TR 2010/1EC - Compendium

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Ruling Compendium – TR 2010/1

This is a compendium of responses to the issues raised by external parties to draft Taxation Ruling TR 2009/D3 – Income tax: superannuation contributions

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 Act 1936* (ITAA 1936), *Superannuation Industry (Supervision) Act 1993* (SISA), Superannuation Industry (Supervision) Regulations 1994 (SISR), *Superannuation Guarantee (Administration) Act 1992* (SGAA).

Summary of issues raised and responses

Issue No.	Issue raised (Unless otherwise noted, references are to examples and paragraphs in TR 2009/D3)	ATO Response/Action taken (Unless otherwise noted, references are to examples and paragraphs in the final ruling)
1	*Ordinary meaning of contribution – paragraphs 4 and 5 (paragraphs 86 to 104)* *Ordinary meaning* The ITAA 1997 does not define what is meant by 'contribution' therefore the word contribution should take on its ordinary meaning. The ordinary meaning should be determined after considering: Dictionary definitions – means to give …towards a common purpose. The ordinary definition does not suggest that the purpose of the receiver be taken into account in determining if something is a contribution. Contribution is akin to a gift. Therefore it does not include any form of service or other form of activity undertaken for reward. The key aspect is that the contributor intends to contribute some asset or service where it is understood the trustee will not pay or give consideration. It is the intention of the contributor that determines whether something is a contribution.	*Ordinary meaning of contribution – paragraphs 4, and 5 and paragraphs 108 to 127* Paragraphs 4 and 5 of the draft Ruling have been recast – paragraphs 4 and 5 of the final Ruling. Paragraphs 86 to 104 of the explanation in the draft Ruling have also been recast – paragraphs 108 to 127 of the final Ruling. The changes will ensure that consideration is given to the circumstances of the fund and the purpose of the contributor – paragraphs 6 to 9 (paragraphs 128 to 149). A contribution will be defined as something of value that increases the capital of the fund that is provided by a person whose purpose is to benefit one or more members of the fund. This definition picks up the case law in relation to the former superannuation contribution deduction provisions that held a contribution augments the capital of the fund. So the fund's circumstances are taken into account in determining whether

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	Use in English language – The use of 'contributors' and not 'contributees' in the English language supports the ordinary meaning of contribution which looks at the purpose of the contributor. Further the English language distinguishes between a 'contribution' and a 'donation'. Neither of these terms make reference to the character of the amount to the receiving entity or the purpose to which the receiving entity will put the amount to. It is the purpose of the payer that determined the nature of the amount. A contribution is distinguished from a donation as a donation represents a gift whereas a contribution represents an investment. History of superannuation – When superannuation commenced contribution was used to describe a payment by an employer to provide superannuation benefits for employees in retirement. The *Income Tax Assessment Act 1915* dealt with tax deductions of employer contributions. It is a long and established practice for employers to pay the cost of their superannuation funds. Later self-employed people made contributions which afterwards commenced the transfers of assets to superannuation. To be a contribution there had to be, and still is, a requirement that there is a payment to a superannuation fund. The payment can take any form. Meaning given by the superannuation industry – One industry online dictionary refers to a contribution as investments made by an employer or an individual into a superannuation fund or RSA. This definition also focuses on the intention of the payer and not the receiving entity.	the capital has been increased. The definition also takes into account the purpose of the person whose actions result in the increase in the fund's capital. This will involve an objective determination of the contributor's purpose, not an investigation into the contributor's subjective intention. This has been done to ensure a detailed exception to the definition of contribution is not required. That is, by examining both the circumstances of the fund and the purpose of the contributor it should not be necessary to rely on an income, profit or gain exception. For example, an arm's length tenant's improvements to a commercial property owned by a fund are made to further the tenant's business, not to obtain superannuation benefits for the fund's members.

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	Definition used in SISR – Unlike the ITAA 1997, the SISR defines what is meant by 'contribution' for the purposes of SISR. The definition is an inclusive and exclusive definition. As an inclusive definition, the term 'contributions' for SISR purposes takes on its ordinary meaning and is extended for additional amounts which are to be included in the definition. If the ATO interpretation that contributions are amounts that increase the capital of a superannuation fund is correct, then parts (a) and (b) of the SISR definition of contributions are not required as they should already be caught. Case law – Case law supports there can be a contribution other than by cash payment provided value may be attributed to the 'something' contributed (*HL (QLD) Nominees Pty Ltd v. Jobera Pty Ltd & Anor* [2009] SASC 165). The analysis in *Hills Industries Ltd v. Commissioner of State Taxation* (2001) 81 SASR 348 is relevant generally to when amounts are taken to be paid to a superannuation fund and therefore the case has application to when amounts are taken to be contributions to a superannuation fund. Doyle CJ analyses when 'crediting' will amount to 'payment' and suggests there is a requirement for 'crediting' to have a legal effect if it were to amount to a 'payment'. At page 49, Doyle held that there could be no payment of money to a superannuation fund or a setting apart of money as a superannuation fund unless there had been an increase in the assets of the fund. Whilst we acknowledge that the Hills decision related to superannuation contributions in the context of a payroll tax matter, the analysis set out in the case is relevant generally to when amounts are taken to be paid to a superannuation fund and therefore the case has application to when amounts are taken to be contributions to a	

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	superannuation fund. Four cases were considered in that analysis: *Winchombe Carson Ltd v. Commissioner of Taxation (NSW) (1935) 5 ATD 69*; *Federal Commissioner of Taxation v. The Northern Timber and Hardware Company Proprietary Limited (1960) 103 CLR 650*; *Deputy Commissioner of Taxation (NSW) v. P Iori and Sons Pty Ltd (1987) 82 ALR 442*; *Lend Lease Corporation Limited v. Federal Commissioner of Taxation (1990) 95 ALR 427*. However, these cases do not establish that all payments which increase the capital of a superannuation fund will necessarily be contributions. Case law supports that a superannuation contribution can be effected by any of three means: • a transfer of money, • a transfer of other property, • an agreement to offset cross liabilities. (*Lend Lease Corporation Ltd v. FC of T* (90 ATC 4401); *FC of T v. P Iori & Sons Pty Ltd* (87 ATC 4775). *Commissioner's view on ordinary meaning* Comments disagree with the Commissioner's view on the ordinary meaning that an amount will be a contribution if it increases the capital of the fund because: • 'Contribution' does not have its ordinary meaning if it is a 'catch-all' for all payments to/movements in a superannuation fund. • It means that all amounts are contributions unless they are specifically excluded. Legislation would be needed to exclude these items so that ordinary tax treatment could apply – such as, so capital gains tax (CGT) applies to the realisation of	

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	investments rather than the gain being treated as a contribution. • It ignores some generally accepted commercial practices. For example, it is not uncommon for tenants to make capital improvements to a property under their tenancy arrangements or leave fit-outs behind when they vacate certain premises. While this is generally accepted commercial practices, the draft Ruling would suggest that such improvements should be treated as a contribution in the ordinary sense. It also ignores many of the commercial practices which have been in place for many years in relation to employer expense payment arrangements. • The expansive definition has been formed for the purpose of reducing the risk of non-compliance with the various superannuation legislation. • The views are more akin to an economic analysis rather than a proper consideration of the law. • The view is based on the sole purpose test (paragraphs 89 and 96) and the Explanatory Memorandum to Taxation Laws Amendment (Simplified Superannuation) Bill 2006 (paragraphs 104). The sole purpose test and authorities considering the meaning of 'a superannuation fund' contain no authority for the Commissioner's definition. The Explanatory Memorandum does not shed light on the ordinary meaning of contribution. • The Commissioner's view does not consider the source, nature and purpose of a payment to the fund. • It is difficult to determine what amounts should be excluded because they are 'derived or received as income, profit or gain from the investment, or realisation of an investment, of the existing capital of the fund or account'. This leads to problems	

