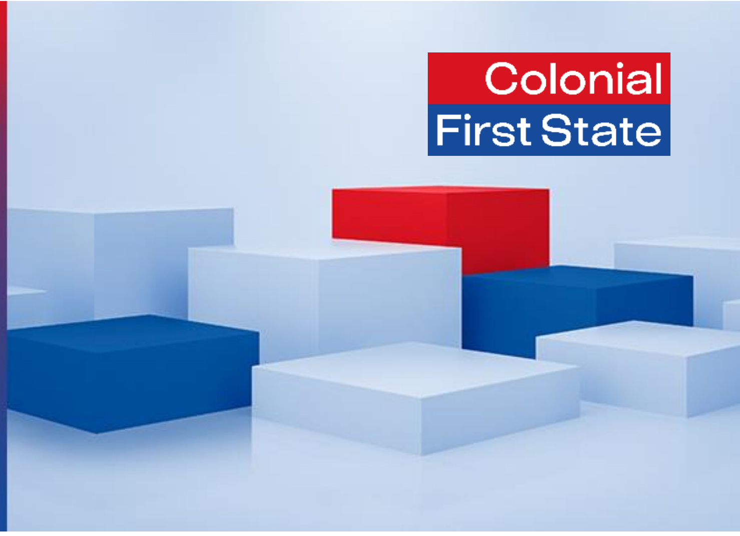
FirstTech Strategic Update



FHSS scheme flexibility
Changes pass parliament, yet to commence

Tim Sanderson, Senior Technical Manager, FirstTech | 20 September 2023

Changes to improve access to the First Home Super Saver (FHSS) scheme have recently passed parliament. However, the commencement date of these reforms is still uncertain and may not occur for up to 12 months[1].

This article explores the key changes that remove some of the current pain points people experience when trying to use the scheme, the uncertainty around the commencement of these reforms, as well as some transitional rules included in the legislation where further regulator clarification is likely required.

FHSS scheme recap

Introduced effectively from 1 July 2018, the FHSS scheme allows people to make eligible voluntary contributions to super, and then withdraw up to $50,000[2] of those contributions (plus an associated earnings amount) to help with purchasing or constructing their first home.

Eligible voluntary contributions include personal non-concessional or concessional (deductible) contributions, and non-mandated employer contributions such as salary sacrifice, made from the 2017-18 financial year onwards.[3]

After making contributions, a person who wishes to withdraw under the scheme must first request a FHSS determination from the ATO, followed by a request that the ATO arranges the release of their contributions and earnings.

To avoid having to recontribute the withdrawn funds or pay additional tax, the person must enter into a contract to purchase or construct their first home between 14 days prior to, and generally 12 months after, requesting the release of their funds.

To be eligible to request an FHSS determination (and therefore use the scheme) a person must:

- be aged 18 or over, and
- have not previously requested a release of super benefits under the FHSS scheme, and
- never have held a freehold interest in a real property in Australia, certain long-term leasehold of land in Australia, or a company title interest in land in Australia (unless the ATO determines the member has suffered a financial hardship).

For further detail about the scheme, see section 8.14 of the **FirstTech Super and Retirement Income Streams guide**.

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[1] The start date is the earlier of a date fixed by Proclamation and 21 September 2024.

[2] An annual limit of $15,000 pa of eligible contributions also applies.

[3] They do not include SG or other mandated employer contributions, spouse or child contributions, structured settlement contributions or contributions made under the lifetime CGT cap. Any contributions made to a defined benefit interest or a constitutionally protected fund is also ineligible.

What are the key changes?

The key changes in the Act[4] that has now passed parliament and received royal assent on 20 September 2023 are:

- Allowing a person who enters into a contract to purchase or build their first home up to 90 days to request the release of their funds under the scheme.
- Allowing people to request an FHSS determination if they have already entered into a contract to purchase their first home, but are not yet the legal owner.
- Allowing users of the scheme to amend or revoke requests for FHSS determinations and releases.

Additional time to request release

The changes in the Act mean that a person using the scheme must enter into a contract to purchase or construct their first home within the period:

- starting 90 days before making a release request under the scheme, and
- ending 12 months after making a release request under the scheme.

Many people using the scheme will request the release of their funds, then go searching for a first home – this includes people who will need the money released to help pay for their deposit. They are not impacted by this change in the Act.

Others will find their home first and enter into the purchase contract, pay the deposit with their available funds, then make a release request (for example to help fund the payment required at settlement).

This second cohort of people currently have 14 days from the time of entering into a contract to request the release of the funds under the scheme – a short period which requires the person to take quick action at a time when there is often a lot of other things happening surrounding the first home purchase.

This change in the Bill allows a longer period of 90 days for these people to request the release of their funds once they have entered into a contract, providing more flexibility.

FirstTech comment – when is the money needed?

While the 90-day period mentioned above will provide clients with more flexibility, it is important to ensure that money is released under the scheme by the time it is needed.

The standard timeframe from contract exchange to settlement may be far shorter than 90 days (for example in NSW the standard contract settlement period is 42 days), and the **ATO indicates** that release requests can take 15-20 days to process and pay.

