, unless and until the fund's trustee is satisfied that they are not preserved benefits: reg 6.06.

Lump sum payments, rollovers or transfers of benefits in respect of a non-member spouse pursuant to a splitting agreement or court order under the *Family Law Act 1975* are required to be taken proportionately from the unrestricted non-preserved benefits, restricted non-preserved benefits and preserved benefits of the member spouse: regs 7A.12 and 7A.13.

All employer ETPs (eg golden handshakes) rolled over to a superannuation fund between 1 July 2004 and 30 June 2007 must be preserved.

The CGT-exempt component (which relates to the small business retirement exemption concessions), government co-contributions and eligible contributions made on behalf of a spouse must also be preserved.

A spouse contributions-splitting amount rolled over or transferred for the benefit of the member's spouse is deemed to be a preserved benefit unless and until the trustee is satisfied that they are not preserved benefits: reg 6.15.

Restricted non-preserved benefits

Restricted non-preserved benefits are not required to be preserved until satisfying a cashing condition but they are nevertheless subject to restrictions as to when they can be paid from a fund. Broadly, they cannot be cashed out until a member terminates employment with an employer who has contributed on her or his behalf to the fund concerned.

Unrestricted non-preserved benefits

Under reg 6.10, unrestricted non-preserved benefits in a regulated superannuation fund are essentially the sum of:

- preserved benefits or restricted non-preserved benefits standing to the credit of a member at 1 July 1999 who has satisfied a condition of release, where there is no cashing restriction in respect of those benefits;
- benefits standing to the member's credit in the fund, which were unrestricted non-preserved benefits in another fund and have been rolled over to the present fund;
- certain ETPs received by the fund, namely, ETPs which are rolled over pursuant to former s 27D of ITAA 1936, as in force before 1 July 2007, and which are not sourced from superannuation funds, eg employer-paid ETPs such as golden handshakes. However, all employer ETPs which were rolled over into superannuation between 1 July 2004 and 30 June 2007 must be preserved. Furthermore, from 1 July 2007, it is no longer possible for employees to roll over employer ETPs to a superannuation fund (except for qualifying directed termination payments made before 1 July 2012); plus
- investment earnings on those benefits for the period before 1 July 1999.

Where an unrestricted non-preserved benefit has been cashed in the form of a pension, annuity or if the benefit is a non-commutable life pension or non-commutable life annuity, the investment earnings are unrestricted non-preserved benefits: reg 6.15A. However, investment earnings on benefits in non-

commutable pensions commenced under the 'transition to retirement pension' condition of release (Item 110 or 208 of Sch 1 of the SIS Regs) are classified as preserved benefits. This effectively avoids the need to apportion investment earnings on a transition to retirement pension containing a mix of preserved and non-preserved benefits.

Once benefits become unrestricted non-preserved benefits, they will retain that status, until they are actually cashed by the member. The only exception relates to member-financed contributions made before 1 July 1999 that were initially treated as undeducted contributions but for which a deduction has subsequently been allowed under former s 82AAT of ITAA 1936. Such contributions would have been treated as restricted non-preserved benefits and, but for this exception, could have become unrestricted non-preserved benefits on termination of employment. By virtue of reg 6.10(3), the benefit arising from such contributions become preserved benefits.

Payment of benefits

Restrictions apply to when a superannuation fund can pay a member's preserved benefits and requirements exist for when a fund must pay benefits. The rules relating to payment of benefits are contained in Divs 6.2 and 6.3 of the SIS Regs, comprising regs 6.17 to 6.27A, and the conditions of release of benefits in Sch 1 to the SIS Regs. The payments rules are also heavily linked to the preservation requirements in Part 6 of the SIS Regs. Specifically, benefits may only be paid by being cashed out, rolled over or transferred in accordance with the SIS Regs.

Broadly, the regs provide for:

- the voluntary payment of benefits to the member, or 'cashing' of benefits, in the amounts and forms set out in regs 6.18-6.20, and on the member satisfying 'conditions of release' set out in Sch 1 to the SIS Regs; and
- the compulsory payment of benefits to the member, or 'cashing' of benefits, at the times and in the forms set out in reg 6.21.