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	with the characterisation of amounts such as trust distributions, insurance policy proceeds, compensation payments, fees and other discounts.) *Other comments regarding ordinary meaning* If an amount is a contribution because it augments the size of the fund, it does not automatically follow that returns on or from investments are not contributions simply because of the sole purpose test. The definition of contribution should be agreed to by all superannuation regulators. Impact of the definition of contribution on other legislation such as state based payroll taxes, and other employment related taxes/requirements should be considered. The rulings treatment of certain events as contributions ignores the CGT law. A checklist should be included indicating what is and is not a 'contribution' as this will provide taxpayers with significant guidance in relation to items to be included as contributions. Paragraph 90 suggests that the identity of a contributor is established by identifying the person that suffers a diminution of assets or resources as a result of the contribution that increase the capital of the fund. It is impossible to say that the member has suffered a diminution of assets/resources as the member has simply exchanged one asset (for example cash at bank) for another asset (that is an interest in a superannuation fund). Determining whether an amount is a contribution based on the analysis of capital increases/diminution of assets is incorrect. The expansive view of the definition of a contribution raises a number of issues that the draft Ruling fails to address and in particular the	

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	consequences of these events being contributions. That is, are the contributions taxable in the fund, and how are the contributions to be allocated and classified. The draft Ruling does not acknowledge that '*superannuation benefits'* is now a defined term. It is defined as being a payment to you from a superannuation fund because you are a member of the fund et cetera. Given the nature of the definition, much of the draft's supporting analysis based on old case law appears to no longer be necessary.	
2	*How a contribution can be made – paragraph 6* <u>Increasing the value of an existing asset of the fund.</u> Actions that the trustee of the fund takes to increase the value of an asset in the fund are irrelevant and do not represent a contribution. Where commercially accepted reasons and practices give rise to such an improvement (at no cost or non-market value cost), the value of that improvement should not be treated as a contribution. For example, tenants that make capital improvements to a property under their tenancy arrangements or leave fit-outs behind when they vacate premises.	*How and when a contribution is made to a superannuation fund – increasing the value of an asset – paragraph 29 to 32* See response to Item 1. Paragraph 29 provides that the capital of the fund may be increased when a person (other than the superannuation provider) increases the value of an existing asset of the fund, for example, by making an improvement to an asset. Paragraph 31 provides that an increase in the value of an asset through a value shifting arrangement will also increase the fund's capital. The purpose test used in the final Ruling (paragraphs 6 to 9) should address any concern that increases of the fund's capital under normal commercial arrangements are not treated as contributions. Also see paragraphs 137 and 169 to 171.
3	*How a contribution can be made – promissory note – paragraph 10 (paragraphs 114 to 123)* Is paragraph 10 seeking to classify the contribution of an	*How and when a contribution is made to a superannuation fund – promissory notes – paragraph 13* The term investment-related promissory note is not used in

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	investment-related promissory note as the contribution of an asset rather than a contribution of money and subject to the usual prohibitions in section 66 of the SISA? I would assume that this is not contingent on the contribution to the superannuation fund being at a discount to face value. I presume that the reference to discounts was included to highlight how these types of assets are usually traded? For consistency purposes reference should be made, in paragraph 122, to section 66 of the SISA which would prohibit the fund's acquisition of an investment-related promissory note from a related party.	the final Ruling. These notes were described as notes issued by an unrelated party where the note is payable at a fixed or determinable future time to another entity (the payee or bearer) and acquired by the payee or bearer at a discount from its face value. The transfer of these notes is a transfer of an asset not a transfer of funds. The footnote to item 7 in the table in paragraph 13 states: > [A note covered by item 7] is to be contrasted with a promissory note made by an entity (the maker) that is not related to, or associated with, the superannuation provider or any member of the fund where the note is payable at a fixed or determinable future time to another entity (the payee or bearer) and is acquired by the payee or bearer at a discount from its face value. The transfer of such a note to superannuation provider is a transfer of an asset not a transfer of funds. Acquiring such a note from a related party of the fund may result in a breach of section 66 of the SISA. This characterisation is not contingent on the fact that these notes are usually acquired at a discount.
4	*How a contribution can be made – other forms of contributions – in specie contribution – paragraph 12* Generally agree that where less than market value consideration is paid for an asset the contribution is the unpaid market value. However, consideration should be given to the reasons giving rise to the discounted value.	*How and when a contribution is made to a superannuation fund – transferring an existing asset – paragraphs 18 to 25 and paragraph 164* There is no intention to treat every acquisition of an asset for less than its market value as a contribution. See paragraph 164. The purpose test discussed in paragraphs 6 to 9 and paragraphs 128 to 149 should ensure that a person who sells property to a fund at a discount to market value but is not in

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		any way concerned that the purchaser is a superannuation provider does not contribute the difference between the market value and price paid.
5	*How a contribution can be made – other forms of contributions – paragraphs 13 to 16 (paragraphs 127 to 128 and 133 to 138)* There is concern that the statements in paragraphs 13 to 16 are too broad and general and some qualifications should be added. For example, where the contributor was motivated by reasons other than increasing the capital of the fund and the transaction was at arm's-length. The transaction should be looked at as a whole to determine if the capital of the fund has been increased. It is not correct to always equate a reduction in superannuation provider liabilities or expenses with an increase in fund assets. It should also be made clearer that paragraphs 13 to 16 are subject to the proviso in paragraph 5 that an amount will not be a contribution if it is derived or received as income, profit or gain from the investment, or realisation of an investment, of the existing capital of the fund. For more closely held or related party situations (SMSFs and possibly SAFs) application to the ATO for consideration of circumstances may be appropriate. Is a contribution made where a trustee provides services to the fund (for example accounting services) without charge?	*How and when a contribution is made to a superannuation fund – paragraphs 10 to 38* The purpose of the contributor is now taken into account in determining if these are contributions. Purpose is discussed at paragraphs 6 to 9 (paragraphs 128 to 149 of the explanation). The ATO considers that a reduction in the liabilities of a superannuation fund by another party results in an increase in the capital of the fund. The proviso in paragraph 5 of the draft Ruling about income, profit or gain from investments of the existing capital of the fund is now used as an example in the discussion of the purpose of a person whose actions have increased the fund capital. See paragraph 133. No contribution is made where a trustee provides their services for free to the fund – see example 2 in paragraphs 75 and 76.
6	*How a contribution can be made – other forms of contributions – expense payments and reimbursements – paragraphs 13 and 14 (paragraph 125 to 128, 132 and 133)*	*How and when a contribution is made to a superannuation fund – expense payments and reimbursements – paragraphs 16 and 34 and paragraphs 145 to 147*

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	Questionable whether case law supports the approach in paragraph 13 – even though the ATO has applied this approach for some time. Paragraphs 13 and 14 should distinguish between: • The situation where an SMSF inadvertently pays an expense of a member and is then repaid. • An expense that the fund is liable to pay – this would be a contribution. • An expense that a third party (such as an employer) is liable to pay under a formal agreement. What evidence would be required to support this? How would the fund determine who is responsible for the payment? Paragraphs 13 and 14 depart from other ATO advice (income tax and GST) regarding the tax treatment of an employer paying expenses of a superannuation fund. For example, Taxation Ruling IT 2672 provides that fund legal expenses are deductible to an employer under former subsection 51(1) of the ITAA 1936. How would a contribution be divided among the members and how can regulation 7.08 of the SISR apply if the trustee doesn't know it is a contribution? A reimbursement indicates that the liability belongs to a third party (Taxation Ruling TR 92/15 supports this view). A reimbursement doesn't increase the capital of the fund – it restores the capital to the correct level. That is, the fund wasn't liable for the expense. Further attention is also required to the treatment of the payment of expenses within defined benefit funds generally. Is the payment a contribution for SISR purposes? If so this could result in members breaching the contribution eligibility rules or funds	Expense payments and reimbursements that are made with the purpose of benefiting one or more members of the fund are included as contributions. The ATO considers the approach outlined in Miscellaneous Taxation Ruling MT 2005/1 regarding expenses of the superannuation fund paid by a third party is still appropriate. The facts of each case need to be considered to determine if an expense payment or reimbursement results in a contribution. Guidance has been included in the ruling and explanation to assist in the decision of whether an amount is a contribution but not all possible scenarios can be included in the Ruling. Some common examples have been included at Examples 1 to 5 (paragraphs 73 to 82). The advice in the draft Ruling does not depart from the advice in other ATO rulings. IT 2672 provides that where an employer pays the costs of amending a superannuation fund trust deed the expense is deductible. The ATO does not agree that the advice in the final Ruling regarding an employer paying the operating costs of an employer sponsored fund is in conflict with IT 2672. An objective determination of the employer's purpose in paying for amendments to the fund trust deed would normally find the payment is not for the purpose of providing benefits to members if the change is necessary because the employer sponsor is altering the rights and entitlements attaching to the conditions of employment. In other circumstances such as modifying a deed to ensure it complies with the superannuation law, the cost of altering a fund's deed would merely be a cost of operating the fund and it could be treated

