

Super Update March 2009

New Superannuation rules for temporary residents from 1 April 2009

Overview of Changes

In May 2008 the Government announced its intention to change superannuation arrangements for temporary residents. The proposed changes generally relate to a temporary resident's ability to access superannuation benefits, and a requirement to transfer the superannuation balance of a former temporary resident to the Australian Taxation Office following their departure from Australia.

The Government changes underwent numerous and significant changes before the legislation was passed through Parliament in early December 2008 and the new rules applying to temporary residents' superannuation, will generally take effect from 1 April 2009. These changes also include an increase in the level of final withholding tax applying to Departing Australian Superannuation Payments.

Summary of what's changed

Conditions of release

From 1 April 2009, a member who is a temporary resident¹, or was formerly a temporary resident, will only be able to access their superannuation fund under a limited number of conditions of release.

These are:

- for the payment of a Departing Australian Superannuation Payment (DASP),
- incapacity of the member (temporary or permanent),
- terminal illness of the member, or
- death of the member.

This effectively means that the other normal conditions of release (such as retirement, reaching preservation age, or age 65, etc) will no longer be available to a member who is a current or former temporary resident; unless any of the normal conditions of release were satisfied before 1 April 2009.

Members who are Australian or New Zealand citizens, a permanent resident of Australia, or holders of a retirement visa (subclasses 405 and 410), will not be regarded as temporary residents. Consequently, they can continue to access their superannuation benefits upon satisfying any relevant condition of release.

¹ A 'temporary resident' is defined as a holder of a temporary resident visa under the Migration act 1958.

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Likewise these measures do not apply to individuals who have never been a temporary resident of Australia and certain public sector funds are excluded from these new rules.

What happens if the condition of release is satisfied prior to 1 April 2009?

Where a current or former temporary resident meets one of the other normal conditions of release (e.g. retirement, reaching preservation age etc) prior to 1 April 2009 they will not be subject to the changes conditions of release restrictions outlined above.

In many such cases this temporary resident, having met the condition of release, e.g. retirement, is likely to have cashed their entire superannuation balance at that time or may have already commenced an income stream meaning the new rules will not affect them. Under these circumstances the benefits taken would not attract the DASP tax rules (see below). They would instead attract the usual tax rules that apply to superannuation benefits, including tax free benefits after age 60.

Alternatively, the temporary resident may have what could become unrestricted non-preserved monies still accumulating in their superannuation fund. And it is in these circumstances that failure to properly consider the new rules and take action will disadvantage the member.

Where the member could access the benefit because the normal condition of release took place before 1 April 2009, but fails to do so, their benefit will be transferred to the ATO under the new rules outlined below. The subsequent claiming back of the amount transferred to the ATO will be taxed under the DASP rules rather than the normal tax rules that would have applied if the member had accessed their superannuation benefit from the fund.

Tax considerations from 1 April 2009

New tax rates on DASPs

From 1 April 2009, the Medicare tax rates applicable on the lump sum Departing Australian Superannuation Payment, will increase. The new and current tax rates are:

Component	Flat Tax Rate* from 1 April 2009	Current Flat Tax Rate* to 31 March 2009
Tax-Free	Nil	Nil
Taxable: Taxed Element	35%	30%
Taxable: Untaxed Element	45%	40%

*Medicare Levy is not payable on these rates.

In addition, the individual may also be subject to tax on the superannuation lump sum in their country of residence.

These rates apply where the DASP payment is made to the former temporary resident from the superannuation fund after their departure from Australia. They also apply to amounts claimed back from the ATO.

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Administration of superannuation balances by the Australian Taxation Office (ATO)

A new administration regime for the superannuation accounts of former temporary residents will come into effect from 1 April 2009. Broadly under this regime the trustee of the superannuation fund will be required to remit a particular amount of the superannuation balance of a temporary resident to the ATO upon its request.

For the ATO to make such a request, all the following conditions must be met:

- the individual has left Australia,
- at least 6 months has passed since the later of:
 - their departure from Australia, and
 - their visa ceasing to have effect,
- the individual is not the holder of a temporary visa,
- the individual is not the holder of a permanent visa, nor have they lodged an application for a permanent visa which has not been determined, and
- the individual is not an Australian citizen or a New Zealand citizen.

The transfer to the ATO of the superannuation balance of a former temporary resident following departure from Australia is a significant development. Transfer to the ATO occurs where they have not claimed their benefit from their superannuation fund within 6 months of their visa expiring or being cancelled.

This means that the former temporary resident will generally have at least 6 months after leaving Australia to claim their benefits directly from the superannuation fund subject to the allowable conditions of release discussed earlier; otherwise the benefit will be transferred to the ATO.

Amounts transferred to the ATO

Once the trustee of the superannuation fund receives a request from the ATO, it will effectively need to remit the required amount of the superannuation balance of the former temporary resident to the ATO by a specified remittance date. The time frame for remittance may be as short as 28 days from receipt of the request, but could be up to 7 months, depending on the remittance date applying.

In practical terms, the amount to be transferred to the ATO will be the amount that would have been payable to the member as the date of transfer less any superannuation balance supporting an income stream.

No DASP withholding tax applies at the time the amount is transferred to the ATO.

A former temporary resident is still able to claim their benefit directly from superannuation fund after the trustee has received the request for transfer by the ATO. However, this must occur before the trustee remits the amount to the ATO.

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Claiming super from the ATO

Once benefits are transferred from a superannuation fund to the ATO, the ATO will hold the superannuation balance indefinitely without interest accruing.

Once transferred to the ATO, should the former temporary resident (or legal personal representative) wish to access their superannuation, they will need to do so by contacting the ATO.

Note: all superannuation benefits paid by the ATO to the member will be treated as a DASP and taxed as such, regardless of the individual's circumstances. This means that there will be no tax concessions applying even if the benefit is claimed due to death, terminal illness or incapacity.

For this purpose the tax components of the ATO paid amount will remain the same as those applying at the time of their receipt from the transferring superannuation fund.

Becoming a citizen or permanent resident

Should the former temporary resident subsequently become a citizen of Australia or New Zealand, or become a permanent resident of Australia, the transferred superannuation balance can be accessed as a lump sum from the ATO under the DASP tax provisions..

In these cases where Australian citizens or permanent residents are involved, the amount held by the ATO will accrue interest up to the date of payment if the person either had left Australia after 30 June 2007 or held a temporary visa after 30 June 2007. The interest accrued will increase the Taxable Component – Untaxed Element of the benefit.

When accessing benefits from the ATO under these circumstances, if the individual wishes, they can direct the ATO to make a payment of their benefits (net of DASP tax) to their chosen superannuation fund. This payment will create a tax free amount in their superannuation fund (as it will have already been subject to tax).



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