Regulation 6.18 of the SIS Regs provides that a member's preserved benefits may be cashed in a form relating to the condition of release specified in Sch 1 to the SIS Regs, or if the specified cashing restriction is 'nil', any one or more of the following forms:

- one or more lump sums;
- one or more pensions; or
- the purchase of one or more annuities.

A member's unrestricted non-preserved benefits may be cashed at any time, up to the full amount of those benefits, and in any combination of one or more lump sums, pensions and purchased annuities: reg 6.20. However, preserved benefits and restricted non-preserved benefits may both only be cashed when a member satisfies a condition of release. Benefits may be paid to the member subject to any restrictions on the amount or prescribed form in which the benefit may be taken.

Note that the compulsory cashing rules from age 65 have been abolished effective from 10 May 2006. As a result, individuals aged 65 to 74 and no longer working (and workers turning age 75) no longer need to satisfy the former work tests in order to maintain their benefits in the superannuation environment. However, a member's benefits in a regulated superannuation fund must still be cashed as soon as practicable after the member dies.

Note also that the regulations use the term 'cashed' to distinguish between benefits which are to be paid out to the member and those which are transferred or rolled over. That is, 'cashed' refers to benefits which are to be paid out of, and not transferred or rolled over within, the superannuation system.

Where a member has satisfied a condition of release but there is some restriction on the cashing, then the benefits must be cashed out in the following order (reg 6.22A):

1. unrestricted non-preserved benefits must be cashed out first;
2. restricted non-preserved benefits;
3. preserved benefits.

Benefits with a 'nil' cashing restriction may be cashed out in any combination of one or more lump sums, pensions or the purchase of an annuity.

Conditions of release

Generally, preserved benefits and restricted non-preserved benefits must be preserved in the superannuation system until a member has retired from the workforce after reaching preservation age (see below).

A member of a superannuation fund is taken to have satisfied a condition of release if the event specified in Column 2 of Sch 1 to the SIS Regs has occurred in relation to the member: regulation 6.01. The voluntary payment of benefits is also subject to the provisions of the superannuation fund's governing rules.

Conditions of release, where there are no cashing restrictions on the amount or form in which preserved benefits can be paid under regulation 6.18 and Schedule 1 of the SIS Reg, include:

- retirement (Item 101);
- attaining age 65, regardless of whether still gainfully employed (Item 110);
- death (Item 102);
- terminal medical condition (reg 6.01A and Item 102A, Sch 1 to the SIS Regs)
- permanent incapacity (Item 103);
- a 'lost member' who is found, and the value of whose benefit in the fund, when released, is less than \$200 (Item 111); and
- termination of gainful employment with a standard employer-sponsor on or after 1 July 1997 where the member's preserved benefits are less than \$200 (Item 104).

Early cashing of benefits

Early release of preserved superannuation benefits is only permitted in certain restricted circumstances, subject to the governing rules of a superannuation fund.

If a fund member cannot meet a condition of release with a nil cashing restriction, other qualifying conditions of release may be available where cashing restrictions apply in relation to the amount or form in which preserved benefits can be cashed under Sch 1 of the SIS Regs. These include:

- severe financial hardship (reg 6.01(5) and Item 105);
- compassionate grounds (reg 6.19A and Item 107);
- temporary incapacity (reg 6.01 and Item 109);
- attaining preservation age for payment of a non-commutable transition to retirement income stream (Item 110);
- an amount to satisfy an excess concessional tax assessment amount specified in a release authority issued by the Commissioner (Items 112 to 114); or
- any other condition expressed to be a condition of release in an approval by the Regulator under s 62(1)(b)(v) of the SIS Act (Item 114).

Preservation age

The preservation age of an individual depends on her or his date of birth:

Date of birth	Preservation age
Before 1 July 1960	55
1 July 1960 to 30 June 1961	56
1 July 1961 to 30 June 1962	57
1 July 1962 to 30 June 1963	58
1 July 1963 to 30 June 1964	59
30 June 1963+	60

Main Residence Exemption

The AAT has held that the CGT main residence exemption was not available to a husband and wife (the taxpayers) on a unit they acquired with the intention of it being their main residence, but which they ultimately never lived in: [2009] AATA 41, *Re Couch and FCT* (the *Couch* case).