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	in pension phase having to have an accumulation account.	as a contribution. However, matters such as these would need to be determined on a case by case basis. The allocation of a contribution between the members of the fund is outside the scope of this Ruling. The allocation would depend on the facts of each case as well as the fund rules. The ATO considers that, a reimbursement, like any other payment of money to a superannuation provider increases the capital of the fund. Paragraph 145 indicates that where a member or employer sponsor reimburses the superannuation provider for a liability incurred in operating the fund it may be reasonably inferred that the purpose of the reimbursement is to benefit one or more members of the fund. Paragraph 1 states the Ruling considers the meaning of contribution as used in the ITAA 1997 in relation to superannuation funds, approved deposit funds and retirement savings accounts. The SISR modifies the ordinary meaning of contribution by excluding transfers and roll-overs. The views in these paragraphs also apply to defined benefit funds.
7	*How a contribution can be made and when a contribution is made – debt forgiveness and guarantees – paragraphs 15, 16, 35 and 36 (paragraph 134 to 137)* A guarantor may enter into an agreement with the fund trustee to limit the right of indemnity against the fund to the value of the asset held in the security trust on behalf of the fund. Under this type of arrangement, the guarantor would be responsible for any shortfall from its own resources without further reference to the fund. It is not clear whether this type of arrangement is covered or intended to be	*How and when a contribution is made to a superannuation fund – debt forgiveness and guarantees – paragraphs 36 to 38 and paragraphs 175 to 180* The draft Ruling dealt separately with a liability owed to a guarantor and a liability to the lender on a loan. The final Ruling simply treats a guarantee payment as the payment of a fund liability and explains that the fund's capital is increased when the fund's liability is extinguished. However, the capital of the fund will not be increased where

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	covered by the draft Ruling. The views stated in paragraphs 15 and 16 are, based on propositions which, in our view, are incorrect. The Ruling needs to distinguish between the following situations: • A commercial lender forgiving a loan (for example where the fund cannot pay). • A related party forgiving a debt (for example where the fund can pay). How is the contribution to be treated and taxed in the fund in each of the above situations? The forgiveness of a debt or a guarantor forgoing a right of indemnity should be treated as a contribution only when it is the intention of the contributor that it is a contribution to the fund. Such intention could be inferred from the particular facts for example the ability of the fund to meet the payment. The nature of the entity forgiving the loan should not determine the tax treatment. Rather the nature of the instrument should determine the tax treatment. Prima facie, the debt forgiveness or CGT provisions should apply. In paragraph 13 the Commissioner has taken the view that an expense payment made on behalf of the fund by a third party is a contribution. It would appear that a payment made by a guarantor could be a contribution under the Commissioner's view in paragraph 13 but under paragraph 137, it is only treated as a contribution if there is no right of indemnity from the fund or the right of indemnity is foregone. This issue needs to be clarified. If a contribution is made when a guarantor forgoes their right of indemnity, when does this occur? It is suggested that if the Ruling is to cover the issue of debt	the guarantor has a right of indemnity. Where a guarantor forgoes their right of indemnity the Ruling treats the liability owed to the guarantor as a debt forgiven by the guarantor and as a result the fund's capital is increased. A guarantor forgoes their right of indemnity when they take formal steps to forgo that right, for example by executing a deed of release, or the guarantor is barred under the law from enforcing the right of indemnity. Where a debt of the fund is forgiven the amount forgiven will only be a contribution where the objective purpose of the creditor in forgiving the liability is to benefit one or more members of the fund. For example, a lender that forgives an arm's length loan for commercial reasons is not considered to have made a contribution to the fund. However, where a related party has forgiven the liability for no commercial reasons there will be a contribution. See paragraphs 139, 148 and 149. It is not appropriate to include more detail on instalment warrants in this Ruling. An analysis of the impact of the capital gains tax and debt forgiveness provisions on forgiving a loan are outside the scope of this Ruling.

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	forgiveness and guarantees as it relates to a range of potential 'warrant' arrangements, further explanations and examples should be included in the Ruling for clarity. Otherwise, the Ruling should note that these issues will be addressed separately when the final ATO view on instalment warrants is settled. Some analysis of the interaction of the CGT law and activities such as forgiveness of a loan should be presented.	
8	*How a contribution can be made – other forms of contributions – Non-arm's length income and distribution from discretionary trust – paragraph 17 (paragraphs, 138, 139)* The distribution of income from a discretionary trust is paid to the fund because it is a beneficiary of the trust and has become entitled to the distribution because the trustee of the discretionary trust has exercised its discretion to pay that distribution to the fund. Upon the trustee of the discretionary trust determining to distribute income or capital to the trustee of the superannuation fund the mere expectancy of being considered along with other beneficiaries of the trust is converted into a right to receive a distribution (a chose in action). This creation of the right determines the taxing point and the income will be subject to tax in the hand of the beneficiary/fund. It is not a contribution. To be a contribution it is implicit that the creation of the right to receive a distribution occurs with the consent or acceptance of the fund and this may not occur with a distribution from a discretionary trust. The distribution received is in satisfaction of that interest and is a return on the asset held and therefore not a contribution. The amount received would be 'non-arm's length income' for the purposes of section 295-550(4) of the ITAA 1997. Is it intended that	*How and when a contribution is made to a superannuation fund – creating rights – Non-arm's length income and distribution from discretionary trust – paragraphs 26 to 28 and 165 to 168* Paragraph 26 provides the ATO view that a contribution occurs when a person creates a contractual right or other legal or equitable right in the superannuation provider and the provider pays no consideration or less than market value consideration. This includes the right the trustee of a discretionary trust creates in the superannuation provider when they appoint income or capital to the provider as an object of the trust. The fund's capital is increased when the trustee of the discretionary trust creates the right in the superannuation provider. Further, the objective purpose of the trustee of the discretionary trust is considered to be to benefit all of the members of the superannuation fund. The distribution from the discretionary trust is not a return on an asset held by the superannuation provider. This is to be distinguished from a return received from a trust where the superannuation provider holds an interest in the trust. The ATO considers that Division 6 of Part III of the ITAA 1936

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	these amounts be captured as both non-arm's length income and as a contribution? Are you intending to distinguish a payment of corpus or distribution? How is the distribution to be apportioned between members given that members do not have equity interests in a discretionary trust? If the payment is a contribution is it a concessional or non-concessional contribution? It would be unfair for the distribution to be included in the caps as a member has no ability to manage their caps if they are unaware of the distribution.	takes priority over Division 295 of the ITAA 1997. The fund's share of the net trust income is included in assessable income under Division 6. Some part of the appointed income or capital may be assessed as a contribution under Division 295, depending on the facts of the case such as the extent to which the amount appointed is different from the fund's share of the net trust income. The fund's share of the net trust income is also taxed as non-arm's length income under section 295-550 of the ITAA 1997. The allocation of contributions between the members of the fund is outside the scope of this Ruling. The allocation would depend on the facts of each case as well as the fund rules. The income or capital appointed to the fund may be included in either the concessional or non-concessional contribution cap depending on the extent to which the amount appointed is included in the fund's assessable income.
9	*How a contribution can be made – other forms of contributions – Roll-over superannuation benefit – paragraph 18* To avoid confusion this paragraph could be more appropriately structured by starting with the general position that subject to certain exceptions the transfer or roll-over of a benefit from one entity to another is not considered to be a contribution. Paragraph 18 should mention: • Division 290, which deals with contributions to superannuation funds, does not apply to a contribution that is a roll-over superannuation benefit. • a directed termination payment is a member contribution.	*How and when a contribution is made to a superannuation fund – Roll-over superannuation benefit and transfer from overseas – paragraphs 17, 162 and 163* The ATO considers roll-overs and transfers from foreign superannuation funds to be contributions. Both are specifically excluded from deductions allowed for contributions under Division 290 of the ITAA 1997 – section 290-5 of the ITAA 1997. Parts or all of a roll-over or transfer from a foreign fund are also excluded from the definition of concessional and non-concessional contributions under Division 292 of the ITAA 1997. The Ruling does not deal with these issues as it is beyond the scope of the Ruling.

