Ruling Compendium – TR 2012/6

This is a compendium of responses to the issues raised by external parties to draft Taxation Ruling TR 2011/D6 – Income Tax: deductibility under subsection 295-465(1) of the *Income Tax Assessment Act 1997* of premiums paid by a complying superannuation fund for an insurance policy providing Total and Permanent Disability cover in respect of its members.

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft Ruling.

The following abbreviations are used in this compendium: *Income Tax Assessment Act 1997* (ITAA 1997), *Income Tax Assessment Regulations 1997* (ITAR 1997), *Superannuation Industry (Supervision) Regulations 1994* (SISR), *Total and Permanent Disability* (TPD).

Summary of issues raised and responses

Issue No.	Issue raised (Unless otherwise noted, references are to examples and paragraphs in TR 2011/D6)	ATO Response/Action taken (Unless otherwise noted, references are to examples and paragraphs in TR 2012/6)
1	*Interpretation of 'substantially the same' in subregulation 295-465.01(2) of the ITAR 1997 – paragraph 29 (and paragraph 203)* The words 'substantially the same' should be interpreted as allowing some conditions which are slightly less restrictive than the conditions described in subregulation 295-465.01(5) (as well as conditions which are more restrictive than). Commissioner's interpretation not consistent with the Regulations. Interpretation in paragraph 29 implies that where the actual conditions are substantially the same as the conditions specified in subregulation 295-465.01(5) but may be marginally more generous than those conditions, the specified proportion cannot be used.	*Interpretation of 'substantially the same' in subregulation 295-465.01(2) of the ITAR 1997 – paragraphs 31 and 32 (and paragraphs 208 to 210)* Subregulation 295-465.01(1) of the ITAR 1997 provides that the proportions specified in the table in that subregulation for certain types of TPD insurance policies may be treated as being attributable to the fund's liability to provide benefits referred to in section 295-460 of the ITAA 1997. The TPD conditions specified in the table are defined in subregulation 295-465.01(5) of the ITAR 1997. Subregulation 295-465.01(2) of the ITAR 1997 is a qualifying provision and identifies the circumstances in which the proportions specified in the table in subregulation 295-465.01(1) can be used to claim the deduction. It states that the proportions will be deductible ***only*** where the conditions in the insurance policy are 'either more restrictive than, or have substantially the same meaning as' the conditions described in the definition of the policy in subregulation 295-465.01(5) of the ITAR 1997.

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	Substantially the same implies there may be minor differences – it does not mean that, where there are minor differences, those differences can only be those which make claiming more restrictive. The term 'substantially the same as' was added following the consultation process and industry concerns on the difficulty of trustees determining whether marginal differences in policy wording would result in less restrictive conditions or not. The varied wording used in different insurance policies to define substantially the same circumstances means it is often extremely difficult to determine conclusively that policy conditions can never produce an insured event that would not meet the conditions in the Regulations. The option for *'substantially the same meaning'* allows trustees to have appropriate flexibility in comparing the terms of their insurance policy with the Regulations. Perhaps an example should be added where the policy conditions have 'substantially the meaning as' the conditions in subregulation 295-465.01(5).	When read in isolation it may be possible to interpret the phrase 'substantially the same meaning as' as including conditions which might be *slightly* less restrictive than those conditions described in subregulation 295-465.01(5). However subregulation 295-465.01(2) contains the composite phrase 'more restrictive than or substantially the same meaning as'. Ascribing a meaning of 'less restrictive than' to the second part of that phrase would render subregulation 295-465.01(2) otiose – that is, it would not provide any qualification as to what types of policy conditions the regulations applied to. The ruling acknowledges in paragraph 31 that the language used to describe the cover in the insurance policy need not be expressed in the same language used to describe the corresponding condition in subregulation 295-465.01(5). However in order to meet the requirements of subregulation 295-465.01(2), the conditions described in the policy must produce the same range of insured events that can come within those conditions in subregulation 295-465.01(5). Conditions which produce a greater range of events could not be considered to be either *more restrictive than* or *have substantially the same meaning as* the conditions in subregulation 295-465.01(5) of the ITAR 1997. Minor inconsequential differences in wording between the conditions in a policy and the corresponding definition in subregulation 295-465.01(5) of the ITAR 1997 will not prevent a trustee from using the proportions set out in the table in subregulation 295-465.01(1) of the ITAR 1997. Paragraph 210 provides an example where a policy condition would be considered 'substantially the same' as the corresponding condition in subregulation 295-465.01(5) of the ITAR 1997.