Background

The husband was in the Australian Defence Force and, between January 1995 and January 2006, was posted to various locations in Australia, Papua New Guinea and East Timor. The taxpayers acquired a unit in South Australia in June 2000 with the intention of residing in it as their matrimonial home.

The taxpayers contended that it only became practicable for them to reside in the unit when they returned to Adelaide in January 2006. They claimed that, because of the husband's postings, there had been no prior opportunity for them to live there. At the last minute, they decided to return, but the unit was still subject to a lease. They subsequently decided that the unit would not be suitable as a family home and, in December 2006, they sold it without having resided in it. In a private binding ruling, the Commissioner ruled that the capital gain derived on the disposal was subject to CGT and that the taxpayers were not entitled to the main residence exemption. He disallowed the taxpayer's objection to the ruling.

The Tribunal said the salient issue was whether the capital gain made on the disposal should be disregarded pursuant to s 118-110 of ITAA 1997 because the residence was considered to be their main residence for the entire ownership period.

Decision

The Tribunal was of the opinion that the taxpayers did not move into the unit when it was first practicable to do so. It said the evidence showed the taxpayers acquired the unit and were legally entitled to move into it immediately after settlement on 16 June 2000. However, they chose to lease the property out. It found that while the taxpayers had an intention to move into the unit at some time, they only moved into it when it became convenient for them to do so.

The taxpayers also contended that there were reasons beyond their control that prevented them from moving into the unit. In the Tribunal's opinion, the fact that the unit was continually leased and that the taxpayers were unable to occupy it because of the husband's postings outside of the state were not sufficient to invoke the provisions of s 118-135.

The Tribunal concluded that it was not satisfied that the main residence exemption in s 118-110 was available to the taxpayers in respect of the disposal of the unit and affirmed the Commissioner's objection decision.

Main residence exemption

Subdivision 118-B of ITAA 1997 provides an automatic exemption from CGT for a capital gain or loss that arises when a CGT event happens to a taxpayer's dwelling (or the taxpayer's ownership interest in it) if the dwelling qualifies as the taxpayer's main residence.

The term 'main residence' is not defined in either ITAA 1936 or ITAA 1997. However, in Taxation Determination TD 51, the Commissioner provides a list of relevant factors to assist taxpayers in deciding whether a dwelling is their main residence:

- the length of time the taxpayer has lived in the dwelling;
- the place of residence of the taxpayer's family;
- whether the taxpayer has moved his or her personal belongings into the dwelling;
- the address to which the taxpayer has his or her mail delivered;
- the taxpayer's address on the Electoral Roll;
- the connection of services such as telephone, gas and electricity; and
- the taxpayer's intention in occupying the dwelling.

The emphasis to be given to each of the factors will depend upon the circumstances of each particular case. The Commissioner acknowledges that there may also be other relevant factors which are not stated in the list. Therefore, the Commissioner says that whether a dwelling is a taxpayer's main residence will depend on the facts and circumstances of each case.

It is important to note that in the Determination, the Commissioner states that a mere intention to construct a dwelling or to occupy a dwelling as a sole or principal residence, but without actually doing so, is insufficient to obtain the exemption. The *Couch* case affirms the Commissioner's view.

Deferral of HELP Repayment

In a recent case, the AAT has declined a taxpayer's request to defer his compulsory HELP repayment for the year ended 30 June 2007 on the basis that there were no special reasons to grant the deferment [2008] AATA 1151, *Re Safe and FCT*.

In September 2007, the taxpayer applied to defer his repayment of \$2,090.65 for the year ended 30 June 2007 on the ground of special reasons. The Commissioner refused. The taxpayer's tax return for that year disclosed taxable income of \$46,459 which included Australian Government allowances and payments of \$9,840 and an ETP of \$35,621. The Commissioner issued a notice of assessment which included a HELP repayment amount of \$2,090.65 based on a debt of \$3,883.

The taxpayer contended that a number of grounds constituted special reasons under s 154-50(3) of the *Higher Education Support Act 2003* (the HESA) that justified deferment, including that:

- the bulk of his 2007 taxable income comprised a one-off superannuation payment which was received in April 2007;
- the ETP related to his last job which ended in 1992;
- he was only eligible to receive the payment because he was over 55 years and no longer in the paid workforce;
- the ETP was a one-off payment and he has no further entitlement to any superannuation payments'; and
- the payment of the HELP amount would result in the cancellation of a term deposit and the loss of interest.