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	• a roll-over is not a contribution for SISR purposes and doesn't count for concessional contributions or non-concessional contributions cap purposes. • Contributions paid to another fund could be reported by either entity. It is suggested that the information on transfers from overseas be expanded to deal with some of the subtleties. Roll-overs and transfers from overseas funds are not contributions. The ordinary meaning of contribution is that new money is entering the system. Section 295-190 distinguishes roll-over amounts from contributions. A roll-over is not a benefit. Section 295-200 specifically distinguishes transfers from overseas funds as assessable income with no reference to the amounts as being contributions.	The Ruling discusses the ordinary meaning of contribution and the income tax deduction available for a contribution. Footnote 6 to paragraph 17 of the Ruling specifically states the definition of contribution in the SISR does not include amounts rolled over or transferred within the meaning of those terms in subregulation 5.01(1) of the SISR. The term transfer in the SISR does not include transfers from overseas funds. A roll-over superannuation benefit as defined in section 306-10 must be a superannuation lump sum and a superannuation member benefit as defined in Division 307 of the ITAA 1997.
10	*How a contribution can be made–insurance proceeds – paragraph 141 of explanation* Part A of the Ruling implies that insurance proceeds (for example resulting from death or incapacity) are a form of investment income (paragraph 141). This raises considerable concerns that the ATO would consider that the insurance proceeds should therefore be taxed as income, profit or gain. This leads to the question as to whether payments such as compensation payments made by an administrator to rectify an error would be considered to be a contribution.	*How and when a contribution is made to a superannuation fund –insurance proceeds – paragraph 138* The ordinary definition of contribution requires consideration of the objective purpose of the contributor before determining if something of value that increases the capital of the fund is a contribution. The purpose of the contributor must be to obtain superannuation benefits for a member of the fund before an amount will be a contribution. An insurance company that pays an amount to a superannuation provider on the occurrence of an insured event according to the policy does so under the terms of the insurance contract. The proceeds of the policy will be treated as income, profit or gain from the use of the fund's existing capital and not as a superannuation contribution.

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		Whether an amount is assessable income of the fund will be determined by the application of the law to the facts of each case. The treatment of compensation payments made by an administrator to rectify an error could be determined similarly.
11	*When a contribution is made – paragraphs 19 to 38 (paragraphs 142 to 168)* Single verses multiple contributions The scope of paragraph 19 should be extended to include the Commissioner's view on what constitutes a single contribution. For example, two separate cheques attached to a contribution form, or the deposit of a cheque on the same day an amount is transferred by electronic funds, or the in-specie transfer of different parcels of shares on the same day. We understand that whether the trustee treats these as a single contribution or multiple contributions will be determined by the way in which the fund's administration system records the transactions. Therefore there may be different treatment between funds. This issue is significant for the purposes of the application by trustees of subregulation 7.04(4) of the SISR, which requires trustees to return amounts received in excess of the contributions caps. Further, would a refunded contribution no longer be counted towards the member's contributions cap? Timing of reportable employer superannuation contributions The timing of reportable employer superannuation contributions is not mentioned in the draft Ruling. The Ruling should consider the difference in when these need to be reported. That is, based on the	*How and when a contribution is made to a superannuation fund – timing of contributions – paragraphs 12 to 38 and 181 to 210* Single versus multiple contributions The issues arising in relation to single versus multiple contributions are essentially relevant to the application of the contribution standards of the SISR. Discussion of the contribution standards is not within the scope of the Ruling and the application of the standards will depend on the facts of each case. However, in relation to in specie transfers of shares it should be noted that for some tax purposes, for example capital gains tax, each share is a separate asset. Timing of reportable employer superannuation contributions The ATO does not consider it appropriate to include a discussion on reportable employer superannuation contributions in this Ruling. At the time of preparing this compendium a guide on reportable employer superannuation contributions was available on the ATO website – *Reportable employer super contributions* Clearing Houses

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	period to which they relate rather than when they are paid. <u>Clearing Houses</u> The adverse consequences for employers resulting from delays in the passing of a contribution from a Clearing House to a superannuation fund/mail delays et cetera are an ongoing concern. We consider that either the legislation itself, or the ATO's interpretation, needs to be amended to reflect a more practical application such that an employer contribution (for Superannuation Guarantee (SG) purposes) is made when it is paid to an appropriately licensed Clearing House (rather than when the superannuation fund receives the contribution). Further information should be provided on the implications of the breach of the SG rules and the timing of deductibility when the contribution is made to a clearing house that fails to pass it on in a timely manner. Advice on what actions could be taken to avoid the impact should also be included. <u>Importance of timing of contributions</u> Paragraph 19 could incorporate a statement to the effect that the date a contribution is 'received' may not necessarily be the same date the contribution is received or allocated to a member. This would cater for situations where a contribution is received by a fund and held in a suspense/reserve account prior to being allocated to the member's account. Paragraph 19 also needs to refer to the importance, and difference (if any), of timing for: • RESC payments, • tax deductibility,	The ATO's interpretation of when a contribution is made when an employer makes a payment to a clearing house that then makes the payment to a superannuation provider is set out in Superannuation Guarantee Determination SGD 2005/2. <u>Importance of timing of contributions</u> Paragraphs 12 to 38 explain when various forms of superannuation contributions are made. While it is beyond the scope of this Ruling to discuss the range of other matters not concerned with the meaning of contribution or the income tax deduction rules for contributions paragraph 181 notes some other circumstances where the time a contribution is made is important.

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	• SG compliance, • government benefit entitlements. The Ruling should also note that a member can apply to the ATO to have a contribution disregarded or allocated to a different year.	
12	*When a contribution is made – money or money equivalent – paragraph 20* <u>Electronic funds transfer</u> Further commentary on electronic banking would be useful. In particular the timing of when a contribution is made by electronic banking. Consideration should be given to circumstances where the contributor has processed the contribution from their bank but the process takes 24 hours to be received by the superannuation fund. Prima facie, such a contribution should be made at the time the contributor processed the contribution from their bank unless the transfer is subsequently dishonoured or the transfer is post dated (similar to a cheque or promissory notes). Clarification of paragraph 147 is required. Is the time of a contribution the date shown on a print-out showing the transfer request by the payer or is it the print-out showing the date the payment is received in the fund's bank account? There seems to be some inconsistency with in specie transfers and electronic transfers. With respect to electronic transfers, has the person done everything when they perform their part of the banking transaction?	*How and when a contribution is made to a superannuation fund – timing of transferring funds – electronic funds transfer – paragraphs 12 to 15 and 181 to 185* The table in paragraph 13 states that a contribution made by electronic transfer is made when it is received by the fund. That is when the fund's capital is increased. Explanation of the Commissioner's approach is set out in paragraphs 183 to 187. Paragraph 187 is substantially the same as paragraph 147 of the draft Ruling. However, it has been revised to clarify that the relevant evidence must show receipt of the contribution to the fund's account. Paragraphs 185 to 187 provide the ATO's view on why electronic fund transfers are treated differently to the transfer of an asset. It is essentially due to the way the electronic payment systems operate, that is, based on contractual agreements between the parties including parties other than the contributor and the superannuation provider.
13	*When a contribution is made – cheques and promissory notes – paragraph 21 to 27*	*How and when a contribution is made to a superannuation fund – timing of transferring funds – cheques and promissory*