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2	*Meaning of 'specified in the policy' in item 5 of the table in subsection 295-465(1) of the ITAA 1997– paragraph 24* The ruling should include some commentary on what this phrase means. A broad interpretation should be adopted, for example including specification in a letter issued by an insurer for this purpose and relating specifically to that policy. It is overly restrictive to require the relevant proportion to be specified in the policy itself. It should also be possible for the insurer to notify the relevant proportion separately from the policy. Suggested rewording of subparagraph 24(b): *'the insurer specifies in writing the part of the premium paid that relates to those particular insured events'.* A life policy document (including TPD and other risks) is a form of contract which is intended to set out the relationship between the policy owner and the issuer. Life companies may issue a range of documents which are associated with their policies and each of these documents should be capable of satisfying the 'policy' concept for the purposes of Item 5 disclosure. Without limiting the extent of these documents, it is submitted that each of the following documents could all be considered to fall with an expanded 'policy' definition for this purpose: • Policy schedules	*Meaning of 'specified in the policy' in item 5 of the table in subsection 295-465(1) of the ITAA 1997– paragraph 26* In recognising that an insurance contract may comprise more than one document, paragraph 26 now clarifies that the relevant part of a premium may be specified in any document which the insurer stipulates in writing as forming part of the policy.

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	• Product disclosure statements • Premium tables • Quotation documents and associated documents • 'Welcoming' documentation • Letters issued specifically to trustee policyholders for the purposes of section 295-465 premium disclosures • Any other document that the insurer specifies in the policy document as being included in the policy	
3	*Example 1 – paragraph 42* We consider that, in the circumstances described in the example, the fund continues to have a contingent liability to provide a 'disability superannuation benefit', as it will be required to pay such a benefit on the contingency of the member satisfying the permanent incapacity condition of release. We understand the ATO rejects this argument and we suggest an alternative approach – Once the own occupation benefit has been paid to the fund by the insurer, any insurance for the member will generally cease, and the trustee will no longer be claiming a deduction for insurance premiums in respect of that member in future years. Subject to appropriate choice made under section 295-465(4) of the ITAA 1997, the fund may subsequently claim a deduction under subsection 295-470 of the ITAA 1997 if a death or	*Example 1 – paragraph 44* The view of the law as expressed in the ruling is that insurance premiums are deductible only to the extent that the premium is for a policy that relates to the fund's liability to provide benefits to a member of the fund in respect of 'disability superannuation benefits' under the ITAA 1997. The extent to which a premium will be in respect of a liability to provide disability superannuation benefits is determined by reference to the nature and scope of the insured event(s), the occurrence of which will lead to a payout under the policy, and the terms of the fund's trust deed which requires the trustee to provide benefits to its members. It is the degree of certainty that the requirements of a 'disability superannuation benefit' will be met ***as a consequence of*** an insured event occurring that is critical in determining the extent to which the premium will be deductible. The application of section 295-470 of the ITAA 1997 in claiming a deduction for a fund's future liability to pay benefits is out of scope of the ruling.