The Tribunal noted that the taxpayer did not contend that repayment of his HELP liability would result in serious hardship and did not provide any evidence in this regard. It concluded that the circumstances cited by the taxpayer did not amount to special reasons under s 154-50(3).

Compulsory repayment of HELP debt

Taxpayers who have a HELP debt are not required to make any payments if their 'HELP repayment income' is below the minimum threshold for a financial year. The minimum threshold for the 2008/09 financial year is \$41,595. The HELP repayment thresholds and thresholds and rates for the 2008/09 financial year are:

Repayment income	Repayment rate
Below \$41,595	0.0%
\$41,595 to \$46,333	4.0%
\$46,334 to \$51,070	4.5%
\$51,071 to \$53,754	5.0%
\$53,755 to \$57,782	5.5%
\$57,783 to \$62,579	6.0%
\$62,580 to \$68,873	6.5%
\$68,874 to \$72,492	7.0%

Repayment income	Repayment rate
\$72,493 to \$77,247	7.5%
\$77,248 and above	8.0%

The HELP repayment income of a taxpayer for a financial year is the sum of:

- taxable income;
- total reportable fringe benefits (if any);
- net exempt foreign employment income; and
- net rental losses.

From the 2008/09 financial year, a taxpayer's repayment income may be reduced by the HECS — HELP benefit. A taxpayer is eligible for the HECS — HELP benefit if he or she:

- graduated from an undergraduate mathematics, statistics or science course of study from the second semester of 2008 onwards and is employed in a related occupation, including teaching those subjects in a secondary school; or
- is an early childhood teacher employed in a childcare centre, kindergarten or pre-school in a regional or remote area, Indigenous community or an area of high socio-economic disadvantage.

Exemption from repayment

A taxpayer is exempted from repaying her or his HELP debt in a financial year if the taxpayer:

- is entitled to a reduction in the Medicare levy; or
- is exempted from the Medicare levy under s 8 of the *Medicare Levy Act 1986*, ie depending on personal or family income, and the number of dependent children.

Deferring repayment

A taxpayer may apply to defer repayment of her or his HELP debt if:

- making the repayment has caused or would cause serious hardship; or
- there are other special reasons that make it fair and reasonable to defer making the repayment.

(See s 154-50(3) of the HESA.)

The term 'serious hardship' is not defined in the tax legislation or the HESA. In the guide *Repaying your HELP debt in 2008-09* published by the Tax Office, the Commissioner says that 'serious hardship' means that a taxpayer is unable to provide food, accommodation, clothing, medical treatment, education or other necessities for herself or himself or the taxpayer's family or people the taxpayer is responsible for.

The tax legislation or the HESA does not list the special reasons. In the guide, the Commissioner also says that special reasons include any unusual or exceptional circumstances that do not qualify as serious hardship but make it fair and reasonable for a taxpayer to defer making a repayment. The Commissioner advises the taxpayer to clearly explain the grounds and reasons for seeking a deferment using a special reason.

The Commissioner warns taxpayers that if their expenditure exceeds their income, it does not automatically mean that an application will be successful under serious hardship. A taxpayer must demonstrate that making a repayment has caused or would cause serious hardship. Alternatively, the taxpayer must demonstrate that special reasons apply to her or his circumstances.

The application form to defer a HELP debt is available from the Tax Office website at www.ato.gov.au/individuals/content.asp?doc=/content/76593.htm&pc=001/002/008/013/001&mnu=998&mfp=001/002&st=&cy=1 [accessed 13 February 2009].

Thomson Reuters comment

With the current economic climate, taxpayers who have a HELP debt and who are facing serious hardship or having other special reasons may consider applying to the Commissioner to defer their repayments.

However, it is important to clearly explain the reasons for seeking a deferral and provide a detail breakdown of all income and expenses.

Lump Sum Payment and Assessable Income

The AAT has held that a lump sum payment in arrears of weekly compensation entitlements was assessable in the year of income in which it was received by the taxpayer: [2008] AATA 1152, *Re Vargiomezis and FCT*.