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	Paragraph 23 is difficult to read and should be re-worded and structured differently to ensure the ATO's position on post dated cheques and promissory notes can be clearly understood. We understand the intent of this paragraph is to allow a post dated cheque or promissory note to be recorded as a contribution on the date the fund receives the cheque or promissory note as long as payment is demanded promptly after the date on which the payment can be demanded. The circumstances surrounding a delay in presentation of cheques or promissory notes should be considered. Where they are caused by the superannuation provider or agents of the superannuation provider paragraphs of 21 and 22 should apply.	*notes –paragraphs 13 to 15 and 188 to 192* The content of paragraph 23 of the draft Ruling has been rewritten in paragraphs 13 to 15. The meaning the comment suggests was not the meaning intended by paragraph 23 of the draft Ruling. Paragraph 13 provides that a contribution made by cheque or promissory note issued by a related party will generally be made when it is received by the trustee. However, the contribution will be taken to be made at a later time if the cheque is post dated or the promissory note is payable in the future.
14	*When a contribution is made – property – paragraphs 28 to 34* For property where there is no formal registration process we suggest ownership may pass on execution of a deed, or on the entry into of a binding agreement to transfer the property (for example an executed deed of transferor), or upon the transferor otherwise becoming subject to some legally binding obligation to transfer the property. The way in which paragraphs 31 and 32 of the Ruling are drafted could be interpreted to indicate that there is an option to choose between the date legal ownership of a contributed asset is acquired by the fund or the date the beneficial ownership of the contributed asset passes to the fund. Some superannuation funds will have explicit rules in this regard and will not generally be able to change this at the direction of an affected member. Can the postal rule apply in relation to off-market share transfers? If so, the contribution might be made as soon as a member posts their	*How and when a contribution is made to a superannuation fund – timing of transferring an existing asset – paragraphs 20 to 25 and 193 to 203* Paragraph 21 confirms that the ATO will accept that ownership of property for which there is no formal registration process may pass on execution of a deed of transfer of the property. Paragraph 25 indicates that a contributor or provider who argues that an *in specie* contribution occurs when beneficial ownership occurs must retain sufficient evidence of the transaction to accurately identify when the change of beneficial ownership occurred. Where there is insufficient evidence of the time when beneficial ownership changes, the contribution will be made when legal ownership changes. If the rules of the fund specifically states that a contribution of an *in specie* asset is made when legal ownership of the asset

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	off-market share transfer form to the trustee of a superannuation fund rather than when the form is received by the fund.	is acquired by the trustee of the fund, the ATO would treat the contribution as made when legal ownership is acquired by the fund. The ATO does not consider the postal rule will apply to off-market share transfers. The postal rule is relevant to determining the time of making a contract, in particular as to when acceptance of an offer to contract occurs. In the case of an *in specie* contribution, the issue in this regard is when beneficial ownership of the asset changes not when the trustee agrees to accept a contribution in the form of an asset.
15	*When a contribution is made – guarantees – paragraph 36 (paragraph 166)* This paragraph and paragraph 166, states that a contribution is considered to be made when the guarantor takes 'formal steps to forgo their right of indemnity'. However, this paragraph does not address situations where the guarantor makes a payment under a guarantee but then takes no action to enforce their right of indemnity.	*How and when a contribution is made to a superannuation fund – time of contribution – guarantees – paragraph 38 and 210* Paragraphs 38 and 210 have been amended to state the contribution is made when the guarantor (who has a right of indemnity) can no longer enforce their right of indemnity. The expiry results in an increase of the capital of the superannuation provider.
16	*In specie roll-over contributions – paragraph 37 and 38* Consideration needs to be given to the treatment of in specie roll-over superannuation benefits. Paragraph 18 of the draft Ruling states that these are contributions which means they are subject to the same rules in relation to date of receipt and value. However, the value of the roll-over on the date it leaves the 'from' fund may not be the same as the value of the roll-over when the completed forms are received by the 'to' fund. Could you clarify what value is used by the 'to' fund and	*How and when a contribution is made to a superannuation fund – In specie roll-over contributions* This is essentially a valuation and regulatory issue that is outside the scope of this Ruling.

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	also that the value used should be consistent with the total amounts (that is the sum of the tax components) that appear on the roll-over benefits statement issued by the 'from' fund?	
17	*Superannuation contributions – purpose of contributor – paragraph 41* It is stated at paragraph 41, having regard to the rules concerning deductibility of contributions, that: 'Providing superannuation benefits must be the person's sole purpose.' We think Justice Hill's comments would be better construed as exploring the proposition rather than necessarily amounting to a hard and fast rule concerning the sole purpose test in this context. *Buy/sell agreements* It is suggested the Ruling include commentary on whether the purpose test is met notwithstanding part of the contribution is to fund insurance cover under a buy/sell agreement. (These are used where a fund member is also an owner/principal engaged in business with arm's-length co-owner/principals. On the death of a fund member their estate or beneficiaries will receive the member's death benefit boosted by the insurance proceeds. A separate buy/sell agreement entered into by the member provides that on the event of his death and the receipt of the benefit from the fund, the deceased member's interest in the business is transferred by his estate to the surviving co-owners of the business.)	*Deducting superannuation contributions – Purpose of contributor – paragraph 39 and 211 to 214* The ATO considers the comments by Hill J regarding the sole purpose of a contributor relevant to determining whether a superannuation contribution is deductible under section 290-60 and section 290-150. This view is further supported by Hill J's comments in *Raymor Contractors Pty Ltd v. Federal Commissioner of Taxation* 91 ATC 4259 at 4271 and Pincus J in *FC of T v. Roche & Others* 91 ATC 5024 at 5030. It is the ATO view that Hill J's comments must be taken as doing more than 'exploring the proposition'. *Buy/sell agreement* The comments did not provide sufficient detail of the arrangement to provide an answer. If this arrangement involves a contribution made by the surviving co-owner/principal it is quite possible that the purpose of the contribution is not solely to provide superannuation benefits for the member. The contributor's purpose takes into account a broader arrangement under which the contributor will be transferred the relevant business asset. If a definitive view is needed from the ATO, a Ruling should be sought.

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18	*Superannuation contributions for employees – paragraphs 42 to 54 (paragraphs 172 to 187)* More content was requested for: • Whether the following people are considered employees: a person who salary sacrifices 100% of their salary; a person who works in a family business conducted by a trust but who receives only trust distributions rather than wages; a person who works in a family business conducted by a company but who receives only dividends rather than wages; a volunteer. • The other conditions for tax deductibility such as the conditions relating to the employee's age. • Contributions made for former employees (as provided for in section 290-85 of the ITAA 1997). Specifically voluntary contributions made by an employer in respect of former employees. For example an employer contributing 12% of an employee's salary every month with a contribution made after employment has terminated. The ATO should indicate that it would accept the tax deduction where the voluntary contributions are being paid on a regular basis, even if they are paid to the fund shortly after termination of employment. • How can a contribution be made by an employer for an artist, musician, sportsman et cetera engaged to perform or present or participate in a performance where the ATO considers that the person will be engaged in the activity only while they participate in the relevant activity? This interpretation makes it effectively impossible for an employer to make a contribution for these employees whilst they are classified as an employee. • Contributions by an employer to fund defined benefits for pensioners and former employees is particularly a problem in	*Deducting superannuation contributions for employees – paragraphs 42 to 47 (paragraphs 215 to 228)* *Is a person an employee?* Whether a person is an employee will depend on the facts in each case. Superannuation Guarantee Ruling SGR 2005/1 explains how to determine whether a person is an employee. *Other rules for deductibility.* Not all the rules for deductibility are considered in the Ruling as the ATO does not consider all the provisions contain interpretative issues that require further explanation. *Former employees* New paragraphs 45 to 47 (paragraphs 223 to 228) have been included to explain when a former employee is treated as an employee for the purpose of claiming a deduction for superannuation contributions made for them. *Artists, musicians, sportsman, et cetera.* Subsection 12(8) of the SGAA provides that artists, musicians, and sports persons et cetera are treated as employees for the purposes of the SGAA. Therefore the provisions for former employees will apply to their circumstances. *Defined benefit funds* Contributions by an employer to fund defined benefits for former employees (whether or not they are pensioners) are