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	disability benefit is subsequently paid in respect of member. Therefore it would be useful if the ruling could include the ATO's views in relation to such claims, particularly in circumstances where the fund continues to claim deductions for premiums in respect of other members.	
4.	*Alignment between the 'permanent incapacity' condition of release and the definition of 'disability superannuation benefit' – paragraphs 161 and 162* Paragraphs 161 and 162 in the Explanation section of draft ruling describes the Commissioner's view on the alignment between the 'permanent incapacity' condition of release in the SISR and the definition of 'disability superannuation benefit' in the ITAA 1997. These paragraphs form an expression of the Commissioner's opinion, and this issue should be covered in the Ruling section as well.	*Alignment between the 'permanent incapacity' condition of release and the definition of 'disability superannuation benefit' – paragraph 21 and paragraph 167* The Commissioner's view on the alignment of the 'permanent incapacity' condition of release in the SISR and the definition of 'disability superannuation benefit' in the ITAA 1997 is expressed at paragraph 21 in the ruling. Paragraph 167 has been expanded to clarify this view.
5.	*General comments* Ruling is unnecessarily long and detailed in a number of areas, making it harder for readers to identify relevant information and reducing the effectiveness of the document. The Ruling section and Example section should be shortened considerably as these sections are likely to have the greatest use in practice. Main areas of concern: (i) Greater use of plain English – some paragraphs are worded in an overly legalistic	*General comments* These general comments have been noted. The length and detail provided in the Ruling is appropriate given the nature and content of the product. Where specific feedback was given about the clarity of a particular paragraph of the Ruling, that paragraph has been reworded to improve the clarity.

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	manner (ii) Repetition and unnecessary information in the Ruling section (iii) Repetition in the Examples section – it would be clearer if duplication between examples was reduced so successive, similar examples concentrate on their points of distinction.	
6.	*Definition of 'insured event' – paragraph 8* The definition refers to 'insured's right'. We believe this should be amended to 'policy owner's right' to properly reflect that ownership of the policy rests with the superannuation fund trustee.	*Definition of 'insured event' – paragraph 8* The definition of 'insured event' in paragraph 8 has been amended to refer to the 'policy owner's right' to claim a benefit.
7.	*Alignment of policy terminology with definition of disability superannuation benefit – paragraph 21* While it is helpful that paragraph 21 clarifies that policy terminology need not exactly match the definition of disability superannuation benefit, a number of trustees have questioned whether the policy wording needs to specifically reflect the 'two medical practitioners' test. Confirmation that this is not a requirement should be included in the ruling. Suggested wording: *'By way of example, it is not necessary that the policy terms express the need for two medical practitioners to certify total disability to the insurer. Rather the Commissioner accepts that, in assessing and admitting liability under these policies, life insurers will apply at least equivalent tests as part of their commercial procedures'.*	*Alignment of policy terminology with definition of disability superannuation benefit – Examples 2, 4, 5, 6, 7 and paragraph 169* Examples 2, 4, 5, 6 and 7 have been amended to include the Commissioner's view that while a condition in a policy may not mandate the requirement for two medical certificates, it is expected that an insurer would not payout on a claim without seeking the advice of at least two medical practitioners, and that for practical purposes this would equate to the certification required for a disability superannuation benefit. Paragraph 169 has been expanded to clarify this view.

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8.	*In what form does the specified part of premium in item 5 of the table in subsection 295-465(1) of the ITAA 1997 need to be expressed* It is not clear whether disclosure needs to be of a specific dollar amount, or whether a proportional (percentage) disclosure would be acceptable. A clarifying statement should be included in the Ruling section to the effect that disclosures for the purposes of determining deductions may be expressed either in dollar or percentage terms.	*In what form does the specified part of premium in item 5 of the table in subsection 295-465(1) of the ITAA 1997 need to be expressed – paragraph 26* Paragraph 26 clarifies that the specified part of the premium identified in item 5 of the table in subsection 295-465(1) of the ITAA 1997 may be expressed as either an amount, or as a proportion or percentage of the total premium amount.
9.	*Can item 6 apply if the deductible part of a premium is specified in the policy?* If an insurance company specifies the part of a premium in a policy which relates to insured events that are aligned with the 'disability superannuation benefit' definition, will this preclude a fund trustee from seeking an actuary's certificate under item 6 of the table in subsection 295-465(1) of the ITAA 1997?	*Can item 6 apply if the deductible part of a premium is specified in the policy?- paragraphs 27, 38 and 217* Paragraph 27 addresses this where it states that subsection 295-465(1A) of the ITAA 1997 provides that any amount of the premium which cannot be deducted under item 5 in the table in subsection 295-465(1) of the ITAA 1997 may still be deductible under item 6 in the table in subsection 295-465(1) of the ITAA 1997. However for clarification, paragraph 38 explains that where an actuary's certificate specifies a greater amount than that identified in the policy as being attributable to a fund's liability to provide a benefit prescribed in section 295-460 of the ITAA 1997, the fund may claim a deduction under item 5 of the table in subsection 295-465(1) of the ITAA 1997 for the amount specified in the policy, and a deduction under item 6 of the table in subsection 295-465(1) of the ITAA 1997 for the amount in excess of this amount as specified in the actuary's certificate.