Background

The taxpayer ceased employment with his former employer in July 2005 and commenced legal proceedings for compensation from the employer. In December 2006, the Magistrates' Court of Victoria ordered his former employer to pay him weekly compensation at a rate for no work capacity for the period July 2005 to January 2007. For the year ended 30 June 2007, the employer issued a PAYG summary which showed gross salary of \$49,158 and PAYG withheld of \$11,114.

During this period the taxpayer also received \$19,232 in disability support pension while waiting for his compensation claim to be finalised. As a consequence of the Court's order, Centrelink issued a Compensation Recovery Notice pursuant to s 1184 of the *Social Security Act 1991* which required repayment of the pension paid to the taxpayer for the period July 2005 to January 2007.

Decision

The Tribunal held that the lump sum payment representing arrears of weekly compensation entitlements was of an income nature and assessable as a replacement for a loss of income. The Court said the Commissioner had correctly assessed this income in the year in which it was received by the taxpayer, notwithstanding that part of the amount was referable to a prior year.

The Tribunal also ruled that the taxpayer was not entitled to reduce his assessable income from the compensation payment or claim a deduction for the disability support pension amounts recovered by Centrelink out of the compensation payment. Pursuant to the Compensation Recovery Notice, the taxpayer's employer was required to satisfy the taxpayer's obligation to repay the disability support pension amounts out of the compensation entitlement. As such, the taxpayer was deemed under s 6-5(4) of ITAA 1997 to have derived that amount at the time it was applied. Further, the Tribunal said no deduction was available under s 8-1 of ITAA 1997 as the repayment could not be said to have been incurred in gaining or producing the assessable income from the compensation entitlement.

The Tribunal said the taxpayer was not entitled to take advantage of s 59-30 of ITAA 1997 which allows a taxpayer to amend an earlier year return of income to exclude previously assessable income which is repaid in a subsequent year and not deductible. The Tribunal noted that the disability support pension was not assessable income in the years of receipt as it was specifically exempt under Item 6.2 of s 52-10(3) of ITAA 1997. To clear any doubt, the Tribunal said s 59-30 also provides that an amount received is not exempt income in the year of receipt if it is repaid in a later year. Furthermore, the Tribunal said s 59-30 ensures that any weekly compensation payments which subsequently replace the previously exempt disability support pension are assessable income. In this respect, the taxpayer was not able to preserve the exempt nature of the disability support pension out of the amounts of compensation received.

In addition, the Tribunal upheld the Commissioner's decision to deny the taxpayer a deduction for work-related travel expenses claimed in respect of public transport and taxis allegedly incurred by the taxpayer in attending his doctor, chemist and other shopping needs. The Tribunal considered that this unsubstantiated expenditure was private or domestic in nature.

Tax treatment of compensation

An amount paid as compensation or damages generally acquires the character of that for which it is substituted. Thus, compensation payments which are a substitute for income will be income according to ordinary concepts, even if received as a lump sum: see *FCT v Inkster* (1989) 20 ATR 1516; *Tinkler v FCT* (1979) 10 ATR 411; *FCT v Smith* (1981) 11 ATR 538; Taxation Determination TD 93/58. Obvious examples

are payments under a disability insurance policy to replace lost salary or wages and workers compensation payments.

In contrast, a lump sum paid as compensation for the loss of physical abilities, eg under workers compensation legislation for the loss of a limb, will be a capital receipt: see ATO ID 2004/943. A payment received by a taxpayer as compensation for pain, suffering and medical expenses, as a result of personal wrong, injury or illness, will also be a capital receipt: see ATO ID 2004/944.

Composite claims

Lump sum damages or out-of-court settlements may be a compromise of a claim made up of a number of items, some being of a revenue nature and others of a capital nature. In these circumstances, if the gross amount is not specifically allocated to the various items making up the claim and it cannot be dissected into its component parts, the compensation (which would be taxable if received in respect of a particular part of the claim) will be of a capital nature: see *McLaurin v FCT* (1961) 104 CLR 381 and *Allsop v FCT* (1965) 113 CLR 341.