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	the current economic environment where assets have fallen considerably and significant top-up contributions are required to properly fund the defined benefits.	not deductible under section 290-85 of the ITAA 1997.
19	*Superannuation contributions for own employees – paragraph 43* Paragraph 43 states that an employee must be a member of the superannuation fund when a contribution is made by an employer, as otherwise it cannot be said that the contribution is for the benefit of the employee. Employers frequently make contributions for new employees at a time prior to the employee becoming a member of the relevant fund. The draft Ruling refers at paragraph 173 to *Walstern Pty Ltd v. Federal Commissioner of Taxation 2003 ATC 5076* where contributions were made at a time when the fund had no members at all, and the amounts were held by the trustee of the relevant fund pending the happening of certain events (including the acceptance of persons as members upon their making qualifying contributions). We do not consider that this case is authority for the proposition that an employee must be a member of a fund to which a superannuation contribution is made by an employer in order for a deduction to be available. Rather, we consider that whether or not a contribution is made 'for the purpose of providing superannuation benefits for another person who is your employee when the contribution is made' is a question of fact to be decided in the particular circumstances of each case. There is also the issue of whether an individual can be a member of a fund if the fund has not accepted any contributions for the member. Section 290-60 of the ITAA 1997 does not require the employee to be a member of the superannuation fund but does require the employer make contributions to a superannuation fund for the purpose of	*Deducting superannuation contributions for own employees – paragraph 44 and 222* This paragraph ensures that a contribution can be seen to provide superannuation benefits for a particular person who is an employee of the contributor. If a particular person is not able to benefit from the contribution because they are not a member of the fund or their ability to benefit from the contribution is otherwise limited the purpose test will not be satisfied. *New employees* There is no intention to deny a deduction for contributions made to provide superannuation benefits to employees who have not yet, but do in due course, become members of the fund. Paragraph 44 of the Ruling now includes the following: > If the employee is not a member of the fund when the contribution is made (for example because the employee has recently commenced working for you), the contribution will be taken to provide superannuation benefits for that employee only if the employee becomes a member of the fund in due course and the contribution is appropriately allocated to the employee as required by the SISR. The approach is not limited to employer sponsor arrangements as the right of an employee to choose a superannuation fund may mean that the issue is not limited to

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	providing superannuation benefits for that employee. An alternative approach to better accommodate standard employer-sponsored arrangements would be to link the requirement to the definition of standard employer-sponsor in the SISA. Specifically, the employee must be a member of the superannuation fund when you made a contribution, or you must be a standard employer-sponsor of the superannuation fund when you make the contribution.	the employer's default fund or sponsored fund.
20	*Superannuation contributions for own employees – fully secured rights – paragraph 45* Recommendations were received that paragraph 45 should either be amended or omitted for the following reasons: • 'fully secured rights' should be replaced with 'vested benefits' as the former is no longer relevant. • Paragraph 45 should be omitted, as it is likely to cause confusion and to be misconstrued. The reference to 'fully secured rights' is taken from the judgement in *Raymor Contractors Pty Ltd v. FC of T 91 ATC 4259*, a case which dealt with the application of section 82AAC(1) of the ITAA 1936 and the interrelationship between that section and sections 82AAM and 82AAE. These sections have been replaced by Subdivision 290-B of the ITAA 1997. The concept of rights to benefits being 'fully secured' is no longer relevant under current superannuation law. Divisions 7.2 and 7.3 of SISR contain operating standards regarding the allocation of contributions, and section 1017E of the *Corporations Act 2001* also imposes obligations regarding the treatment of amounts received prior to the issue of an interest in the superannuation fund. • Paragraph 45 might be read as meaning that an employer is not	*Deducting superannuation contributions for own employees – fully secured rights* Paragraph 45 of the draft Ruling has been deleted as there is no specific requirement that benefits be fully secured. That requirement was a feature of the deduction provision only while a deduction could be claimed for amounts set apart as a superannuation fund.

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	entitled to a deduction until amounts have been finally allocated to member accounts (in the case of an accumulation fund), although we are not sure that this is the intended meaning of the paragraph. This argument, if it is intended, is inconsistent with paragraph 142 which states that a contribution is deductible in the year the contribution is received by the fund. • Neither section 290-60 of the ITAA 1997 or section 82AAC of the ITAA 1936 requires superannuation contributions to be 100% vested in the employee. The provisions simply require that the employer make contributions to a superannuation fund or RSA for the purpose of providing superannuation benefits for that employee or SIS dependants of the employee. Therefore, provided the employer has a bona fide belief that the contribution will vest in the employee in the ordinary course of events, the contribution should be deductible. Further clarification of paragraph 45 is required with respect to: • Defined benefit funds where there are often discretions exercised by the trustee and paid out of the corpus of the trust. • Accumulation arrangements which, in some cases, might still have an unvested component. • Many of the vesting rules within superannuation funds which may result in partial vesting of the contributions over time or based on certain formulas and trustee discretions. • What is intended by the reference to benefit entitlements arising only upon the exercise of a discretion by a superannuation provider. Amounts may for example be held initially on receipt by a fund within a suspense account, while the fund's administrator reconciles contribution data received from an employer, or clarifies details provided by a member. Other administrative	

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	steps may also apply. It is not clear whether the paragraph is intended to have effect in respect of such steps.	
21	*Superannuation contributions for another's employees – paragraph 46 to 50 (paragraphs 176 to 180)* Similar to paragraph 20, paragraph 46 should acknowledge that the date a contribution is received by a fund may not necessarily be the same date the contribution is received or allocated to the members account. However, for the purpose of determining the income year in which the contribution is deductible, this distinction is irrelevant. Consideration should be given to casting votes in paragraph 179.	*Deducting superannuation contributions for another's employees – paragraph 48 to 52 and 229 to 233* *Allocation of contribution* As allocation of contributions by a fund is not within the scope of this Ruling the suggestion has not been taken up. Part A explains when a contribution is made and Part B of the ruling is concerned with the tests for deductibility of contributions. *Controlling interest – casting votes* Paragraphs 51 and 232 have been amended to refer to equal voting rights in the example.
22	*Employment activity conditions – Directors – Paragraph 51 to 54 (paragraphs 181 to 187)* It is suggested that consideration be given to clarifying the entitlement to a deduction (under section 290-60) for the corporate trustee of a trust, where superannuation contributions are made on behalf of a director of the trustee. This was the subject of ATO ID 2008/15 which has been withdrawn and not replaced. It is unclear why the ATO ID was withdrawn. ATO ID 2007/145 which also considers the deductibility of superannuation contributions made to a director of a corporate trustee and draws a similar conclusion to ATO ID 2008/15 has also been withdrawn because it was no longer relevant for income years after 1 July 2007.	*Deducting superannuation contributions – Employment activity conditions – Directors – paragraphs 238 to 243* Paragraph 243 has been included in the explanation of the Ruling to indicate when a deduction for a superannuation contribution for a director can be claimed by the corporate trustee against the company's income, and when the corporate trustee can claim a deduction for superannuation contributions for its director against the income of the trust fund. It states: > The corporate trustee of a trust may be entitled to deduct a contribution made for a director against the income earned by the company (rather than the income of the trust). A superannuation contribution for a director of the corporate trustee of a trust can only be deducted from the income of the