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10.	*Ruling should include TPD policies where a benefit is paid to a fund member who is permanently incapable of performing the 'activities of daily working'.* Policies exist where a payment is made in the event a person, as a result of illness or injury, is unable to perform at least two of the five everyday working activities without the physical assistance of another person, despite the use of appropriate assistive aids. It is highly likely that a payment made to a person who meets these conditions would also meet the requirements of the disability superannuation benefit. Suggest an example be included in the ruling in relation to a policy with these terms, with the conclusion that the premium would be deductible.	*Ruling should include TPD policies where a benefit is paid to a fund member who is permanently incapable of performing the 'activities of daily working'.* The general principle of law expressed in the ruling is that insurance premiums are deductible only to the extent that the premium is for a policy that relates to the fund's liability to provide benefits to a member of the fund in respect of 'disability superannuation benefits' under the ITAA 1997. The extent to which a premium will be in respect of a liability to provide disability superannuation benefits is determined by reference to the nature and scope of the insured event(s), the occurrence of which will lead to a payout under the policy, and the terms of the fund's trust deed which requires the trustee to provide benefits to its members. Where the occasion of an insured event gives rise to a liability under or in accordance with the terms of the fund's trust deed to provide a 'disability superannuation benefit' to a member, then the premium, or part thereof, paid in relation to such an event will be deductible. It is not necessary to include further examples of insured events to explain this principle.
11.	*Premiums for particular policy features* It is common for insurers to offer certain features or options in relation to TPD insurance cover. These features or options do not involve the payment of any benefits, but rather provide for either a waiver of a premium or a waiver of underwriting for future increases to sums insured if specified events occur. In some cases, the insurer will not charge an additional amount of premium for such features, that is, the premium would be the same if the feature or option was	*Premiums for particular policy features – paragraphs 18, 40 and 223* The view of the law as expressed in the ruling is that insurance premiums are deductible only to the extent that the premium is for a policy that relates to the fund's liability to provide benefits to a member of the fund in respect of 'disability superannuation benefits' under the ITAA 1997. The extent to which a premium will be in respect of a liability to provide disability superannuation benefits is determined by reference to the nature and scope of the insured event(s), the occurrence of which will lead to a payout under the policy, and the terms of the fund's trust deed which requires the trustee to provide benefits to its members.

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	not built into the policy. In other cases, an additional amount of premium may be charged for such a feature or option. The events that trigger the premium waivers or underwriting waivers are not 'insured events' as defined in the ruling as they do not result in the payment of benefits under the insurance policy. The ruling should confirm that the inclusion of these features should not impact on the extent to which the premium is deductible, regardless of whether the deductible portion is determined in accordance with item 5 or 6 in the table in subsection 295-465(1) of the ITAA 1997, and if item 6, regardless of whether it is determined based on actuarial certification or the percentages prescribed in the Regulations.	Paragraph 18 clarifies that provided any additional features or options included in a policy do not result in a payment which is not referrable to a benefit prescribed in section 295-460 of the ITAA 1997, the inclusion of these additional features or options does not affect the extent to which the premium is deductible. Paragraph 40 explains that the premium would need to be apportioned when calculating deductibility where the policy contained features or options which provided for a payment to be made which was not referrable to a benefit prescribed in section 295-460 of the ITAA 1997.
12.	*Actuaries' certificates* Provision of an actuary's certificate would appear to be a 'tax agent service' as that term is defined in section 90-5 of the *Tax Agent Services Act 2009*. This means that the actuary providing the certificate would be in breach of that legislation if they were not also a registered tax agent or had been granted some exemption from registration. This anomaly creates concerns that trustees may not be able to rely on such certificates as they could be treated as invalid. Commissioner should escalate this issue, but should also include a statement in the ruling that the validity of	*Actuaries' certificates* The registration requirements of actuaries are beyond the scope of this ruling. However the Commissioner notes that information on the Institute of Actuaries of Australia's website would indicate that the Institute is taking action in this regard. 'Actuary' is defined in subsection 995-1(1) of the ITAA 1997 for the purposes of that Act. The Commissioner does not distinguish between certificates issued by actuaries based on an actuary's employment status.