In *FCT v CSR Ltd* (2000) 45 ATR 559, a lump sum was paid to a taxpayer by its insurer in settlement of an action arising from the insurer's refusal to indemnify the taxpayer in respect of asbestos-related claims. The Full Federal Court held that as the payment was for the release of a number of causes of action, some of which related to income and some to capital, it was an undissected capital amount (assessable as a capital gain). In contrast, in *[2004] AATA 1395* 58 ATR 1152, compensation paid to the taxpayer for the compulsory acquisition of land could be dissected into capital and interest components, even though the compensation was partly in the form of replacement blocks of land (the interest component was assessable income). An AAT decision that a single sum in settlement of all claims against a partnership which the taxpayer left was an undissected capital amount *[2006] AATA 538, Re McNally and FCT* 63 ATR 1117 was set aside on appeal and the matter remitted to the AAT. The Federal Court held that the AAT should have determined whether part or parts of the sum represented net income of the partnership to which the taxpayer was entitled: see *McNally v FCT* (2007) 65 ATR 738.

Where the different components of a lump sum compensation/settlement payment can be identified, those components that are of an income nature (eg to compensate for loss of income) will be assessable as such: Taxation Determination TD 93/58.

Receipts and Education Tax Refund

In two separate but related media releases, the Treasurer and the Acting Tax Commissioner Ms Jennie Granger have reminded parents to keep receipts relating to expenses incurred on their children's education if they wish to claim the Education Tax Refund.

Education Tax Refund

The Education Tax Refund was introduced by the *Tax Laws Amendment (Education Refund) Act 2008*, which received Royal Assent on 9 December 2008. The Bill inserted Subdiv 61-M into ITAA 1997 which contained the provisions relating to the refund.

From 1 July 2008, eligible families can claim up to 50% for eligible education expenses every year up to:

- \$750 for each child undertaking primary studies (ie a maximum of \$375); and
- \$1,500 for each child undertaking secondary studies (ie a maximum of \$750).

Families who receive Family Tax Benefit (FTB Part A) with one or more children undertaking primary or secondary studies and satisfy the schooling requirement (see below) are eligible for the refund. Families who would be eligible for FTB Part A in respect of a child but for the fact that they or the child are in receipt of payments under a prescribed educational scheme (eg Abstudy, the Veterans' Children Education Scheme, the Student Financial Supplement Scheme or the scheme under s 258 of the *Military Rehabilitation and Compensation Act 2004*), a social security pension (eg carer payment, sole parent pension, widow B pension or disability wage supplement), a social security benefit (eg youth allowance, Austudy payment, Newstart allowance or sickness allowance) or a payment under a Labour Market Program are also eligible for the refund.

Independent students (aged under 25) undertaking secondary studies at an educational institution such as TAFE may also be eligible. However, students attending general TAFE courses and/or university are not eligible.

The list of eligible education expenses is contained in s 61-640 and includes the following:

- computers;
- computer-related equipment;
- computer software;
- home internet connection;
- school textbooks and stationery; and
- prescribed tools of trade.

The acquisition cost of an item can be by way of purchase, lease or hire-purchase. Where applicable, the cost of an item can include associated costs such as repair and maintenance, and establishment costs.

The Tax Office has released a detailed FAQs on the refund which states that parents can only claim for items which they have paid for themselves. For example, a computer paid for by grandparents would not be eligible.

An expense is not eligible for the refund to the extent that the expense is deductible under another provision of ITAA 1997 or ITAA 1936, is subject to another tax offset, or a claimant received or is entitled to receive payment or property for the expenses: see s 61-640. The Tax Office's FAQs states that if an item is used for different purposes (eg education and business) only the amount that relates to the education of the child is eligible for the refund. The Tax Office has also stated various items which it considers not eligible for the refund. These include computer games and consoles, school fees, sporting equipment, musical instruments, tuck shop expenses and transport.

The refund is claimed through the tax system on lodgment of an income tax return. Those not required to lodge an income tax return can claim the refund through the Tax Office by lodging a separate form at the end of the income year. The Tax Office expects this form to be available from July 2009.

Schooling requirement

A child satisfies the schooling requirement contained in s 61-630 if the child undertakes primary or secondary studies (which can include home schooling) on at least one day in a six-month period beginning on 1 July or 1 January.

The division of a financial year into two lots of six-month periods means that a taxpayer will still qualify for the refund, albeit a partial refund, if the child enters or leaves school part-way through the financial year, or for another reason only satisfies the criteria for one-half of the financial year.