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		trust if the director is a common law employee of the trust engaged in producing the assessable income of the trust or its business.
23	*Maximum earnings test – paragraphs 55 to 64 (paragraphs, 189 to 203)* This is a complex area which warrants more detailed commentary and some specific examples. Particularly due to the newly reduced entitlements to contribute, the interactions between the contribution caps, and the consequences for cap breaches. In the context of the 10% rule, a 100% salary sacrifice situation, and the adjusted taxable income calculation, what is the status of the contribution made by the employer • that represents the 100% salary sacrifice? • that represents the 9% SGC contribution payable had the person not entered into a 100% salary sacrifice?	*Deducting personal contributions – Maximum earnings test – paragraphs 57 to 66 and 246 to 262* The ATO has included new examples (8 and 9) at paragraphs 88 to 93) to further explain the maximum earnings test. The ATO does not consider it appropriate to include in this Ruling a discussion on reportable employer superannuation contributions or the interactions with the contributions caps. At the time of completing this compendium a guide was available on the ATO website to explain reportable employer superannuation contributions – *Reportable employer super contributions*
24	*Maximum earnings test – employment activities – paragraph 60* Paragraphs 60 – 62 touch on the treatment of payments other than salary such as workers' compensation payments that might or might not be attributable to employment depending on the circumstances. It would be useful to further clarify that an individual engaged in employment activities during the year will count payments they receive connected to that employment in the maximum earning test. However, these payments would not count to the maximum earnings test if the individual had not carried out any work for the employer to which they relate during the financial year. Further clarification would be useful on the following types of	*Deducting personal contributions – Maximum earnings test – employment activities – paragraph 57 to 66 and 246 to 262* The ATO has included new examples (8 and 9) at paragraphs 88 to 93 to further explain the maximum earnings test. Paragraphs 57 and 58 explain the primary test for the maximum earnings test. The paragraphs have been reworded as a result of the comments received. Salary continuance payments have not been specifically included in the Ruling as each case would be dependant on the policy under which the payments are made. However,

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	payments: • Workers' compensation payments will always be attributable to employment if they are paid to someone who is still employed because they are engaged in work for this purpose and their workers' compensation payments are attributable to that work. However, would the workers' compensation payments attributable to employment in a previous year count in a later year when all the employment income is from other employment? • Would similar logic apply to salary continuance payments? • Is an individual who is on sick leave still employed such that sick leave payments are included in employment income? • An individual whose termination occurs in one year but is paid termination payments in the following year will not have those payments included in the maximum earnings test in the year of payment. However, if the individual terminated employment in the same year as they received the termination payments they would count towards the maximum earnings test. • Where directors are required to on-pay their directors fees to other organisations are the amounts counted towards the 10% threshold? What amounts are taken into account as assessable income for the maximum earnings test. For example, for property income is it the individual's gross rental income or rent less specific deductions that is taken into account for the test. For business income is it gross business income or net business income which is used?	paragraph 64 notes that workers' compensation and like payments made because of injury or illness received by a person while holding the employment office or appointment, the performance of which gave rise to the entitlement to the compensation payments are attributable to an employment activity. As with other types of assessable income, where director's fees are included in a person's assessable income they will be included in the maximum earnings test. Where the director's fees are not included in assessable income (such as described in Taxation Determination TD 97/2 for directors who are partners in professional partnerships) the fees will not be included in the maximum earnings test. Paragraph 64 (paragraph 62 in the draft Ruling) has been expanded, and paragraph 254 has been included to provide further clarification on what amounts are included in assessable income for the purposes of the maximum earnings test. In particular, reference has been made to partnership income, rental income (joint and sole owner) and business income.
25	*Maximum earnings test – Reportable employer superannuation*	*Deducting personal contributions – Maximum earnings test –*

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	contributions (RESC) – Paragraph 62 Clarification is needed on the recently introduced RESC reporting requirements and the concept of adjusted taxable income. Paragraph 61 and 62 should incorporate the change to subsection 290-160(2) of the ITAA 1997 made by *Taxation Laws Amendment (2009 Measures No. 1) Act 2009*. The commentary on personal tax deductions does not discuss RESC, which need to be taken into account for the purpose of the 10% test.	*Reportable employer superannuation contributions (RESC) – Paragraphs 62, 63, 252 and 253.* References to RESC have been included in paragraphs 62, 63, 252 and 253. *Reporting requirements for RESC and concept of adjusted taxable income.* The ATO does not consider it appropriate to include a discussion on RESC in this Ruling. At the time of completing this compendium a guide on RESC was available on the ATO website – *Reportable employer super contributions*.
26	*Maximum earnings test – overseas employment – Paragraph 63* Clarification is required on non-residents and residents with overseas employment income meeting the maximum earnings test. Assuming an individual is engaged in an employment activity that results in them being treated as an employee, is the following correct: • A non-resident who receives overseas employment income (not assessable in Australia) and who has other Australian sourced income will meet the 10% test. • An Australian resident who receives overseas employment income (assessable in Australia) and who has other Australian sourced income will not meet the 10% test.	*Deducting personal contributions – Maximum earnings test – overseas employment – Paragraph 65, 66, 261 and 262.* No changes to the Ruling – Paragraphs 261 and 262 contain details on these situations. Paragraph 261 covers the situation of a non-resident receiving overseas employment income that is not assessable in Australia and who has other Australian sourced income. Paragraph 262 covers the situation of an Australian resident employed overseas by a foreign employer. As both comments on the operation of the maximum earnings test are correct the Ruling does not seem to need to be changed.
27	*Invalid notice of intention to claim a deduction – paragraphs 69 to 71* There appears to be no clear policy reason for the circumstances in	*Deducting personal contributions –Notice of intention to claim a deduction – paragraphs 67 to 72 and 263 to 276*

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	which a notice is not valid. Along with discussion on when a notice is invalid, the ATO should advise what actions contributors should take to avoid notices being invalid. The ATO should adopt a more liberal attitude in paragraphs 69, 70 and 71 (by treating the application as valid if there are sufficient assets left in the accumulation section of the fund to meet the resultant contributions tax). <u>Different interpretation for subparagraphs in paragraph 290-170(2)(c)</u> Why is a different policy approach adopted in the interpretation of subparagraph 290-170(2)(c)(ii) and subparagraph 290-170(2)(c)(iii) of the ITAA 1997? The interpretation for invalid notices where a pension has commenced is simpler in the sense that it creates a more workable outcome in terms of tax components than the treatment for partial roll-overs. The interpretation for both subparagraphs should consider what amount is left in the member's interest to determine if the notice is valid. Section 290-170(4) provides that a superannuation provider may refuse to acknowledge a notice if the value of the superannuation interest is less than the contributions tax that will need to be paid if the notice is accepted. The example in the Ruling (taken from the Explanatory Memorandum) demonstrates the approach by the legislature of requiring the superannuation provider to consider what is left in the member's account to determine the validity of a notice. <u>Fund no longer holds a contribution</u> We suggest more information be included in the Ruling to explain the statement 'no longer holds the contribution' referred to in	The range of comments provided has caused the ATO to review the position taken in the Ruling. However, the approach is not more liberal as suggested by one of the comments. Rather the approach reflects another comment which suggests that the validity of the notice should be affected by the tax components of the remaining balance. <u>Different interpretation for subparagraphs in paragraph 290-170(2)(c)</u> The interpretations taken are different because the words used in the relevant paragraphs are different. However, the Ruling does align the interpretation of the different words as much as possible to maintain the integrity of the proportioning rule that applies to work out the components of superannuation benefits. The revised approach takes account of not only the value of the interest that remains in the fund after a partial roll-over, but also the relevant components of the remaining amount. <u>Fund no longer holds a contribution – successor fund</u> The ATO cannot make an extra-statutory concession to allow deduction notices to be given to successor funds. Legislative amendment is required to authorise that. <u>Pension has commenced</u> The position taken in the draft Ruling has been retained to maintain the integrity of the proportioning rule.