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	certificates will not be challenged. Clarification should also be included in the ruling as to whether the Commissioner distinguishes between certificates issued by actuaries employed by life offices and those issued by actuaries in private practice, for example a certification by a life office actuary might be taken to satisfy a life office disclosure in relation to the concept of 'policy' in item 5 of subsection 295-465(1) of the ITAA 1997.	
13.	*Deduction for specified part of the premium under item 5 in the table in subsection 295-465(1) of the ITAA 1997* It is implied in Examples 4, 6 and 7 that a deduction for the whole of a premium, where the occurrence of an event would be certain to result in a fund liability, would only be applicable where a TPD definition included one or more of: • Any occupation, • Activities of daily living (ADL), and • Domestic duties (DD) The components that are deemed by the Commissioner certain to result in a fund liability should be referenced in the ruling.	*Deduction for specified part of the premium under item 5 in the table in subsection 295-465(1) of the ITAA 1997* Examples form part of the ruling and are legally binding on the Commissioner. Examples 4, 6 and 7 have been amended to clarify the alignment between the definition of insured events in a policy and the requirements of a disability superannuation benefit.

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14.	*Definitions of activities of daily living (ADL) and domestic duties (DD)* There is no reference to the definitions of ADL and DD for determining whether a policy definition is as restrictive, and therefore that a certain liability will arise and item 5 can be applied. The conditions described in subregulation 295-465.01(5) only apply if item 6 of the table in subsection 295-465(1) applies.	*Definitions of activities of daily living (ADL) and domestic duties (DD)* Examples 4 and 6 have been amended to clarify the alignment between the definitions of DD and ADL and the requirements of a disability superannuation benefit. Examples in a ruling form part of the ruling and are legally binding on the Commissioner. Paragraphs 185 and 189 further clarify the alignment between the ADL and DD conditions and the requirements of a disability superannuation benefit.
15.	*Inclusion of other TPD insurance policy terms* What scope does the Commissioner have to include other TPD definitions, which are becoming common in the market place, in the ruling in the future, for example Everyday Working Activities and Specific Loss. If there is no scope, recommend that the ruling recognises that these components exist and that they are intentionally excluded.	*Inclusion of other TPD insurance policy terms* The Commissioner is able to review and rewrite public rulings on a needs basis to incorporate legislative amendments. The ruling sets out the Commissioner's interpretation of the relevant legislation in its current form. No change required to be made to the ruling.
16.	*Claiming a deduction for part of the premium under item 6 in the table in subsection 295-465(1) using the proportions in subregulation 295-465.01(1)* We would like direction as to who makes the determination that the definition components in the policy are at least as restrictive as those described in the definitions in subregulation 295-465.01(5) of the ITAR 1997.	*Claiming a deduction for part of the premium under item 6 in the table in subsection 295-465(1) using the proportions in subregulation 295-465.01(1)* The trustee of the fund is responsible for claiming the deduction for the proportion of the insurance policy premium in accordance with regulation 295-465.01 of the ITAR 1997. If a trustee requires clarification or confirmation in relation to such a claim, they may seek a Private Binding Ruling from the Commissioner.