It is important to note that where a child transitions from primary to secondary school in the same financial year, the secondary school limit of \$750 will apply.

In a case where a child ceases full-time study, a partial refund is available for that part of the financial year that the child meets the schooling requirement. It is also a requirement that the Commissioner must be satisfied that the child would have been an 'FTB child' for the year, disregarding any adjusted taxable income that equals or exceeds the cut-out amount.

Calculation of refund

The amount of refund that a taxpayer can claim in a financial year is the lesser of either:

- one-half of the sum of all the eligible expenses incurred in a current year and any excess education expenses incurred in the previous financial year; and
- the refund limit permissible for the financial year.

Any eligible expenses above a taxpayer's refund limit for a financial year can be carried forward to the following financial year as long as the taxpayer is still eligible. It is of paramount importance to realise that any excess can only be carried forward for one year. Eligible expenses not claimed will automatically lapse.

Whether a taxpayer has excess eligible expenses is determined by comparing half of the taxpayer's education expenses to his or her refund limit. The excess amount is then doubled to restore the amount to its original value and carried forward to the following financial year.

The refund limit is calculated using a four-step method as prescribed by s 61-660:

1. Start with the maximum offset limit, that is, \$750 for a secondary school student or \$375 for a primary school student.
2. Add up the days in the financial year in which the taxpayer satisfies the entitlement criteria for the refund.
3. Divide the result of step 2 by the number of days in the financial year rounding the result to two decimal places.
4. Multiply the applicable limit by the result in step 3.

Beware — Tax Refund Scam

The Tax Office has issued two separate but related media releases in which it warns taxpayers of two e-mail scams purporting to offer a refund.

The scams operate by requesting for a taxpayer's credit card and personal details.

Generally, the subject heading of the emails are titled:

- 'Get refunds on your Visa or Master Card';
- 'Notification — Please Read'; or
- 'Australian Taxation Office — Please Read This'.

The Tax Office does not send e-mails requesting personal information including credit card details.

Tax Practice Update

Tax Return Not Necessary Status

The Tax Office has issued a reminder that each year it receives data from Centrelink, the Department of Veterans' Affairs and other external sources, including financial institutions. This data is matched with taxpayers' individual records to identify those who may not need to lodge an income tax return for that year. It says those taxpayers may then be allocated a 'current year income tax return not necessary' status. This status is not set for taxpayers who had tax deducted from their pensions, allowances or payments or where information held by the Tax Office indicates that they may have an obligation to lodge a return (eg they received other income during the year).

The Tax Office says the setting of the not necessary status on the 2008 financial year means that those clients will not appear on some tax agent's electronic lodgment service (ELS) lodgment lists, however, the Tax Office says they will remain on their client list. This year the data-matching process will take place in January to February 2009.

Income test and deeming rates

From 27 January 2009, the social security income test upper deeming rates for pensions and allowances have been lowered to take into account deceased returns on deposits or other investments.

Note that the lower deeming rates were adjusted downward in November 2008.

The new upper deeming rates are:

- *for a single person* — 4% (previously 5%) for the balance of financial investments over \$41,000;
- *for a couple (both receiving a pension)* — 4% (previously 5%) for the balance of the couple's total combined financial investments over \$68,200;

- **for a couple (one person receiving a pension and the other receiving an allowance)** — 4% (previously 5%) for the balance of the couple's total combined financial investments over \$68,200; and
- **for a couple (both receiving an allowance)** — 4% (previously 5%) for the balance of the couple's total combined financial investments over \$34,100 of their total combined financial investments.

The changes to the deeming rates mean that part-rate pensioners paid under the income test may receive an increase in their pension payments. However, pensioners already paid at the maximum rate will have no change to their pension payments.

Payments affected by the decrease to the deeming rates include:

- Age Pension;
- Disability Support Pension;
- Carer Payment;
- Parenting Payment; and
- Newstart Allowances.

Veterans

The changes to the social security income test upper deeming rates also apply to veterans. Department of Veterans' Affairs payments which are affected by the upper deeming rates include service pension and income support supplement.

Veterans who already are paid at the maximum rate have no change to their pension payments.

Currency:

This issue of Client Alert takes into account all developments up to and including 13 February 2009.

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