In the absence of a long settlement period, where a client needs the release amount to settle on the property, it will be important for them to request the release as soon as possible, and well within the 90-day period.

Allowing FHSS determinations after entering into contract

One of the current eligibility requirements to request an FHSS determination (and therefore use the scheme) is that a person must not have ever held a freehold interest in real property in Australia.[5] The ATO has confirmed that a person will in many cases have a freehold interest once they enter into a contract for a property, not just from the settlement date.[6]

Under current rules, this means that a person looking to purchase their first home must always request an FHSS determination before entering into a contract to purchase their first home, even if they are not requesting the release of their funds until after signing the contract.

For the people who want to find their desired property first, then request the release of their funds under the scheme later – this current rule can be a huge trap which has caught many people out, as interaction with

[4] *Treasury Laws Amendment (2023 Measures No. 3) Act 2023,* Schedule 4.

[5] Or certain long-term leasehold of land in Australia, or a company title interest in land in Australia. Note, this requirement does not apply if the ATO determines the person has suffered a financial hardship.

[6] ATO Guidance Note GN 2018/1.

the ATO (to get a determination) is still the first required step.

However, the Act changes the scheme eligibility requirement around property ownership to say that a person must not have ever held 'a legal interest in an estate in fee simple in real property in Australia'.[4] This broadly means that a person entering into a contract to purchase a property won't be considered a property owner until the time that the contract is completed and they are the legal owner.

This change in the Act means that a person can enter into a contract (to purchase their first home) as the first step, then apply for an FHSS determination, then request the release of their funds under the scheme within 90 days of signing the contract.

As mentioned in the previous section, where funds released under the scheme will be needed to settle the property, a client may need to take action quickly to request an FHSS determination[7] and then a release request within the time between signing the contract and settlement date.

Amending and revoking requests

Currently, a person cannot revoke or amend requests for FHSS determinations and release requests once made.

The Act changes this to allow a person to generally revoke or amend these requests, provided an FHSS scheme amount has not yet been paid to the person.[8]

Any amended requests for FHSS determinations or releases must still comply with the underlying criteria and policy intention of the scheme. For example, someone who now owns a home cannot submit an amended request for an FHSS determination and then have an amount released to them under the scheme.

Where a super fund has already paid an amount to the ATO under the scheme that has not yet been released to a person, and due to the revocation or amendment, the amount is no longer payable, the Act allows the ATO to return the amount to the super fund (or in rare cases pay it to the individual or their LPR where a full condition of release has been satisfied).

Amounts returned to a super fund as a result of this change:

- are not included in the fund's assessable income (or the person's assessable income).
- do no count towards any of a person's contributions caps.
- have the same tax component proportions as the released amount (ensuring that returned amounts are subject to the same taxation treatment as if they had never been released to the ATO).

Transitional rules

The Act also introduces some special transitional provisions, which are aimed at extending the flexibility provided by the amendments discussed above to users who have had an FHSS determination made for them before these amendments commence and who have since become a property owner.

The Explanatory Memorandum to the Bill indicates that these special rules will only apply:

- to FHSS determinations made before the commencement of the Bill
- where the individual has begun holding the relevant interest in real property or land after the relevant determination was made
- for the period of three years from commencement of the Bill
- if the person has not already been paid an FHSS scheme amount, and
- to allow an individual to release an FHSS Scheme amount up to the maximum amount the individual could have released at the time the original determination was made.

Unfortunately at the time of writing it is unclear exactly how these transitional rules could work or which clients will be able to benefit from them.

However, it appears that clients who had previously applied for a determination but couldn't have the amount released successfully, perhaps because the determination was applied after entering into a contract to purchase their first home but before becoming the legal owner (incorrect under current

[7] It's FirstTech's understanding that the process of requesting an FHSS determination is a quick process that can be completed by a client in ATO online services via myGov.

[8] An FHSS Scheme amount is effectively considered to be paid to a person if the ATO has begun the process of paying the amount to the person, even though they may not have received the amount yet.

rules) may potentially become eligible to release funds under the scheme because of these transitional rules.

We will likely need to wait for further specific guidance from the ATO before knowing exactly how these transitional rules will operate.

When do these changes commence?

Commencement date

Even though the Bill has passed both houses of parliament, the schedule of the Bill representing the FHSS scheme changes doesn't commence / become law until the earlier of:

- a single day to be fixed by proclamation, and
- 21 September 2024 (ie the day after the 12 month period beginning when the Act receives Royal Assent).

The Explanatory Memorandum says that this commencement approach is necessary to ensure that the ATO and other stakeholders have sufficient time to update their systems to administer and comply with the technical changes. At the time of writing, no date of proclamation had yet been fixed.

Application date

Once the changes have commenced (see above), they are generally then retrospective and apply to FHSS scheme determinations made on or after from 1 July 2018.

However, the property ownership change allowing a person to be eligible to request an FHSS determination between signing a contract and settlement applies to FHSS determinations made on or after the commencement date.

How to contact us

Adviser Services 13 18 36

firsttech@cfs.com.au