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	subparagraph 290-170(2)(c)(ii) of the ITAA 1997. Where a partial roll-over occurs the validity of the notice should be affected by the tax components of the remaining balance. The effect of the notice is to reclassify the amount in the notice from a tax free component to a taxable component. Where the tax free component is lower than the amount in the notice this will create an anomaly. Suggestions for changes to paragraphs 69 and 70 were: • Paragraph 69 and 70 seem to contradict Example 3. Where a partial roll-over has occurred the example allows a tax deduction equal to the amount left in the fund where this is less than the contribution. However, paragraphs 69 and 70 state that a notice is invalid if 'the value of the interest after the roll-over is less than the current year's personal contributions'. • The statement in paragraph 70 appears more restrictive than subparagraph 290-170(2)(c)(ii) of the ITAA 1997. The requirement for a valid notice should be that there are sufficient non-concessional contributions available to cover the notice. That is, paragraph 70 should state where a partial roll-over occurs the provider 'will no longer hold a contribution ……' where '…..the value of the non concessional component of the interest is less than the amount in the notice.' • Paragraph 70 appears to impose an additional condition under section 290-170(2) of the ITAA 1997 – that the balance of the member's account cannot be less than the value of the contribution which is being claimed as a tax deduction. This may be relevant where the value of a member's interest at the time the provider receives the notice has declined due to negative investment earnings and is less than the contribution but the fund could still be considered to hold the contribution as the	

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	contribution has not been withdrawn from the fund. In contrast, subparagraph 290-170(2)(c)(ii) of the ITAA 1997 only denies the tax deduction in this scenario if the fund no longer holds the contribution. • The statement in paragraph 70 that '*a superannuation provider will no longer hold a contribution if the member's interest in the fund has been transferred to a successor fund'* is not necessarily correct in all circumstances. The Commissioner should consider the wider ramifications of this view particularly in a successor fund transfer context. There appears to be increasing fund merger activity, and that the inability of members to give valid notices of their intention to claim a deduction once a successor fund transfer has taken place may significantly disadvantage some members. We suggest that this issue be referred to Treasury for consideration. <u>Pension has commenced</u> In relation to a notice being invalid if a pension has commenced based in whole or part on the contribution (subparagraph 290-170(2)(c)(iii) of the ITAA 1997) it is considered that: • For a contribution made before the pension commenced, the notice should still be valid after the pension has commenced, provided the member's accumulation interest to which the contribution was made contains sufficient tax free component to give effect to the notice. • The approach adopted by the Commissioner is unduly restrictive in the event the account balance is not wholly applied to the provision of an income stream.	

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28	*Examples – paragraphs 72 to 82* Could you include certain specific situations in relation to deductible contributions? For example, superannuation deductions for a director of a corporate trustee – as was the case with the recently withdrawn ATO ID 2008/15.	*Examples – paragraphs 88 to 102* Examples 8 to 11 have been included in the Ruling in relation to the rules for deductibility of contributions. Paragraph 243 has been included in the explanation section of the Ruling to indicate when a deduction for a superannuation contribution for a director can be claimed by the corporate trustee against the company's income, and when the corporate trustee can claim a deduction for superannuation contributions for its director against the income of the trust fund. It states: > The corporate trustee of a trust may be entitled to deduct a contribution made for a director against the income earned by the company (rather than the income of the trust). A superannuation contribution for a director of the corporate trustee of a trust can only be deducted from the income of the trust if the director is a common law employee of the trust engaged in producing the assessable income of the trust or its business.
29	*Example 1 – paragraphs 72 and 73* Reference is made to Example 1 at paragraphs 72 and 73 of the draft Ruling. It would be very useful to business owners and their advisors if this example could be expanded in a simple way so as to also outline the CGT small business concessions and superannuation CGT contribution cap consequences. In particular for in-specie contributions where the CGT retirement exemption is used. It should consider the timing required under CGT for the contribution, and the timing for the choice to exclude the amount from non-concessional contributions and presenting the required form to the superannuation	*Example 6 – paragraphs 83 and 84* The suggested expansion to this example is not within the scope of this Ruling.

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	provider.	
30	*Examples 3 and 4 – paragraphs 77 to 79 and 80 to 82.* It is expected that the number of fund mergers will increase over the next 12 months to 2 years. An example regarding the application of the timing requirements for notices in relation to successor fund transfers and fund mergers should be included.	*Examples – successor fund.* The ATO considers there is sufficient information in the Ruling (paragraphs 70 and 276) to deal with when a notice of intention to deduct is invalid where a person is no longer a member of the fund as a result of the member's interest being transferred to a successor fund. At the time of finalising this compendium, a measure before Parliament will amend the law to allow a notice of intention to deduct to be given to a successor fund as a result of certain fund mergers. The Ruling will be amended by addendum once the measure is enacted.
31	*Example 4 – paragraphs 80 to 82* In reference to paragraph 82, can you explain why a notice of intention to deduct would be invalid where the taxpayer commenced a pension based on a prior period balance and did not include any current year contributions?	*Example 11 – paragraph 100 to 102* Further detail has been included in the example. The change allows the example to more clearly illustrate the explanation in paragraphs 268 to 276 that a valid notice cannot be given in respect of contributions made prior to the commencement of a superannuation income stream.
32	*Relevant CGT Event* Is the relevant CGT Event for an in specie contribution CGT Event A1 or CGT Event E2? This is not covered in the ruling. See ATO ID 2003/559 – Disposal of a CGT asset to a trust: application of CGT event A1 or CGT event E2.	*Relevant CGT Event* The ATO considers this issue is not within the scope of this Ruling. The ATO view is contained in Draft Taxation Ruling TR 2004/D25. Example 11 at paragraphs 176 and 177 of TR 2004/D25 states that where a person transfers shares to a self-managed superannuation fund CGT Event E2 occurs.

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		This view is not inconsistent with ATO ID 2003/559 which states that CGT Event A1 is the relevant event for the sale of an asset to a trust where the parties to the transaction are indifferent to the type of entity receiving the asset.
33	*Grandfathered vesting arrangements* Should this Ruling also deal with what counts to the contribution caps for the grandfathered vesting arrangements? It is suggested that the Ruling could make it clear that where grandfathered vesting arrangements apply, employer contributions which are not fully and immediately vested will still count to the concessional contribution cap in the year in which they are contributed (unless there are other exceptions that may apply in accordance with the principles in PS LA 2008/1)	*Grandfathered vesting arrangements* As allocation of contributions by a fund is not within the scope of this Ruling, the suggestion has not been taken up.
34	*Omissions from Part B* Part B of the Ruling should include information on: • Whether a contribution is taxable to the fund. • Whether a contribution is concessional, non-concessional or neither. • Excess contributions tax – when it is incurred, how the tax payable it is calculated, and the processes involved. • Whether a fund can or cannot accept a particular contribution. • No-TFN contributions – the rules and the tax implications. The Ruling should also include information on the interactions between the above matters (and other issues such as reportable employer superannuation contributions) so contributors understand the implication and ramifications of making contributions. This could	*Omissions from Part B* None of the matters suggested here is within the scope of this Ruling as they do not raise interpretive issues concerned with the meaning of contribution for the purposes of the income tax law or the rules that apply for claiming a deduction for superannuation contributions.

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	be achieved by: • expanding the 'What this Ruling is about' section and • including specific references at relevant spots in the text (not through footnotes).	
35	*Date of effect* The final Ruling should apply prospectively. It is considered that any change to the law or to the application of the law should apply prospectively. Some of the statements regarding the treatment of amounts received by superannuation funds are contrary to existing practice and the general understanding of these principles as applied within the superannuation industry. Some funds and fund members could suffer considerable disadvantage if the views expressed in the draft Ruling were applied in respect of prior periods.	*Date of effect – paragraphs 103 to 106* Part A of the Ruling is to apply both before and after its date of issue. Part B of the Ruling applies to the 2007-08 and later income years. However, to the extent paragraphs 71 and 72 and examples 10 and 11, about invalid notices of intention to deduct personal superannuation contributions, are not reflected in a superannuation provider's current administrative practice they will apply to the 2010-11 and later income years. The ruling does not replace the views in Taxation Ruling TR 2005/24. The Ruling will not apply to taxpayers to the extent it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling.