TR 2010/1 - Income tax: superannuation contributions

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Taxation Ruling

Income tax: superannuation contributions

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What this Ruling is about

1. This Ruling is about contributions made to a superannuation fund, an approved deposit fund or a retirement savings account. It explains the Commissioner's views as to the ordinary meaning of the word 'contribution' in so far as 'contribution' is used in relation to a superannuation fund, approved deposit fund or retirement savings account in the *Income Tax Assessment Act 1997* (ITAA 1997).[1] Aspects of this Ruling are also relevant to the meaning of 'contribution' in the *Superannuation Industry (Supervision) Act 1993* (SISA) and the Superannuation Industry (Supervision) Regulations 1994 (SISR). However, it should be noted that the definition of 'contribution' in the SISR modifies the ordinary meaning of the word 'contribution'.

2. Part A of this Ruling considers the ordinary meaning of contribution, how a contribution can be made and when a contribution is made.

3. Part B of this Ruling explains some aspects of the rules in Division 290 that apply if a superannuation contribution for an employee or a personal contribution is to be deducted.

[1] All legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

Ruling

Part A – General superannuation contributions concepts

Ordinary meaning of contribution

4. In the superannuation context, a contribution is anything of value that increases the capital of a superannuation fund provided by a person whose purpose is to benefit one or more particular members of the fund or all of the members in general.

5. How a person's purpose is determined, how a fund's capital is increased and when a contribution is made are discussed in paragraphs 6 to 38 of this Ruling.

Determining a person's purpose

6. Not every increase in the capital of a fund is a superannuation contribution as a person who increases a fund's capital must have the purpose of benefiting one or more particular members of the fund or all of the members in general.

7. A person's purpose is the object which they have in view or in mind. Generally, a person will be said to intend the natural and probable consequences of their acts and likewise their purpose may be inferred from their acts. This is a determination of a person's objective purpose, not their subjective intention.

8. A person will not normally have a purpose of benefiting a member of the fund if the transaction they carry out is in no way dependent upon the identity of the other party as a superannuation provider or they are simply fulfilling the terms of a contract or arrangement entered into on a commercial or arm's length basis.

9. By contrast, an objective determination of a person's purpose may in some cases lead to the conclusion that the person's purpose is to benefit one or more particular members of the fund or all of the members in general. This may occur when a transaction or arrangement is entered into because of a connection or relationship between the person and the superannuation provider or cannot be explained by reference to commercial or arm's length dealings.

How and when a contribution is made to a superannuation fund

10. The capital of a superannuation fund may be increased directly by:

- transferring funds to the superannuation provider;
- rolling over a superannuation benefit from another superannuation fund;
- transferring an existing asset to the superannuation provider (an *in specie* contribution);

- creating rights in the superannuation provider (also an *in specie* contribution); or
- increasing the value of an existing asset held by the superannuation provider.

11. The capital of a superannuation fund can also be increased indirectly by:

- paying an amount to a third party for the benefit of the superannuation provider;
- forgiving a debt owed by the superannuation provider; or
- shifting value to an asset owned by the superannuation provider.

Transferring funds to the superannuation provider

12. A superannuation fund's capital is most commonly increased by transferring funds to the superannuation provider and, as a general rule, the contribution will be made when the funds are received by the superannuation provider.

13. The following table summarises the ways in which funds are typically transferred and when the contribution is made:

No.	If the funds are transferred by …	A contribution is made when …
1	Making a cash payment (either in Australian or foreign currency) to the superannuation provider	The cash is received by the superannuation provider.
2	An electronic transfer of funds to the superannuation provider	The funds are credited to the superannuation provider's account.
3	Giving the superannuation provider a money order or bank cheque on which payment is made	The money order or bank cheque is received by the superannuation provider, unless the order or cheque is dishonoured.[2]
4	Giving the superannuation provider a personal cheque (other than one that is post-dated[3]) that is presented and honoured with cash or its electronic equivalent	The personal cheque is received by the superannuation provider, so long as the cheque is promptly presented and is honoured.

[2] No contribution is made if the order or cheque is not honoured.
[3] That is, the date on the cheque is later than the date on which the cheque is received by the superannuation provider.

5	Giving the superannuation provider a personal cheque that is post-dated and that is presented and honoured with cash or its electronic equivalent	The cheque is able to be presented for the payment (that is, the date on the cheque), so long as the cheque is promptly presented and is honoured.
6	A related party (as maker) issuing a promissory note, payable on demand at face value, to the superannuation provider and the note is paid with cash or its electronic equivalent	The promissory note is received, so long as payment is demanded promptly and the note is honoured.
7	A related party (as maker) issuing a promissory note, payable on a future date at face value, to the superannuation provider and the note is paid with cash or its electronic equivalent[4]	Payment is able to be demanded or required to be made, so long as the demand (if required) is promptly made and the note is honoured.

14. Payment of a personal cheque or related party promissory note will be taken to have been demanded promptly if payment is demanded within a few business days.

15. Where it is clear to the Commissioner that payment has not been promptly sought on a personal cheque or related party promissory note the contribution will, in the absence of extenuating circumstances, be taken to be made if, and when, a payment of cash (or its electronic equivalent) actually occurs.

16. A transfer of funds to a superannuation provider is a contribution even if it is made by a person under an agreement to reimburse the superannuation provider for a liability the provider incurred in carrying out its duties as a superannuation provider.

[4] Such a note 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 the 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.

Roll-over of a superannuation benefit

17. A roll-over superannuation benefit[5] (other than a superannuation benefit that is paid from one superannuation interest of a member in a superannuation plan to another interest of that member in the same plan) and a transfer of a person's benefits from an overseas superannuation fund to an Australian superannuation provider, however made, is a contribution as it increases the capital of the fund in the same way as any other transfer of funds or assets and is made to obtain superannuation benefits for a particular individual.[6]

Transferring an existing asset (in specie contribution)

18. The fund's capital will be increased when a person transfers an asset to the superannuation provider but the provider pays no consideration or pays consideration less than the market value of the asset.[7]

19. For example, a person might transfer shares they own in a stock exchange listed company to the superannuation provider to make a superannuation contribution.

20. A contribution by way of a transfer of an asset will be made when the superannuation provider obtains ownership of the asset from the contributor. The Commissioner accepts the superannuation provider obtains ownership of an asset when beneficial ownership of the asset is acquired and that beneficial ownership can be acquired earlier than legal ownership.

21. For many classes of property, there is no formal registration process that evidences ownership. For such property, the ownership of property will often pass when the provider acquires [physical] possession of the property. However, the Commissioner accepts that ownership of property may be acquired earlier than [physical] possession is obtained, for example, on execution of a deed of transfer of the property.

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[5] As defined in section 306-10 but not a transfer of a person's benefits from one superannuation interest in a superannuation plan to another interest of that person in the plan. Such a transfer between superannuation interests in the same superannuation plan does not increase the fund's capital.

[6] Note however, the definition of contribution in subregulation 1.03(1) of the SISR specifically excludes benefits that have been rolled over or transferred. In applying that definition, the Commissioner takes 'rolled over' and 'transferred' to have the meanings given to those terms in subregulation 5.01(1) of those regulations and therefore takes 'rolled over' and 'transferred' to be concerned only with amounts moved within the Australian superannuation system.

[7] A superannuation provider may breach section 66 of the SISA when an asset is acquired from a related party of the fund, such as a member. However, a superannuation provider is able to acquire certain assets such as business real property and listed securities from a related party. In the context of a self managed superannuation fund see Self Managed Superannuation Funds Ruling SMSFR 2010/1 Self Managed Superannuation Funds: the application of subsection 66(1) of the *Superannuation Industry (Supervision) Act 1993* to the acquisition of an asset by a self managed superannuation fund from a related party.

22. For a class of property, the legal ownership of which is evidenced by a system of formal registration (for example shares in a publicly listed company or Torrens System land), legal ownership will pass when the superannuation provider is registered as the owner. However, beneficial ownership may be transferred earlier.

23. A superannuation provider acquires the beneficial ownership of real property when the provider obtains possession of a properly executed transfer that is in registrable form together with any title deeds and other documents necessary to procure registration of the superannuation provider as the legal owner of the land.

24. A superannuation provider acquires the beneficial ownership of shares or units in an Australian Stock Exchange listed company or unit trust when the provider obtains a properly executed off-market share transfer in registrable form.

25. A contributor or superannuation provider who seeks to argue a contribution of property occurs when beneficial, not legal, ownership of property passes must retain sufficient evidence of the relevant transactions and events to precisely identify when the change of beneficial ownership occurs.

Creating rights in the superannuation provider (in specie contribution)

26. Similarly, the fund's capital is increased when a person creates a contractual right or other legal or equitable right in the superannuation provider that did not previously exist but the provider pays no consideration or pays consideration less than the market value of the right. The right must be the substantive asset acquired by the superannuation provider not a subsidiary right that arises from a transaction or arrangement. For example, when you enter a contract to buy land you obtain a series of subsidiary rights under the contract.

27. A contribution of property by way of the creation of a contractual right or other legal or equitable right in the superannuation provider will occur when the superannuation provider commences to hold that right.

28. For example, a superannuation provider commences to hold a right to receive income or capital from a discretionary trust as soon as the trustee of the discretionary trust makes its resolution to appoint the trust income or capital.

Increasing the value of, or shifting value to, an asset owned by the superannuation provider

29. The fund's capital 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 the asset.[8]

30. A contribution by way of an improvement to an asset of a fund, such as making an improvement to land or a building owned by a superannuation provider, is made when ownership of the improvement passes to the superannuation provider. In the absence of a lease or other agreement that provides otherwise, ownership of the improvement would pass immediately on the improvement becoming a fixture to the land or building.

31. An increase in the capital of the fund may take the form of increasing the value of an existing asset of the fund through a value shifting arrangement that transfers value from an asset held by another.

32. A contribution by way of value shifting to an asset owned by a superannuation provider is made when the capital of the fund is increased because of the increase in value of the asset.

Indirectly increasing the capital of the fund

33. The capital of the fund may be increased indirectly.

34. A person may pay an amount to a third party to satisfy a liability of a superannuation provider to that third party. The payment to the third party for the superannuation provider's benefit is constructively received by the provider and the capital of the superannuation fund is increased by the satisfaction of the fund's liability provided that the person is not entitled to be reimbursed from the fund.

35. A contribution by way of satisfaction of a fund's liability to a third party will be made when the fund's liability is extinguished.

36. Similarly, a fund's capital is increased when a liability incurred by the superannuation provider is forgiven by the person to whom the liability is owed.

37. A contribution by way of debt forgiveness will be taken to occur when a deed of release that relieves a superannuation provider from the obligation to pay the liability is executed or the creditor is barred under the law from enforcing the liability.[9]

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[8] The improvement may also result in a breach of section 66 of the SISA if it results in the acquisition of an asset from a related party of the fund.

[9] Under section 67 of the SISA, the trustees of superannuation funds can only borrow money in a limited range of circumstances.

38. When a guarantor makes a contribution by paying a debt of a superannuation provider the timing of the contribution will be determined by whether or not the guarantor has a right to be indemnified by the superannuation provider. If the guarantor has no right of indemnity, the contribution is made when the guarantor satisfies the provider's liability. If the guarantor has a right of indemnity, a contribution is only made when the guarantor takes 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.

Part B – Specific rules about deducting superannuation contributions

Purpose of the contributor

39. Whether a superannuation contribution is deductible is determined by regard to the purpose of the contributor. The contributor's purpose must be to provide superannuation benefits for a particular person or class of persons.

40. As stated in paragraph 7 of this Ruling, a person's purpose is the object which they have in view or in mind. Generally, a person will be said to intend the natural and probable consequences of their acts and likewise their purpose may be inferred from their acts. This is a determination of a person's objective purpose, not their subjective intention.

41. Providing superannuation benefits must be the person's sole purpose. However, it does not matter that a person takes account of the incidental consequences of making a contribution such as obtaining a tax deduction.

Deducting superannuation contributions for own employees

42. You can claim a deduction for a contribution that you make to provide superannuation benefits for another person who is your employee at the time that the contribution is made.

43. A contribution will provide superannuation benefits to an employee if it will benefit a particular employee who is a member of the fund, or if it will benefit all or an identifiable class of employees who are members of the fund.

44. An employee must be a member of the superannuation fund when you make the contribution if the contribution is to provide superannuation benefits for that employee. 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.

Treating former employees as employees

45. A contribution you make to a superannuation provider for a former employee is deductible if you can treat the former employee as an employee when the contribution is made and the conditions for deductibility are met.

46. You can treat a former employee as an employee when a contribution is made if the contribution reduces your charge percentage for the former employee under section 22 or 23 of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) because of section 15B of the SGAA.[10] The contribution will not be deductible to the extent to which it exceeds the amount required to reduce the charge percentage to nil.

47. You can also treat a former employee as an employee when a contribution is made if the contribution is in lieu of salary or wages that relate to the former employee's period of service.[11] The contribution must be a one-off payment made following termination of employment pursuant to an effective salary sacrifice agreement[12] and should reflect the normal contributions to superannuation for the employee just before they ceased employment. Where you are required to make more than one contribution pursuant to the salary sacrifice agreement the contributions also must be made within 2 months after termination of employment.[13]

Deducting superannuation contributions for another's employees

48. You can claim a deduction for a superannuation contribution for another person who, when the contribution is made, is an employee of a company in which you have a controlling interest.[14] The term 'controlling interest' is not defined and will take its common law meaning.

49. A shareholder who has a bare majority, more than one half of the voting power, will have a controlling interest in a company.

50. However, a shareholder may still have a controlling interest notwithstanding it does not have a bare majority if it has the power, by the exercise of voting rights, to carry a resolution at a general meeting of the company or is more powerful than all other shareholders put together in a general meeting.

51. If two shareholders hold equal shares of 50% with equal voting rights neither of the shareholders has a controlling interest.

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[10] Paragraph 290-85(1)(a).
[11] Paragraph 290-85(1)(b).
[12] See Taxation Ruling TR 2001/10 Income tax: fringe benefits tax and superannuation guarantee: salary sacrifice arrangements.
[13] Paragraph 290-85(1)(c).
[14] Subsection 290-90(1).

52. However, a shareholder in a company may be able to deduct a contribution for an employee of the company in other circumstances.[15]

Employment activity conditions

53. An employee is a common law employee and any other person who is treated as an employee by section 12 of the SGAA.[16] If a contribution for an employee is to be deductible, the employee must (among other requirements) satisfy the employment activity condition.[17]

54. A person who is an employee because of the operation of subsections 12(2) to 12(10) of the SGAA automatically satisfies the employment activity condition.[18]

55. To satisfy the employment activity condition, a common law employee must be either:

- engaged in producing the employer's assessable income; or
- an Australian resident who is engaged in the employer's business.[19]

56. The meaning of 'engaged' is explained in paragraph 59 of this Ruling.

Deducting personal contributions

Maximum earnings test

57. Those persons who are engaged in an 'employment' activity in the income year in which they make a contribution need to meet an earnings test if they are to deduct their contribution.[20]

58. Those persons who have not engaged in an 'employment' activity in the income year in which they make a contribution, such as persons who although receiving workers' compensation payments are not employed at any time during the year, are not subject to the maximum earnings test.

[15] See subsection 290-90(5).
[16] Section 290-65.
[17] Subsection 290-60(2) and section 290-70.
[18] Paragraph 290-70(aa).
[19] Paragraphs 290-70(a) and (b).
[20] Section 290-150 and subsection 290-160(1).

59. A person will be engaged in an 'employment' activity if they are engaged in an activity in the income year that results in them being treated as an employee for the purposes of the SGAA.[21] The term 'engaged' is not defined and takes its ordinary meaning. One of several meanings given to engaged is 'busy or occupied; involved'. Another meaning is 'under an engagement' where the ordinary meaning of 'engagement' is given as 'under an obligation or agreement'.[22]

60. Consequently, a person need not be physically engaged in the activity. For example:

- a common law employee or office holder will be engaged in the activity while they remain employed or hold the office;
- a member of the executive body of a body corporate (for example a director) who is entitled to payment for their services in that capacity will be engaged in the activity while they remain a member of the executive body;
- a member of a Parliament of the Commonwealth or a State or of a Legislative Assembly of a Territory will be engaged in the activity while they are a member of the Parliament or Assembly; and
- a person who is engaged under a contract wholly or principally for labour is engaged in the activity throughout the duration of the contract.

61. An artist, musician or other person engaged to perform or present or participate in a performance or other activity covered by subsection 12(8) of the SGAA will be engaged in the activity while they participate in the relevant activity.

62. Where the person engages in any 'employment' activities in the income year a deduction can only be claimed where the sum of assessable income, reportable fringe benefits total, and (from 1 July 2009) reportable employer superannuation contributions attributable to the 'employment' activities is less than 10% of the total of the person's assessable income, reportable fringe benefits total and reportable employer superannuation contributions in the income year that the contribution is made.[23]

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[21] See generally Superannuation Guarantee Ruling SGR 2005/1 Superannuation guarantee: who is an employee? for the meaning of 'employee' for these purposes.
[22] Macquarie Dictionary, 3rd edition, 1998.
[23] Subsection 290-160(2).

63. Assessable income, reportable fringe benefits total and reportable employer superannuation contributions are to be given their statutory meaning. In this regard, a person's assessable income is usually a gross amount worked out ignoring expenses incurred in gaining the income. However, in some cases, such as partnership or trust income, the amount included in a person's assessable income is their share of the net partnership income or net trust income.

64. All amounts that are attributable to the 'employment' activity are taken into account as assessable income in the 10% test. These include:

- the salary or wages (as used in its ordinary meaning) from the activity;
- allowances and other payments earned by an employee;
- the other payments, such as commission, director's remuneration and contract payments, that are treated as salary or wages by section 11 of the SGAA for those persons who engage in an 'employment' activity in a capacity other than a common law employee;
- an employment termination payment received by a person in consequence of the termination of their employment; and
- 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.

65. In the application of the maximum earnings test, the relevant 'employment' activity need not be an activity in Australia. For a non-resident, the income attributable to employment outside Australia is not assessable income in Australia and so will not be counted in the maximum earnings test. A non-resident with Australian sourced income that is not attributable to 'employment' activities may therefore be able to deduct a personal superannuation contribution made to an Australian superannuation provider against their Australian sourced income.

66. However, the 'employment' income of an Australian resident employed overseas by a foreign employer will be counted in the maximum earnings test if the income is assessable income.

Notice of intention to claim a deduction

67. A person who intends to deduct their personal superannuation contributions must give the superannuation provider a valid notice in the approved form.

68. The notice may be given by an agent on behalf of the person, including a legal personal representative of a deceased person.

69. A notice is not valid in certain circumstances, including a notice given, when:

- the person is no longer a member of the fund (for example, because the person's benefits have been paid to them or they have rolled over their benefits in full to another fund);
- the superannuation provider no longer holds the contribution (for example, the trustee may no longer hold a contribution where a person has been paid a lump sum superannuation benefit or had part of their benefit rolled over to another superannuation fund); or
- the superannuation provider has commenced to pay an income stream based in whole or part on the contribution.[24]

70. A superannuation provider will no longer hold a contribution if a member's interest in the fund has been transferred to a successor fund.

71. A superannuation provider will no longer hold a contribution, or at least a part of it, if the member has chosen to roll-over or withdraw a part of the superannuation interest held by the provider. In such a case, a deduction notice cannot be given for the entire contribution. A valid deduction notice will be limited to a proportion of the tax free component of the superannuation interest that remains after the roll-over or withdrawal. That proportion is the value of the relevant contribution divided by the tax free component of the superannuation interest immediately before the roll-over or withdrawal – see Examples 10 and 10A.

72. An income stream is based in whole or part on the contribution if it is commenced from the superannuation interest to which the contribution was made – see Example 11.

Examples

Example 1 – contribution made by paying a fund's expense

73. Jane has a self-managed superannuation fund of which she is the sole member. During the 2010-11 income year Jane arranged accounting and audit services to ensure the fund met its income tax and regulatory obligations for the year ended 30 June 2010. Jane paid the accounting and audit fees for the fund from her own money. Jane did not reimburse her outlay from fund monies.

[24] Paragraph 290-170(2)(c).

74. By satisfying a liability of the fund Jane has indirectly increased the capital of the fund. Jane's purpose in paying the liability of the fund without reimbursement was to increase the benefits she would ultimately receive from the fund. Therefore, Jane made a contribution to the fund when she paid the accounting and audit fees.

Example 2 – no contribution made by a free service

75. Jasmine has a self-managed superannuation fund of which she is the sole member. She is a chartered accountant and has significant experience in general accounting, taxation and superannuation matters. Jasmine prepares the accounts and income tax and regulatory return for her self-managed superannuation fund each year without remuneration.

76. By ensuring the fund does not incur a liability in having the fund accounts prepared, Jasmine does not increase the capital of the fund and there is no contribution.

Example 3 – contribution made by forgiving liability

77. Gus and Pina are the only members of a self-managed superannuation fund. They are the shareholders of a company through which they operate a successful advisory business which provides accounting, taxation and superannuation services. An employee of their company prepares the fund's accounts. The company invoices Gus and Pina as trustees of the fund for the services provided by the company, but Gus and Pina as shareholders of the company forgive the invoiced liability.

78. By forgiving the liability, Gus and Pina have increased the capital of the fund. Therefore, they have made a contribution equal to the forgiven amount.

Example 4 – contribution made by employer's reimbursement

79. EDC Pty Ltd is the employer-sponsor of the EDC Superannuation Fund. All of the members for whom contributions are currently being made are employees of EDC Pty Ltd or its subsidiaries. In addition to the benefits accruing from contributions and earnings on those contributions, each member is entitled to an additional benefit on death or permanent disability. These additional benefits are provided through a group life insurance policy owned by the trustee of the EDC Superannuation Fund. EDC Pty Ltd reimburses the trustee of the EDC Superannuation Fund for the premiums payable on this policy each year.

80. By reimbursing EDC Superannuation Fund for the insurance policy premiums, there is a direct increase in the capital of the fund. The reimbursement is a contribution as it is considered that the purpose of EDC Pty Ltd's payment is to provide superannuation benefits for their employees.

Example 5 – no contribution made by employer sponsor

81. Mega Pty Ltd is the employer sponsor of the Mega Staff Superannuation Fund. The vast majority of Mega's current employees are members of the Mega Staff Superannuation Fund. Mega pays the wages of five individuals who are employed to provide assistance to the trustees and administrators of the fund and to assist other Mega employees with questions concerning the fund and their benefits as members. Mega Pty Ltd does not seek to recover from Mega Staff Superannuation Fund the wages paid to these individuals.

82. As with Example 2, by ensuring the fund has not incurred these liabilities in operating the fund, Mega Pty Ltd does not increase the capital of the fund and there is no contribution.

Example 6 – when in specie contribution of real property is made

83. Bob owns land on which retail premises have been constructed. Those premises include the site from which Bob runs his pharmacy business. Bob decides to contribute the land (being business real property) to his self-managed superannuation fund. The fund has a corporate trustee, CarPharm Pty Ltd, of which Bob and his wife Janet are directors. The directors of CarPharm Pty Ltd resolve to accept the contribution of the land on 1 June 2009. After obtaining advice from their solicitor, Bob, as owner of the land, and Bob and Janet, as directors of the corporate trustee of the fund, complete the necessary land transfer forms and take possession of those forms and the relevant title deeds on Monday, 29 June 2009 to hold in their capacity as directors of the corporate trustee. Therefore, as at that date, Bob and Janet hold all the documents in registrable form necessary to obtain registration of title to the land in their capacity as directors of the trustee of the fund. Janet lodges them with the registrar of land titles on 2 July 2009. CarPharm Pty Ltd is registered as owner of the land on 9 July 2009.

84. In these circumstances, Bob's contribution will be made on 29 June 2009.

Example 7 – when in specie contribution of shares is made

85. On 26 June 2009, Cheung signs an off-market share transfer form to effect a contribution of shares from herself to Cho Pty Ltd, the trustee of her self-managed superannuation fund. However, Cheung leaves certain parts of the form blank for completion by her stock broker, as her shareholdings, and those of Cho Pty Ltd are broker sponsored. Cheung posts the transfer form to her broker on the same day.

86. Cheung's broker adds the omitted information on 2 July 2009 and completes the transfer through CHESS. Cho Pty Ltd is registered as a shareholder on 5 July 2009.

87. Cheung's contribution will be made on 2 July 2009 as it is not until that day that the relevant transfer has been completed to registrable form.

Example 8 – maximum earnings test

88. Caitlin terminates her employment with Bling Pty Ltd on 30 June 2009 and was paid unused long service leave and annual leave on 3 July 2009. Caitlin made a contribution of $5,000 to her complying superannuation fund on 9 July 2009. Caitlin was not engaged in any employment activities for the 2009-10 income year.

89. As Caitlin was not engaged in any employment activities in the 2009-10 income year, she does not need to meet the earnings test in relation to her $5,000 contribution.

Example 9 – maximum earnings test – worker's compensation

90. Brian was employed by Blackwood Pty Ltd and was injured at work in November 2008. From November 2008 to 30 June 2010 Brian received worker's compensation payments. Brian resigned from Blackwood Pty Ltd on 10 July 2009. On 17 July 2009 Brian received $21,000 from Blackwood Pty Ltd for unused long service leave and annual leave.

91. Brian made a personal superannuation contribution of $21,000 to a complying superannuation fund in the 2009-10 income year.

92. As Brian was still employed by Blackwood Pty Ltd in the 2009-10 income year he is considered to be engaged in an employment activity in that income year. Brian is required to meet the maximum earnings test to claim a deduction for personal superannuation contributions made in the 2009-10 income year.

93. The income attributable to Brian's employment activities in the 2009-10 income year includes the worker's compensation payments and the unused long service leave and annual leave payments from Blackwood Pty Ltd to the extent that they are assessable in the 2009-10 income year.

Example 10 – valid notice of intention to deduct – roll-over

94. Rachel, who is 54, has a superannuation interest valued at $50,000. This interest includes a contributions segment of $10,000. She makes a $100,000 personal contribution in March 2012. The fund records this contribution against the contributions segment for Rachel's superannuation interest which means that amount would be counted against the tax free component of any superannuation benefit paid to Rachel. The value of her superannuation interest is $150,000.

95. In June 2012, Rachel rolls over $60,000 leaving her with an interest of $90,000. The $60,000 roll-over is comprised of a $44,000 tax free component and a $16,000 taxable component. The tax free component of the roll-over is worked out as follows:

$$\text{Roll-over amount} \times \frac{\text{Tax free component of interest before roll-over}}{\text{Value of the superannuation interest before roll-over}}$$

$$\$60{,}000 \times \frac{\$110{,}000}{\$150{,}000}$$

$$\$44{,}000$$

96. The tax free component of the remaining superannuation interest is $66,000.

97. Rachel then lodges a notice in September 2012 advising that she intends to claim a deduction for the $100,000 contribution made in the 2011-12 income year.

98. That notice is not valid. Rachel's superannuation fund no longer holds the entire $100,000 contribution.

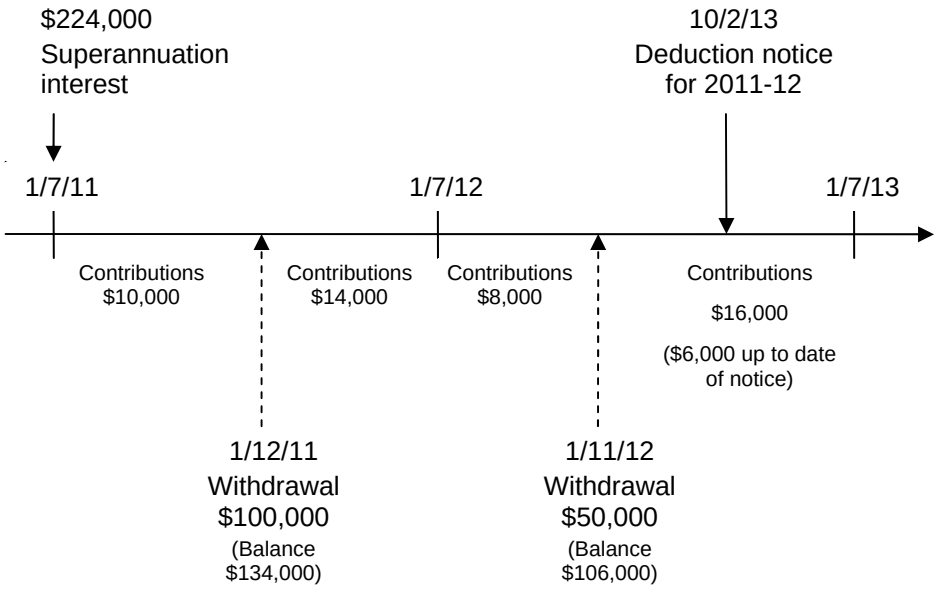
99. Rachel could give a valid deduction notice for an amount up to $60,000. That amount is worked out as follows:

$$\text{Tax free component of remaining interest} \times \frac{\text{Contribution}}{\text{Tax free component of interest before roll-over}}$$

$$\$66{,}000 \times \frac{\$100{,}000}{\$110{,}000}$$

$$\$60{,}000$$

Example 10A – valid notice of intention to deduct – multiple withdrawals



99A. This example assumes no investment earnings or administration fees. All calculations have been rounded to the nearest dollar.

99B. On 1 July 2011 Mark had a superannuation interest valued at $224,000 including a tax free component of $74,000. Mark pays superannuation contributions of $2,000 on the 20th day of each month.

1st withdrawal

99C. On 1 December 2011 Mark withdraws $100,000. Prior to the withdrawal Mark's account balance was $234,000 including a tax free component of $84,000 ($74,000 + $10,000 contributions). The balance after withdrawal is $134,000 including a tax free component of $48,103.[24A]

99D. The withdrawal affects the amount Mark can include in a valid deduction notice for the contributions made from 1 July 2011 until the withdrawal (1 December 2011) as only a proportion of these contributions are still held by the fund. The proportion of the $10,000 in contributions still held by the fund is:

[24A] That is, $100,000 withdrawal x $84,000 (tax free component) / $234,000 = $35,897 tax free component withdrawn. Remaining tax free component is therefore $84,000 - $35,897 = $48,103.

$$\text{Tax free component of remaining interest} \times \frac{\text{Contributions}}{\text{Tax free component of interest before withdrawal}}$$

$$\$48{,}103 \times \frac{\$10{,}000}{\$84{,}000}$$

$$\$5{,}727$$

2nd withdrawal

99E. Mark makes a second withdrawal of $50,000 on 1 November 2012. Prior to the withdrawal Mark's account balance was $156,000 including a tax free component of $70,103 ($48,103 + $14,000 + $8,000). The balance after withdrawal is $106,000 including a tax free component of $47,634.[24B]

99F. This second withdrawal also affects the amount Mark can include in a valid deduction notice for contributions made in the 2011-12 income year. Additionally, it affects the amount that can be included in a valid deduction notice for contributions made in the 2012-13 income year insofar as the contributions ($8,000) were made before the withdrawal.

Valid deduction for the 2011-12 income year

99G. For the 2011-12 income year Mark had made contributions of $10,000 prior to the withdrawal on 1 December 2011. As calculated above, only $5,727 of those contributions remained in the fund after the first withdrawal. After the first withdrawal, further contributions of $14,000 were made in the 2011-12 income year. The proportion of the contributions made in the 2011-12 income year that are still in the fund after the second withdrawal and for which Mark could present a valid deduction notice for 2011-12 is:

$$\text{Tax free component of remaining interest} \times \frac{\text{Contributions}}{\text{Tax free component of interest before withdrawal}}$$

$$\$47{,}634 \times \frac{\$5{,}727 + \$14{,}000}{\$70{,}103}$$

$$\$13{,}404$$

[24B] That is, $50,000 withdrawal x $70,103 (tax free component) / $156,000 = $22,469 tax free component withdrawn. Remaining tax free component is therefore $70,103 - $22,469 = $47,634.

Valid deduction for the 2012-13 income year

99H. For the 2012-13 income year Mark had made contributions of $8,000 between 1 July 2012 and the second withdrawal on 1 November 2012. The proportions of these contributions which are still held by the fund after the second withdrawal and for which Mark could give a valid notice for 2012-13 are:

$$\text{Tax free component of remaining interest} \times \frac{\text{Contributions}}{\text{Tax free component of interest before withdrawal}}$$

$$\$47{,}634 \times \frac{\$8{,}000}{\$70{,}103}$$

$$\$5{,}436$$

99I. On 10 February 2013 Mark presented a valid deduction notice for $13,404 for contributions made during the 2011-12 income year. These contributions cease to be part of the tax free component and become part of the taxable component. The balance of Mark's interest is reduced by $2,011 (15% of $13,404), being the tax payable by the fund on the contribution which is now assessable income of the fund. The balance of Mark's interest after presentation of the notice is $109,989 ($106,000 + $6,000 – $2,011), comprising a tax free component of $40,230 ($47,634 + $6,000 – $13,404) and a taxable component of $69,759 ($109,989 – $40,230).

99J. Provided Mark does not make another withdrawal before he presents a deduction notice for the 2012-13 income year a valid notice can be given to the fund for $21,436. This comprises the contributions made between 1 July 2012 and 1 November 2012 that remain in the fund after the withdrawal ($5,436) and contributions made between 1 November 2012 and 30 June 2013 ($16,000).

Example 11 – invalid notice of intention to deduct

100. Libby has a superannuation interest valued at $150,000. Libby makes a $50,000 personal contribution in March 2008 so that her interest is valued at $200,000.

101. If, before lodging a section 290-170 notice, she were to commence a pension using $180,000 of her $200,000 interest, her fund will have commenced to pay a superannuation income stream based in whole or part on the contribution. A notice Libby purports to give her fund to deduct the contribution will be invalid.

102. Further, the outcome will be same even if, after making her personal contribution, Libby were to commence a pension of only $140,000 leaving the value of her interest in excess of the amount she intended to deduct.

Date of effect

103. Part A of this ruling applies both before and after its date of issue.

104. Part B of this ruling applies to the 2007-08 and later income years.

105. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. The Ruling does not replace the views in Taxation Ruling TR 2005/24 Income tax: deductibility of personal superannuation contributions, with respect to income years up to and including 2006-07.

106. Further, to the extent to which the approach taken in paragraphs 71 and 72 and Examples 10, 10A and 11 of this Ruling are not reflected in a superannuation provider's current administrative practice, they will apply to personal contributions made in the 2011-12 and later income years.

Commissioner of Taxation
25 February 2010

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Part A – General superannuation contributions concepts

Ordinary meaning of contribution

107. The ITAA 1997 does not define the term 'contribution'. The ordinary meaning of 'contribution' is '1. the act of contributing 2. something contributed'. The ordinary meaning of 'contribute' is '1. … give [money, time etc.] to a common stock or for a common purpose', ... 3. to make contribution; furnish a contribution'.[25]

Statutory context

108. Consistent with basic principles of statutory interpretation, it is necessary to ascertain the meaning of a 'contribution' to a superannuation fund having regard to the context and underlying purpose of the legislative provisions in which the term appears.[26] An analysis of the statutory context, in particular the scheme of the ITAA 1997 and related superannuation legislation, will help determine whether the legislation intends to adopt the ordinary meaning of 'contribution'.

109. In Australia, the income tax law provides concessions to superannuation funds[27] that comply with the regulatory provisions in the SISA. Such funds are referred to as complying superannuation funds. Many of the references to a contribution in the ITAA 1997 are specifically related to complying superannuation funds.

110. A complying superannuation fund must be a regulated superannuation fund under the SISA. In turn, a regulated superannuation fund must have a trustee.[28] Accordingly, in Australia, superannuation funds will almost invariably take the form of a trust.

111. The Commissioner considers that there are two aspects of the surrounding context that are particularly relevant in considering the meaning of a superannuation contribution: first, the nature of a superannuation fund, including the activities it commonly undertakes and the purpose of its establishment and maintenance; and, secondly, the fact that the vast majority of Australian superannuation funds are structured as a trust.

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[25] Macquarie Dictionary 3rd edition 1998.
[26] *CIC Insurance Limited v. Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at 408; *Project Blue Sky Inc. v. Australian Broadcasting Authority* [1998] HCA 28 at paragraphs 69 and 70; (1998) 194 CLR 355 at 381-382.
[27] Subsection 995-1(1) defines superannuation fund and complying superannuation fund by reference to the meanings given for those terms in the SISA.
[28] Subsection 19(2) of the SISA.

The nature of a superannuation fund

112. The trustee of a superannuation fund holds the assets and the income, profits or gains arising from the investment of the assets, or the realisation of those investments, on behalf of the members of the fund. In this regard, the sole purpose test in the SISA requires fund trustees to maintain the fund solely for the purpose of providing retirement or similar types of benefits to, or in respect of, fund members.[29]

113. While adherence to the sole purpose test is critical in establishing that a superannuation fund complies with the SISA, substantially similar tests define the existence of a superannuation fund. A superannuation fund is a fund that has the sole purpose of providing real monetary benefits, or benefits of a monetary value, to members on retirement, death or other cessation of employment.[30]

114. The application of the sole purpose test and the authorities considering the meaning of a 'superannuation fund' provide the context from which the meaning of contribution can be determined.

Trust structure

115. As money or other property is required to constitute a trust, money or other property is required to constitute a superannuation fund that is constituted as a trust consistent with the requirements of the SISA.[31]

116. It is a well established principle of trust law that certainty of subject matter, or identifiable trust property, is necessary to found the existence of a trust.[32]

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[29] Section 62 of the SISA.

[30] *Scott v. Commissioner of Taxation (No 2)* (1966) 40 ALJR 265 at 272 per Windeyer J; *Mahony v. Commissioner of Taxation* (1967) 41 ALJR 232 at 232 per Kitto J; *Walstern v. Federal Commissioner of Taxation* [2003] FCA 1428 at paragraphs 53 and 54; (2003) 138 FCR 1 at 15-16.

[31] *Walstern v. Commissioner of Taxation* [2003] FCA 1428 at paragraphs 49 to 51; (2003) 138 FCR 1 at 14-15.

[32] *Herdegen v. Federal Commissioner of Taxation* (1988) 84 ALR 271 at 277; 88 ATC 4995 at 5000; (1988) 20 ATR 24 at 29; *Jacob's Law of Trusts*, paragraph [106], page 5.

Purpose of tax treatment of contributions

117. The purpose of the rules dealing with the tax treatment of superannuation contributions is also relevant in identifying the meaning of the concept. Although the ITAA 1997 does not contain any specific object clause in relation to the contribution deduction provisions, the Explanatory Memorandum to the Tax Laws Amendment (Simplified Superannuation) Bill 2006 states:[33]

> The object of [Schedule 1 to the Bill][34] is to ensure that the amount of concessionally taxed superannuation benefits that a person receives results from superannuation contributions that have been made gradually over the course of the person's life.

118. The explicit relationship recognised in the Explanatory Memorandum between contributions made and benefits ultimately received by the fund supports the proposition that a contribution, regardless of its form, must enable the fund to derive real benefits on behalf of fund members.

Earlier statutory contexts and case law on former provisions

119. Although the income tax law has, for many years, included specific provisions allowing deductions for superannuation contributions, very few Court and Tribunal decisions have been required to consider the meaning of 'contribution'. To the extent to which they have, some (such as those which concerned whether an amount had been set apart as a superannuation fund) are not, strictly speaking, relevant to the current income tax provisions which are expressed differently. However, those cases do add to the overall context in which the income tax laws should be interpreted.

120. For example, in the *Commissioner of Taxation v Roche*[35] although Pincus J was required to consider the purpose for which a contribution was made he noted that the relevant payment 'augmented the size of the fund'.

121. In *Lend Lease Corporation Ltd v Commissioner of Taxation*[36] Hill J made a similar observation in relation to the provision that allowed a deduction for an amount set apart as a fund:

> When the section refers to an amount being set apart as a fund, it appears to envisage a case where the act of 'setting apart' either creates an existing fund or supplements an existing fund … [with] the consequence that the amount has become subjected to the trusts of a fund.

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[33] Paragraph 1.9.
[34] Schedule 1 to the Tax Laws Amendment (Simplified Superannuation) Bill 2006 inserted Part 3-30-Superannuation into the ITAA 1997. Part 3-30 contains Division 280, Guide to superannuation provisions, Division 290, Contributions to superannuation funds, Division 292, Excess contributions tax, Division 295, Taxation of superannuation entities and Divisions 301 to 307 concerning the taxation of superannuation benefits.
[35] [1991] FCA 606 at paragraph 24; 22 ATR 828 at 834; 91 ATC 5024 at 5029.
[36] [1990] FCA 165 at paragraph 35; 90 ATC 4401 at 4407: 21 ATR 402 at 409.

122. A similar view was expressed by Doyle CJ in *Hills Industries Ltd & Anor v Commissioner of State Taxation & Anor*[37] in relation to payroll tax legislation that was also concerned with amounts paid to, or set apart as, a superannuation fund:

> But the question remains of whether the act of crediting each account was a payment of money to a superannuation fund or a setting apart of money as a superannuation fund. As I observed earlier, the assets of the Fund held by the trustee were not increased by the crediting of these amounts. It is clear that the Fund referred to in the Rules comprises all of the assets of the Fund. Prima facie, one would expect that a payment of money to the Fund, or a setting apart of money (as an augmentation of) the Fund would increase the Fund, in the sense of resulting in an increase in the assets of the Fund.

123. In 1989 when a new section 82AAC of the *Income Tax Assessment Act 1936* (ITAA 1936) was substituted for the previous section that allowed a deduction for an amount set apart as a fund, the Explanatory Memorandum emphasised that amounts set apart but not actually paid to a superannuation fund would be denied deduction and only amounts paid to a fund as a contribution would subsequently be deductible.[38]

Commissioner's interpretation as to meaning of contribution

124. The ordinary meaning of 'contribute' referred to in paragraph 107 of this Ruling refers to something given by a person or entity. What is given must also be given for a particular purpose.

125. In general terms, the Commissioner considers that the matter of whether an amount is a superannuation contribution is determined by having regard to whether a superannuation provider is given something of value and whether what is given is given for a particular purpose.

126. Specifically, the Commissioner considers that a contribution is anything of value that increases the capital of a superannuation fund provided by a person whose purpose is to benefit one or more particular members of the fund or all of the members in general.

127. It is necessary to objectively analyse whether the capital of the fund has been increased (or augmented in the words of Pincus J) and the purpose of the person responsible for that increase.

Determining a person's purpose

128. Not every increase in the capital of a fund is a contribution. The increase in the capital of the fund must be provided by a person whose purpose is to benefit one or more particular members of the fund or all of the members in general.

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[37] [2002] SASC 67 at paragraph 44.

[38] Explanatory Memorandum, Part B Notes on clauses, to Taxation Laws Amendment Bill (No 2) 1989 – refer to the discussion of the amendments made by Schedule 1 to that Act under the heading "Contributions to superannuation funds for benefit of employees".

129. A person's purpose is the object which they have in view or in mind. Generally, a person will be said to intend the natural and probable consequences of their acts and likewise their purpose may be inferred from their acts. This is a determination of a person's objective purpose, not their subjective intention.

130. This approach is based on views expressed in relation to the former superannuation contribution deduction provisions of the ITAA 1936. For example, Hill J said in *Raymor Contractors Pty Ltd v. Federal Commissioner of Taxation*:[39]

> In the context of section 82AA, purpose is the object which the taxpayer has in view or in mind. There may be a fine distinction between purpose and intention but it is not necessary to explore that distinction, cf *Plimmer v. Commissioner of Inland Revenue (NZ)* (1957) 11 ATD 480 at 483-484. Generally speaking a person will be said to intend the natural and probable consequences of his acts and likewise his purpose may be inferred from them. In the present case the taxpayer's purpose in making the payments in each year of income may be inferred from the objective evidence ...

131. As such, it is clearly appropriate to consider the natural and probable consequences of a transaction or arrangement to determine whether a contribution has been made.

132. A person will not normally have the purpose of benefiting a member of the fund if the transaction they carry out is not in any way dependent upon the identity of the other party as a superannuation provider.

133. To illustrate this point, the Commissioner considers that an increase in the fund's capital due to income, profits and gains arising from the use of the fund's existing capital will not, generally, be derived from someone whose purpose is to benefit one or more particular members of the fund.

134. This is consistent with a view taken by Senior Member Block in AAT Case 18/97[40] in relation to a contention that income accumulations could be taken to be contributions for the purposes of the definition of 'purchase price' as used in relation to an annuity or superannuation pension under section 27H of the ITAA 1936:

> To interpret the term 'contribution' in this fashion would, in the view of the Tribunal, strain its meaning; when a bank pays interest which becomes a part of the Accumulated Credit, that bank makes a payment, but it cannot be said that it makes a contribution …

135. A deposit taking institution pays interest on deposits because of the obligations arising under the contract it has with its customer, not to benefit the members of a superannuation fund whose superannuation provider is a customer.

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[39] 91 ATC 4259 at 4270; (1991) 21 ATR 1410 at 1423.
[40] 97 ATC 227 at 231; AAT Case 11709 (1997) 35 ATR 1074 at 1078.

136. A company pays a dividend to provide a return to its shareholders, not to benefit the members of a particular shareholder that happens to be a superannuation provider.

137. A person who, as a tenant of commercial premises owned by a superannuation provider, makes improvements to the leased property would ordinarily make the improvements for its own business purposes, not to benefit the fund members.

138. An insurance company that pays an amount to a superannuation provider on the occurrence of an insured event under the terms of an insurance 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.

139. A lender that, for commercial reasons and on commercial terms, forgives an arm's length loan owed by a superannuation provider is doing so for its own business purposes not to benefit the fund members.

140. An entitlement to income or capital from a trust may not be treated the same way in all cases.

141. An entitlement to income or capital from a trust in which the superannuation provider has an interest will not be a contribution to the fund where the fund is merely receiving income or capital as a return on, or of, moneys invested in the trust in the same way as any other entity that has an interest in the trust. In these circumstances, the distribution is not made because the recipient is a superannuation provider but because it is entitled to a return on, or of, the investment in the trust.

142. An appointment of income or capital made by the trustee of a discretionary trust to a superannuation provider is, however, a contribution to the fund. In these circumstances, the appointment increases the capital of the superannuation fund. The amount cannot be characterised as income, profit or gain from the use of the existing capital of the fund. Further, in appointing an amount to a trust that has a particular purpose, whether the trust is a charitable trust or superannuation fund, the trustee must be taken to intend to have the appointed amount used for the purpose of that trust. It is therefore necessary to conclude that the trustee's purpose in appointing an amount to a superannuation fund is to provide benefits to the members of the fund. The trustee of the discretionary trust will be concerned with the identity of the superannuation provider when choosing between the objects of the trust.

143. As the previous paragraph shows, an objective determination of the natural and probable consequences of a person's actions in providing something of value that increases the capital of a superannuation fund may be to benefit one or more particular members of the fund or all of the members in general.

144. For example, a person who transfers their benefits from one superannuation fund to another (whether that transfer constitutes a roll-over superannuation benefit[41] or a transfer of a person's benefits from an overseas superannuation fund) is also a contribution because the person's purpose is to obtain superannuation benefits from the receiving fund.

145. Where a fund member or employer sponsor satisfies a liability of a superannuation provider or reimburses the superannuation provider for a liability incurred in operating the fund, it may be reasonably inferred that it is to provide benefits for the members of the fund.

146. The Commissioner explains the meaning of 'reimbursement' in Taxation Ruling TR 92/15 Income tax and fringe benefits tax: the difference between an allowance and a reimbursement. Paragraph 3 states:

> A payment is a reimbursement when the recipient is compensated exactly (meaning precisely, as opposed to approximately), whether wholly or partly, for an expense already incurred although not necessarily disbursed. In general, the provider considers the expense to be its own and the recipient incurs the expenditure on behalf of the provider. A requirement that the recipient vouch expenses lends weight to a presumption that a payment is a reimbursement rather than an allowance. A requirement that the recipient refunds unexpended amounts to the employer adds further weight to that presumption.

147. Having regard to that definition, it has been suggested that a reimbursement of an expense incurred by a superannuation provider merely reflects the payer's intention to treat a particular expense as its own and not the superannuation provider's. The Commissioner does not accept it is open to a superannuation provider to treat an expense properly incurred in operating a superannuation fund as an expense of another person. A person who agrees to reimburse the superannuation provider for such an expense is doing so to benefit the members of the fund and the reimbursement payment will be treated as a contribution.

148. A person who forgives a liability of a superannuation provider will be taken to have the purpose of benefiting the members if the person has no commercial reason for forgiving the liability.

[41] As defined in section 306-10.

149. Similarly, a guarantor who satisfies a loan obligation of a superannuation provider may be taken to benefit the fund members in circumstances where the guarantor has no, or forgoes their right of, redemption against the superannuation provider. There may be a commercial reason for providing the guarantee (for example, the loan would not have been made to the superannuation provider without the guarantee) or indeed for satisfying the liability of the fund (the contractual requirements of the guarantee itself). However, the failure to deal with superannuation provider on a similar commercial basis in satisfying the fund's obligation means that it may be reasonably inferred that the guarantor's purpose is to provide benefits for the members of the fund.

How a thing of value increases the fund's capital

150. The capital of a superannuation fund may be increased by something of value provided directly or indirectly in a number of ways.

151. A 'contribution' is not limited to a direct payment of cash to the superannuation provider. A superannuation contribution can be made by transferring funds or other assets to the superannuation provider. Subject to the restrictions in the SISA on a superannuation fund acquiring assets from a related party, a transfer of an asset to a superannuation fund may be a contribution *in specie*.[42]

Transfer of funds

152. A superannuation fund's capital is most commonly increased by transferring funds to the superannuation provider. A transfer of funds, can occur in a number of ways including by cash, electronic transfer of funds, money order, bank cheque, personal cheque or through the use of a promissory note issued by a related party (the maker) at face value to the superannuation provider.

153. The funds can be denominated in Australian currency or a foreign currency.

154. However, if the capital of the fund is to be increased, there must be an actual transfer of funds to the superannuation provider. No payment will be made if the cheque, promissory note or similar negotiable instrument is not honoured.

155. How the transfer occurs is relevant to both whether the fund's capital is increased and when a particular contribution is made. Various cases and texts have noted that cheques and other negotiable instruments are not the same as cash.

[42] Subsection 285-5(1).

156. For example, in *Sidney Raper Pty Ltd v. Commonwealth Trading Bank of Australia* [1975] 2 NSWLR 227, Moffit P said at 233 a bank cheque or other negotiable instrument although being treated by many as equivalent to, or as good as cash, is still a cheque and not cash. It is effectively converted to cash on presentation to the relevant financial institution if the drawer of the cheque has sufficient funds available in the account with the institution.

157. As noted in '*Mann on the Legal Aspect of Money*' in the course of discussing the concept of 'payment':

> … the mere acceptance of the cheque or other instrument by the creditor does not of itself constitute 'payment', for it does not have the effect of making funds available to the creditor; such instruments only constitute payment if they are subsequently honoured …[43]

158. In a similar vein, Rich J in *Permanent Trustee Co (Executors of Estate of F H Prior, deceased) v. Federal Commissioner of Taxation*,[44] in discussing whether income was derived for the purposes of the ITAA 1936, noted that:

> [t]o see whether income has been derived one must look to realities. Usually payment of interest by cheque involves a receipt of income, but payment by a valueless cheque does not … You do not transform interest into an accretion of capital by writing out words on a piece of paper. There must be some reality behind them. Some accretion of value to corpus.

159. Further, *Chalmers & Guest on Bills of Exchange* states that a cheque, being payable on demand, is intended as an instrument which will immediately be paid. This can be contrasted with a bill of exchange, which is said to be a credit instrument which is frequently drawn payable at a future date.[45]

160. An amount set aside but not actually paid is not a contribution. It is well established that the making of a journal entry in the books of an entity does not alone establish a payment. However, an actual payment, albeit to reimburse the superannuation provider for an expense incurred in operating the fund, may constitute a contribution.

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[43] Charles Proctor, *Mann on the Legal Aspect of Money*, 6th edition, Oxford University Press, [7.13].
[44] (1940) 6 ATD 5 at 12 and 13.
[45] See paragraph 1862 of *Chalmers & Guest on Bills of Exchange, Cheques and Promissory Notes* 15th edition, Sweet & Maxwell, London 1998.

161. An entity, often an employer sponsor of a superannuation fund, may agree to reimburse the superannuation provider for certain expenses incurred in operating the fund. For example, the employer may agree to reimburse the trustee for certain insurance premiums or administration costs of the fund. Consequently, the trustee may periodically invoice the employer for an amount of such expenses. This may be a reimbursement of the actual costs incurred and paid in operating the fund or be a payment of an amount based on some other figure such as a percentage of the salaries of every employee. This reimbursement increases the capital of the fund in the same way as any other transfer of funds and for the reasons set out in paragraphs 145 to 147 of this Ruling will be taken to be made for the purpose of benefiting the members of the fund.

Roll-over superannuation benefit

162. A roll-over superannuation benefit[46] (other than a superannuation benefit that is paid from one superannuation interest of a member in a superannuation fund to another interest of that member in the same fund) and a transfer of a person's benefits from an overseas superannuation fund to an Australian superannuation provider are usually made by a payment of funds. But they can be made by transferring an asset or a combination of both the payment of funds and asset transfer. However the roll-over or transfer occurs, the capital of the fund is increased in the same way as any other transfer of funds or assets.[47]

163. The payment of a superannuation benefit from one superannuation interest of a member in a superannuation plan to another interest of that member in the same plan does not increase the capital of the fund.

Transferring an existing asset

164. The increase in the capital of a superannuation fund may result from transferring an asset to a superannuation provider. A person who transfers an asset to a superannuation provider may be paid for the transfer of that asset although the amount paid by the provider is less than the market value of the asset. In these circumstances, the transfer of the asset may be both the purchase of an asset by the superannuation provider and a contribution of the asset by the transferor if their purpose is to benefit one or more particular members of the fund or all of the members in general (as discussed in paragraphs 128 to 149 of this Ruling).

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[46] As defined in section 306-10.

[47] Note however, for the purposes of the SISR the definition of contribution in subregulation 1.03(1) of the SISR specifically excludes benefits that have been rolled over or transferred as those terms are defined in subregulation 5.01(1) of those regulations.

Creating rights in the superannuation provider

165. The fund's capital is increased if a person creates a contractual right or other legal or equitable right in the superannuation provider that did not previously exist. This will be a contribution if the superannuation provider pays no consideration for the right or less than the market value for the right.

166. The right must be the substantive asset acquired by the superannuation provider, that is, the right must be the substance of the transaction or arrangement, not a subsidiary or subordinate right that simply arises from a transaction or arrangement.

167. For example, the trustee of a discretionary trust creates a right in a superannuation provider that is the object of the trust when the trustee of the trust appoints income or capital to the superannuation provider. The appointment of the income or capital is the substance of the arrangement.

168. By contrast, when a superannuation provider enters into a contract to buy land from another party, the superannuation provider acquires a bundle of rights which are the means by which ownership of the land is transferred. In such a case, the Commissioner will look to the substantive transaction, the acquisition of the land, not the subordinate bundle of rights created by the contract.

Increasing the value of, or shifting value to, a fund asset

169. The fund's capital may be increased when a person (other than the superannuation provider) increases the value of an existing asset of the fund. For example, a person may add a fixture to land owned by the superannuation provider.

170. An increase in the capital of the fund may also take the form of increasing the value of an existing fund asset through a value shifting arrangement that transfers value from an asset held by another. For example, the fund's capital will be increased where:

- a fund holds an interest in an entity (commonly shares in a company) and there is an alteration of the rights attaching to the interest held, such as distribution or voting rights, in favour of the interest held by the fund to the detriment of the other interest holders; or
- a person or entity transfers an asset without consideration to a second entity in which a fund holds an interest.

171. In each of these cases, the indirect increase in the capital of the fund may be a contribution if the increase is attributable to the actions of a person whose purpose is to benefit one or more particular members of the fund or all of the members in general.

Payment of fund expense

172. The Commissioner recognises that it has become common within some parts of the superannuation industry for a person to pay an expense on behalf of a superannuation fund. This will usually involve an employer or member of the fund. The practice involves making journal entries after the expense is paid that, in the case of the employer or fund member, re-classifies the expense payment as a superannuation contribution and, in the accounts of the superannuation provider, recognises the making of the contribution and payment of the expense.

173. The Commissioner's preferred approach is for all superannuation fund expenses to be paid directly out of the fund itself and for superannuation contributions to be made directly to the fund. This provides clarity because the outgoings of, for example, an employer or member of a fund, and the fund directly match the tax treatment.

174. Where a person pays an amount to a third party to satisfy a liability of a superannuation provider, the superannuation provider is taken to have constructively received the payment made to the third party on the superannuation provider's behalf. The payment to the third party increases the capital of the fund because the person's payment of the superannuation provider's expense extinguishes the liability of the provider.

Debt forgiveness and payments by guarantors

175. Although the SISA generally prohibits a trustee of a superannuation fund from borrowing money, there are a few limited exceptions. A question has arisen as to whether a contribution would be made if a lender were to forgive the debt of a trustee, particularly in relation to the limited recourse borrowing arrangements covered by subsection 67(4A) of the SISA.

176. Some of the borrowing arrangements entered into by superannuation providers as a result of the enactment of subsection 67(4A) of the SISA have required a person other than the fund trustees, or a fund trustee in their personal capacity, to provide a guarantee for the repayment of the borrowed amount.

177. The capital of a fund is increased where a liability incurred by the superannuation provider is forgiven by the person to whom the liability is owed. The capital of the fund is increased by extinguishing the liability of the superannuation provider.

178. Further, a superannuation provider is taken to have constructively received a payment made by a guarantor to a lender on the superannuation provider's behalf. The guarantor's payment will extinguish the superannuation provider's liability to the lender. Therefore, the guarantor's payment of the superannuation provider's liability will increase the capital of the fund if the guarantor has no right of indemnity against the fund.

179. The capital of the fund would not be increased merely if a liability to one party were extinguished in consideration for the acceptance of a liability of the same amount to another party. Therefore, the capital of the fund will not be increased by a guarantor who satisfies the superannuation provider's liability but who has a right of indemnity against the superannuation provider. However, if the guarantor subsequently forgoes that right or is prevented from enforcing that right (for example by the statute of limitations), the fund's capital will then be increased.

180. Similarly, the capital of the fund would not be increased when a lender exercises their right of recourse against the asset in circumstances where the value of the asset is less than the amount outstanding on the loan. This will be so even if the lender exercises both the right of recourse against the asset and requires a guarantor to satisfy any difference between the value of the asset and the outstanding loan amount.

When a superannuation contribution is made

181. The time at which a contribution is made will determine the period for which the person making the contribution may be eligible to claim a deduction. Subsections 290-60(3) and 290-150(3) prescribe that a contribution made in an income year is deductible in that income year. When a contribution is made is also relevant to the operation of the excess contributions taxes.[48] Further, a contribution that is included in the assessable income of a superannuation fund is normally included in the income year in which it is received.[49]

General rule – a contribution is made when received by the fund

182. A superannuation contribution is made when the capital of the fund is increased. As explained in paragraphs 183 to 210 of this Ruling, the contribution may be made when an amount is received, or ownership of an asset is obtained or the fund otherwise obtains the benefit of an amount.

Contributions of funds

183. A contribution of funds as cash or an electronic funds transfer, is made when the amount is received by the superannuation provider or credited to the relevant account.

[48] See subsections 292-25(2) and 292-90(2).
[49] Sections 295-160 and 295-190. However, note that a member's personal contribution that is deducted may be included in a later income year in some circumstances – see subsection 295-190(2) and (3).

184. It has been suggested that a contribution made by electronic funds transfer may occur as soon as the contributor has done everything necessary to effect a payment. The Commissioner does not accept that is sufficient to increase the capital of the fund.

185. Electronic payment systems operate through contractual arrangements between the:

- payer and payer's financial institution;
- payer's financial institution and payee's financial institution; and
- payee's financial institution and payee.

186. When a financial institution agrees to accept a payment instruction it notifies the receiving institution of the details of the payment. In Australia there are several different clearing systems for the transferring of information and netting of amounts to be transferred between institutions. The clearing rules of these systems bind the financial institutions but not the customers. Most small payments between institutions are not processed in real time but are subject to deferred net settlement which occurs overnight.[50] As such, it is not until an amount is credited to a bank account of the superannuation provider that a contribution will be taken to be made.

187. A superannuation provider's account statement would normally provide the best evidence as to when a contribution is received. However, in limited circumstances, other evidence may be used to determine when a contribution is made. For example, a transfer of funds between the linked accounts of a member of a self-managed superannuation fund and the fund held at the same financial institution may result in a contemporaneous debit and credit to the respective accounts with the funds being immediately available for use of the self-managed superannuation fund. When such a transfer occurs on a week-end, it is common for bank statements to show the transaction occurring on the next business day. Evidence, such as a computer print-out recording the receipt of the amount into an account of the superannuation provider, may be used to establish the timing of the contribution.

Cheques and promissory notes

188. Subject to the qualification in paragraphs 190 and 191 of this Ruling, a contribution made by money order, cheque or promissory note is made when the order, cheque or note is received by the trustee of the fund.[51] As stated in footnote 2 and paragraph 154 of this Ruling, if the cheque or note is dishonoured, no contribution will have been made by the person.

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[50] Thomson Legal Online, Law Relating to Banker and Customer, paragraphs 4.1860, 4.1980 and 4.2090.
[51] *Tilley v. Official Receiver in Bankruptcy* (1960) 103 CLR 529.

189. Subject to the qualification in paragraphs 190 and 191 of this Ruling, if a cheque is post-dated (that is, it is payable on a date later than the day on which the cheque is received by the superannuation provider) or a promissory note is payable on a date later than the day on which the note is received, the contribution will be made on the later of the day the cheque or note is received and the date on which payment can be demanded as shown on the cheque or note. Payment on such instruments cannot be demanded before the date shown.[52] Again, no contribution will have been made if the instrument is not honoured.

190. In the case of a personal cheque or a promissory note that is contributed by the maker, the Commissioner will treat the contribution as being made when the cheque or note received by the superannuation provider only if the superannuation provider promptly presents the cheque or note for payment and the cheque or note is honoured with cash (or its electronic equivalent).

191. In circumstances where such a personal cheque or promissory note is not promptly dealt with, the Commissioner will treat a contribution as having been made only once the superannuation provider has obtained payment in cash (or its electronic equivalent).

192. Presentation of such a personal cheque or demand for payment of such a promissory note will be accepted as prompt if it occurs within a few business days consistent with prudent business practice. Subject to extenuating circumstances, the Commissioner expects a trustee to obtain payment on any cheque or promissory note as soon as possible as such behaviour is consistent with the covenant in paragraph 52(2)(b) of the SISA. Under that covenant, the trustee is required to exercise the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with the property of another to whom the trustee felt morally bound to provide.

Transfer of assets or creation of rights

193. A contribution by way of a transfer of an asset will be made when the superannuation provider obtains ownership of the asset from the contributor. The Commissioner accepts the superannuation provider obtains ownership of an asset when legal or beneficial ownership of the asset is acquired and that beneficial ownership can be acquired earlier than legal ownership.

194. For many classes of property, there is no formal registration process that evidences ownership of the property. For such property, in the absence of a formal agreement to the contrary, the ownership will pass when the provider acquires [physical] possession of the property. However, the Commissioner accepts that ownership of property may pass on the execution of a deed of transfer of the property notwithstanding there has been no change in the [physical] possession.

[52] Subsection 61(2) of the *Cheques Act 1986.*

195. By contrast, legal ownership of some classes of property is evidenced by a system of formal registration (for example shares in a publicly listed company or Torrens System land). For such property, legal ownership of the property will pass when the superannuation provider is registered as the owner of the property.

196. However, in some circumstances the formal registration of the change of legal ownership occurs some time after beneficial ownership of the property passes. In recognising this, the Commissioner accepts that a superannuation provider may treat a contribution of property as made when beneficial ownership of the property is obtained by the superannuation provider.

197. When a person contributes real property to a fund, legal ownership will pass with registration of the superannuation provider as owner of the real property. The beneficial ownership may pass earlier.

198. In the case of a sale and acquisition of land, beneficial ownership normally passes when the purchase is settled at which time the buyer hands over the purchase price in exchange for a completed transfer in registrable form, together with any other necessary documents including title deeds and discharge of mortgage that enable transfer of title.[53]

199. In the case of a gift of land (which can be likened to an *in specie* contribution of land), case law indicates that an equitable interest in the land will be created once the donor (contributor) has done everything on their part necessary to transfer legal title to the property.[54] This principle is established in the High Court case of *Corin and Another v. Patton*:[55]

> [W]e conclude that, if an intending donor of property has done everything which it is necessary for him to have done to effect a transfer of legal title, then equity will recognise the gift. So long as the donee has been equipped to achieve the transfer of legal ownership, the gift is complete in equity. 'Necessary' used in this sense means necessary to effect a transfer. From the viewpoint of the intending donor, the question is whether what he has done is sufficient to enable the legal transfer to be effected without further action on his part.
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> …

[53] Taxation Ruling TR 94/29 Income tax: capital gains tax consequences of a contract for the sale of land falling through contains a detailed discussion of when a contract for the sale of land is completed.
[54] Beneficial ownership will normally be acquired when an equitable interest in the land is acquired.
[55] (1990) 92 ALR 1 at 13-14 per Mason CJ and McHugh J.

> … the donee acquires an equitable estate or interest in the subject matter of the gift once the transaction was complete so far as the donor is concerned. So much was acknowledged by the English Court of Appeal in *Re Rose*. There the court concluded that the donor had executed and delivered transfers and share certificates to the donee with the intention of transferring title to the shares to him and had placed him in a position to secure the legal title to the shares by registration subject to an exercise by the directors of their discretion to register the transfers. In this situation the donor could not recall the gift or invoke the aid of the court to prevent registration: see at 516. The court held that the donor had parted with his beneficial interest and had become a constructive trustee for the donee.

200. Having regard to these principles the Commissioner accepts that a superannuation provider acquires the beneficial ownership of real property when the provider obtains possession of a properly executed transfer that is in registrable form, together with any title deeds or other documents necessary to procure registration of the superannuation provider as the legal owner of the land.

201. When a person makes a contribution of shares in a company the superannuation provider has a duty to ensure it holds proper legal title to the shares. Legal ownership of the shares is recognised when the superannuation provider's name is registered in the company's share register – section 1072F of the *Corporations Act 2001*.[56] This will be the case where a contribution of shares in a publicly listed company is effected through the Clearing House Electronic Subregister System, known as CHESS.

202. As with a contribution of real property, the Commissioner accepts that a superannuation provider may acquire beneficial ownership of shares or units in an Australian Stock Exchange listed company or unit trust effected through an off-market share transfer, when the trustee obtains a properly executed off-market share transfer in registrable form.

[56] Section 1072F of the *Corporations Act 2001* is a replaceable rule. This means that ownership of the share may, according to the rules of the company be evidenced in another way.

203. Whether a contribution is made when beneficial ownership of property passes will need to be determined on a case by case basis. A contributor or superannuation provider who seeks to argue that a contribution of property is made when beneficial, not legal, ownership of the property passes must retain sufficient evidence of the relevant transactions and events to precisely identify when the change of beneficial ownership occurs. The evidence should show when everything that is required to be done to enable the superannuation provider to obtain registration of the change of ownership occurs. Such evidence would include relevant minutes of any trustee meeting held to consider the acceptance of the *in specie* contribution, the relevant transfer forms, and any other record of when the relevant transfer took place. In the absence of such evidence, the Commissioner will treat the contribution as made when the superannuation provider obtains legal ownership of the relevant property.

204. A contribution of property by way of the creation of a contractual right or other legal or equitable right in the superannuation provider will occur when the superannuation provider commences to hold that right.

205. For example, a superannuation provider commences to hold a right to receive income or capital from a discretionary trust as soon as the trustee of the discretionary trust appoints the trust income or capital.

206. A contribution by way of an improvement to an asset of a fund, such as making an improvement to land or a building owned by a superannuation provider, is made when ownership of the improvement passes to the superannuation provider. In the absence of a lease or other agreement that provides otherwise, ownership of the improvement would pass immediately on the improvement becoming a fixture to the land or building.[57]

207. A contribution by way of value shifting to an asset owned by a superannuation provider is made when the capital of the fund is increased because of the increase in value of the asset.

Payment of a fund liability

208. A contribution by way of satisfaction of a fund's liability to a third party will be made when a person satisfies the liability as that is when the fund's capital is increased.

[57] It is not within the scope of this Ruling to explore in detail the law of real property concerning fixtures. For example, an objective determination of a person's purpose is required to determine whether a chattel brought onto land is a fixture. However, it is clear that although a tenant may have a right to remove certain fixtures that are characterised by the law as tenant's fixtures, ownership of such fixtures lies with the landlord. See, for example, paragraphs 28.15.13 to 28.15.24 of *The Laws of Australia* Thomson Legal Online.

Debt forgiveness and guarantees

209. A contribution by way of debt forgiveness will be taken to occur when the lender executes a deed of release that relieves a superannuation provider from the obligation to repay a loan to the lender.

210. If a guarantor makes a contribution by paying a debt of a superannuation provider, when the contribution is made will be determined by whether or not the guarantor has a right to be indemnified by the superannuation provider. If the guarantor has no right of indemnity, the contribution is made when the superannuation provider's liability is satisfied. If the guarantor has a right of indemnity, a contribution is only made when the right of indemnity expires, for example, because of the operation of the statute of limitations of actions or when the guarantor takes formal steps to forgo that right, for example, by executing a deed of release.

Part B – Specific rules about deducting superannuation contributions

Purpose of the contributor

211. Whether a superannuation contribution is deductible is determined by regard to the purpose of the contributor. Subsections 290-60(1) and 290-150(1) of the ITAA 1997 make it clear that the contributor's purpose must be to provide superannuation benefits for a particular person or class of persons. As this element of the tests for deduction is the same as in the former sections 82AAC and 82AAT of the ITAA 1936 it is possible to rely on cases that considered the purpose test in those provisions and their predecessors.

212. Paragraph 130 of this Ruling quoted part of a judgment of Hill J from *Raymor Contractors Pty Ltd v. Federal Commissioner of Taxation*[58] concerning the meaning of 'purpose' in relation to superannuation contributions. The passage goes further and states the purpose must be the sole purpose of a contribution. Hill J said:

> In the context of section 82AA, purpose is the object which the taxpayer has in view or in mind. There may be a fine distinction between purpose and intention but it is not necessary to explore that distinction, cf *Plimmer v. Commissioner of Inland Revenue (NZ)* (1957) 11 ATD 480 at 483-484. Generally speaking a person will be said to intend the natural and probable consequences of his acts and likewise his purpose may be inferred from them. In the present case the taxpayer's purpose in making the payments in each year of income may be inferred from the objective evidence that in the years of income in question benefits were continually being forfeited and only one person was in fact paid out, that person being a director of the appellant. Coupled with the fact that virtually the whole of the contributions were lent back to the contributing companies these facts suggest that the appellant's purpose was not to benefit those persons who were members of the fund; or certainly that that was not the sole or dominant purpose in making the contributions in the years in question.

213. Hill J elaborated further on purpose in *Walstern Pty Ltd v. Federal Commissioner of Taxation*[59] (*Walstern's Case*) where he said:

> While I do not think it makes any difference in the present case either, I am inclined to the view that 'the purpose'' as used in section 82AAE refers to sole rather than dominant or principal purpose. This is the view that was accepted also by Pincus J in *FC of T v. Roche & Ors* 91 ATC 5024 at 5030; (1991) 105 ALR 95 at 103. However, I do not think that a deduction would be lost if the directors of a taxpayer/employer took into account in making a contribution, but incidentally, the taxation benefits which the Act makes available where a contribution is made to a fund. The answer may well lie in the fact that the taxation deduction will not, in such a case, be an object of the contribution; rather it will be a consequence of the contribution.

214. The Commissioner considers that a contribution is only deductible if the contributor's sole purpose is to obtain superannuation benefits for a person.

Deducting superannuation contributions for own employees

215. You can claim a deduction for the amount of a contribution that you make to a superannuation provider for the purpose of providing superannuation benefits for another person who is your employee at the time that the contribution is made.[60]

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[58] 91 ATC 4259 at 4270; (1991) 21 ATR 1410 at 1423.
[59] 2003 ATC 5076 at 5088; AAT Case 11709 (1997) 35 ATR 1074 at 1078.
[60] Section 290-60.

216. A contribution will provide superannuation benefits to an employee if it will benefit a particular employee who is a member of the fund, or if it will benefit all or an identifiable class of employees who are members of the fund.

217. As to benefiting a class of employees, Davies J (Wilcox J agreeing) in *Raymor Contractors Pty Ltd v Commissioner of Taxation*[61] put it this way:

> It is not necessary that an employer should turn his attention to the particular circumstances of each employee when making a contribution for it is sufficient that the contribution is made for the purpose of benefiting all or identifiable members of the fund … It is not, however, sufficient that the employer has in mind that the moneys in the superannuation fund will ultimately go to the benefit, not of the general members of the fund, but of a remaining employee or employees such as a managing director/principal shareholder. Funds which are managed for such an ultimate end are not funds maintained for the benefit of the employees in respect of whom contributions have, in the formal sense, been set apart or paid into the fund.

218. In the same case, Hill J expressed it similarly:[62]

> Many fund deeds require the employer contributor to pay an amount, actuarially calculated to be sufficient to fund the totality of benefits payable by the fund. In such a case no particular amount may be paid in respect of a particular employee although it would be possible on an actuarial basis to calculate how much of the total payment was referable to a particular employee.

219. Most employers now contribute for the benefit of each particular employee because of their obligations under the SGAA. Consequently, it will normally only be necessary to characterise a contribution as made for a class of employees where the contributions are made to a fund that provides defined benefits.

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[61] 91 ATC 4259, 21 ATR 1410 at paragraph 8 of his judgment.
[62] *Raymor Contractors Pty Ltd v Commissioner of Taxation* 91 ATC 4259, 21 ATR 1410 at paragraph 52 of his judgment.

220. A contribution cannot obtain superannuation benefits for a person who is not a member of the fund. As Hill J said in *Walstern's Case*:[63]

> There is another problem for Walstern under section 82AAE. At the time Walstern made the contribution there was no person who was a member of the fund. In law the trustee of the fund held the contribution upon resulting trust for Walstern pending nomination of an employee as member and ultimate acceptance of the person as member after payment of the qualifying contribution. It is true that a deduction would be allowable for a contribution to a fund where there were members of the fund, notwithstanding that at the time the contribution was made there had been no allocation among the members. That was decided in *Raymor*. But the present case goes beyond the issue of allocation which arose in *Raymor*. The fact is that unless and until any person became a member (and this did not happen until the later year of income) it simply was not correct to say that Walstern had made a contribution to a fund for the benefit of a person who was an eligible employee. It remained within the power of Walstern to have the contribution repaid to itself as owner in equity of the money, unless it took the further step of nominating a person as a member.

221. A similar view was taken in *Cameron Brae Pty Ltd v. Federal Commissioner of Taxation*.[64] In that case, the majority of the Full Federal Court found that the payment made by the employer company did not obtain any superannuation benefits for any employees as their entitlement to any benefits was at the discretion of the trustee. As the joint judgment of Stone and Allsop JJ stated:

> 42 The history of the provisions to which we have referred makes clear that deductions for payments in respect of employee superannuation have been available in a variety of statutory contexts, but always in circumstances where individual personal benefits, pensions or retiring allowances were provided to, that is furnished or supplied to, existing employees of the taxpayer employer with rights to such benefits by the payment. This can be seen from the earliest provisions dealing with the requirement of benefits being secured: *Metropolitan Gas Company v FCT* (1932) 47 CLR at 631. The need for the employees to be existing was always present. The payment was from an employer for the benefit of an existing employee. The right to receive the benefit was to be secured.
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> 43 …
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> 44 … Putting a trustee in funds to make it possible for a wide discretion to be exercised in favour of one or other of existing employees is not the same as a contribution that makes provision for superannuation benefits (involving the right to receive such benefits) for the existing employees.[65]

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[63] *Walstern Pty Ltd v. Federal Commissioner of Taxation* 2003 ATC 5076 at 5089; (2003) 54 ATR 423 at 436.
[64] [2007] FCAFC 135.
[65] *Cameron Brae Pty Ltd v. Federal Commissioner of Taxation* [2007] FCAFC 135 at paragraphs 42 and 44.

222. It is common for an employer to make a contribution for an employee who is not a member of the fund when the contribution is made, for example because the employee has recently commenced working for an employer who contributes to a default fund chosen by the employer rather than a fund nominated by the new employee in accordance with the choice of fund requirements of the SGAA. Sometimes the employer will forward the employee's application to become a member of the fund with the contribution. Sometimes the new employee will make their application to become a member of the fund separately. The Commissioner accepts that in circumstances such as these, the contribution is for the purpose of obtaining superannuation benefits for that employee 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.

Treating former employees as employees

223. A contribution you make to a superannuation provider for a former employee is deductible if the law allows you to treat the former employee as an employee when the contribution is made and the conditions for deductibility are met.[66]

224. You can treat a former employee as an employee when the contribution is made if the contribution reduces your charge percentage for the former employee under section 22 or 23 of the SGAA because of section 15B of that Act.[67] The contribution will not be deductible to the extent to which it exceeds the amount required to reduce the charge percentage to nil.

225. You can also treat a former employee as an employee when the contribution is made if the contribution is a one-off payment in lieu of salary or wages that relates to the former employee's period of service.[68]

226. The Explanatory Memorandum to Tax Laws Amendment (Simplified Superannuation) Bill 2006 for paragraph 290-85(1)(b) notes that these one-off contributions in lieu of salary or wages would normally be made under a salary sacrifice agreement. Paragraph 1.38 states:

> The contribution has to be a one-off payment made following the termination of employment and should reflect the employee's normal contributions to superannuation just before they ceased employment.

[66] Sections 290-60 and 290-85
[67] Paragraph 290-85(1)(a).
[68] Paragraph 290-85(1)(b).

227. Accordingly, a contribution for a former employee is covered by paragraph 290-85(1)(b) only if it is a one-off payment made following termination of employment pursuant to an effective salary sacrifice agreement that was in place before the termination. The deduction is limited to the normal contributions to superannuation for the employee just before they ceased employment.

228. Where you are required to make more than one contribution in lieu of salary and wages you can treat the former employee as an employee at the time each contribution is made provided the contribution is made within 2 months after termination of employment.[69] Like the one-off contribution, the contributions covered by paragraph 290-85(1)(c) must also be pursuant to an effective salary sacrifice agreement that was in place before the termination of employment and reflect the normal contributions made to superannuation for the employee just before they ceased employment.

Deducting superannuation contributions for another's employees

229. You can claim a deduction for a superannuation contribution for another person who, at that time, is an employee of a company in which you have a controlling interest.[70] The term 'controlling interest' is not defined and will take its common law meaning. There are several decisions, particularly in the United Kingdom, in which the expression 'controlling interest' has been considered.

230. For example, a bare majority, more than one half of the voting power, is sufficient to confer a controlling interest.[71] Further, a shareholder has been held to have a controlling interest in a company where the shareholder has the power, by the exercise of voting rights (including a casting vote) to carry a resolution at a general meeting of the company.[72]

231. Similarly, in another case, a shareholder was held to have a controlling interest where their shareholding in the company was such that they were more powerful than all other shareholders put together in a general meeting.[73]

232. However, in a company that has two shareholders who each hold 50% of the shares and equal voting rights, it is considered that neither of the shareholders has a controlling interest. This is because neither one of them has a majority of the voting power.

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[69] Paragraph 290-85(1)(c).
[70] Section 290-60 and paragraph 290-90(1)(a).
[71] *British American Tobacco Co Ltd v. IR Commissioners* (1942) 29 TC 49.
[72] *IR Commissioners v. J Bibby & Sons Ltd* [1945] 1 All ER 667; *IR Commissioners v. Harton Coal Co Ltd (in liq)* (1960) 39 TC 174 at 183.
[73] *BW Noble Ltd v. Commissioners of Inland Revenue* (1926) 12 TC 911.

233. However, a shareholder in a company may be able to deduct a contribution for an employee of the company in other circumstances.[74]

Employment activity conditions

234. An employee is a common law employee and any other person who is treated as an employee by section 12 of the SGAA.[75] If a contribution for an employee is to be deductible, the employee must (among other requirements) satisfy the employment activity condition.[76]

235. To satisfy the employment activity condition, a common law employee must be either:

- engaged in producing the employer's assessable income; or
- an Australian resident who is engaged in the employer's business.[77]

236. The meaning of 'engaged' is discussed in paragraphs 248 to 250 of this Ruling.

237. A person who is an employee only because of the operation of subsection 12(2) to 12(10) of the SGAA automatically satisfies the employment activity condition.[78] As paragraphs 5.72 to 5.76 of the Explanatory Memorandum to Tax Laws Amendment (2007 Measures No. 4) Bill 2007 makes clear, this ensures an employer can claim a deduction for contributions made on behalf of a person who is an employee as defined in those subsections even though that employee is not actually engaged in producing the employer's assessable income or engaged in the employer's business.

238. For example, a company's director is an employee of the company for the purposes of the SGAA if the director is entitled to payment for the performance of duties as a member of the company's executive body.

[74] See subsection 290-90(5).
[75] Section 290-65.
[76] Subsection 290-60(2) and section 290-70.
[77] Paragraphs 290-70(a) and (b).
[78] Paragraph 290-70(aa).

239. It has long been held that the directors of a company are not entitled to payment for the services they provided as directors unless it is specifically provided for in the company's constitution or approved by shareholders (see *Hutton v. West Cork Railway Co* (1883) 23 Ch D 654 and *Re George Newman & Co* [1895] 1 Ch 674). In *Re George Newman & Co* the United Kingdom's Court of Appeal said:

> Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorised to do so by the instrument which regulates the company or by the shareholders at properly convened meetings. The shareholders, at a meeting duly convened for the purpose can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible among the shareholders themselves.

240. However, section 202A of the *Corporations Act 2001* states that directors shall be paid such remuneration as is from time to time determined by the company in a general meeting. As this is a replaceable rule for the purposes of that Act, whether a particular director is entitled to remuneration must be determined on a case by case basis.

241. A director entitled to remuneration will satisfy the employment activity test even if not engaged in producing the company's assessable income or its business.[79]

242. A company cannot deduct a superannuation contribution for a member of the executive body who is not entitled to payment for the performance of duties as a member of the company's executive body.

243. 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.

244. A former employee must satisfy the employment activity conditions just before the termination of the employment.[80]

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[79] So far as directors are concerned, the provisions of the ITAA 1997 operate differently from the ITAA 1936 which deemed a director of a company to be employed by the company. However, the definition of employee used in the ITAA 1936 also required a director to be engaged in producing the company's assessable income or in the company's business.

[80] Paragraph 290-85(3)(a).

Deducting personal contributions

245. As with deductions for superannuation contributions for employees, an individual who wishes to deduct their personal contributions must satisfy a number of requirements.[81] Matters affecting the maximum earnings test and the notice of intent to deduct contributions are discussed in paragraphs 246 to 276 of this Ruling.[82]

Maximum earnings test

246. Those persons who are engaged in an 'employment' activity in the income year in which they make a contribution need to meet the maximum earnings test.[83]

247. Those persons who have not engaged in an 'employment' activity in the income year in which they make a contribution are not subject to this earnings test. For example, a person who, although no longer employed, is receiving workers' compensation payments, is not subject to the maximum earnings test.

248. A person will be engaged in an 'employment' activity if they are engaged in an activity in the income year that results in them being treated as an employee for the purposes of the SGAA. The term 'engaged' is not defined and takes its ordinary meaning. One of several meanings given to engaged is 'busy or occupied; involved'. Another meaning is 'under an engagement' where the ordinary meaning of 'engagement' is given as 'under an obligation or agreement.'[84]

249. Consequently, it will be obvious that a person is engaged in an employment activity when they are physically carrying out the obligations and duties of the job or work. But the Commissioner also considers that a person need not be actively engaged in the activity while they remain a party to a contract or some ongoing obligation. For example:

- a common law employee will be engaged in the activity while they remain employed;
- a member of the executive body of a body corporate (for example a director) who is entitled to payment for their services in that capacity will be engaged in the activity while they remain as a director;
- a member of a Parliament of the Commonwealth or a State or of a Legislative Assembly of a Territory will be engaged in the activity while they hold their seat in the Parliament or Assembly; and

[81] Subsections 290-150(1) and 290-150(2).
[82] Sections 290-160 and 290-170.
[83] Subsection 290-160(1).
[84] Macquarie Dictionary 3rd edition 1998.

- a person who is engaged under a contract wholly or principally for labour is engaged in the activity throughout the duration of the contract.

250. An artist, musician or other person engaged to perform or present or participate in a performance or other activity covered by subsection 12(8) of the SGAA will be engaged in the activity only while they participate in the relevant activity.

251. In the application of the maximum earnings test, the relevant 'employment' activity need not be an activity in Australia. The SGAA does not contain any territorial nexus that limits which individuals will be treated as employees for the purposes of the SGAA. The practical limits of the application of the SGAA are created through the modification of the meaning of salary or wages in section 27 of the SGAA. That section ensures that amounts received, for example, by a non-Australian resident employee working outside Australia or an Australian resident employed by a non-resident employer to work outside Australia are not taken into account as salary or wages when working out whether an employer has an individual superannuation guarantee shortfall for an employee.

252. Where the person engages in any 'employment' activities in the income year a deduction can only be claimed where the assessable income, reportable fringe benefits total, and (from 1 July 2009) reportable employer superannuation contributions attributable to the 'employment' activities are together less than 10% of the person's total assessable income, reportable fringe benefits total, and reportable employer superannuation contributions in the income year that the contribution is made. Further, if the person has more than one period of engaging in 'employment' activities in an income year, the assessable income, reportable fringe benefits total, and reportable employer superannuation contributions attributable to each period of 'employment' is aggregated.

253. Assessable income, reportable fringe benefits total and reportable employer superannuation contributions are to be given their statutory meaning. Reportable fringe benefits total is given the meaning in the *Fringe Benefits Tax Assessment Act 1986*. The meaning of reportable employer superannuation contributions is provided in Schedule 1 to the *Taxation Administration Act 1953*. The meaning of assessable income is provided in the ITAA 1997 and includes ordinary income and statutory income.

254. For an individual, assessable income includes, for example, salary and wages, gross business income as a sole trader, gross rent from a solely owned property, interest, dividends and franking credits. If an individual is a partner in a partnership their share of the net income of the partnership, as determined under Division 5 of Part III of the ITAA 1936, is included in their assessable income. The net income of a partnership will include the individual's share of the net income from jointly owned assets such as a jointly owned rental properties. If an individual is a beneficiary of a trust their share of the net income of the trust, as determined under Division 6 of Part III of the ITAA 1936, is included in their assessable income.

255. The term 'attributable to' in subsection 290-160(2) is not defined. However, the courts have considered the meaning of the term in a number of different cases. For example, in determining whether the plaintiff's loss of employment was 'attributable to' the provisions of the *Local Government Act 1972* (UK), Donaldson J in *Walsh v. Rother District Council* stated:[85]

> These are plain English words involving some causal connection between the loss of employment and that to which the loss is said to be attributable. However, this connection need not be that of a sole, dominant, direct or proximate cause and effect. A contributory causal connection is quite sufficient.

256. Donaldson J's comments were cited with approval by the High Court in *Commissioner of Taxation v. Sun Alliance Investments Pty Limited (in liquidation)*.[86]

257. In *Repatriation Commission v. Law*, the Full Federal Court said:[87]

> It seems clear the expression 'attributable to' in each case involves an element of causation. The cause need not be the sole or dominant cause: it is sufficient to show 'attributability' if the cause is one of a number of causes provided it is a contributing cause ...

258. In *McIntosh v. Federal Commissioner of Taxation*[88] the Full Federal Court considered whether there was a causal connection between a commutation payment and the employee's termination of employment. Brennan J said that:

> Though the language of causation often contains the seeds of confusion, I apprehend his Honour to hold the required nexus to be (at least) that the payment would not have been made but for the retirement.

259. The 'employment' activities of the recipient are not the direct or proximate cause of workers' compensation payments and like payments such as the proceeds of an insurance policy covering loss of employment income. Rather, the direct or proximate cause of the payments is the injury suffered during the course of their employment activities. However, the injury would never have arisen but for those activities. Therefore, there is a contributory cause or connection between the 'employment' activities and the payments to show 'attributability' within the meaning of subsection 290-160(2).

[85] [1978] ICR 1216 at 1220; [1978] 1 All ER 5101 at 5104.
[86] [2005] HCA 70; 2005 ATC 4955; (2005) 60 ATR 560.
[87] (1980) 31 ALR 140 at 151.
[88] 79 ATC 4325; (1980) 10 ATR 13.

260. A number of decisions of the Administrative Appeals Tribunal (the Tribunal) have considered whether amounts payable to a person in consequence of the termination of their employment are included in the 10% test.[89] The Commissioner considers that the decision of the Tribunal in *Falson v. Federal Commissioner of Taxation*[90] to be the correct view of the law. The Tribunal members concluded that an amount received by Mr Falson after his retirement due to ill health but in the same income year as the retirement was assessable income attributable to his 'eligible employment' as that term was defined in the ITAA 1936.[91]

261. For a non-resident, the income attributable to 'employment' activities engaged in outside Australia is not assessable income in Australia and so will not be counted in the maximum earnings test. A non-resident with Australian sourced income that is not attributable to 'employment' activities may therefore be able to deduct a personal superannuation contribution made to an Australian superannuation provider against that income.

262. However, the 'employment' income of an Australian resident employed overseas by a foreign employer will be counted in the maximum earnings test if the income is assessable income.

Notice of intention to claim a deduction

263. A person who intends to deduct their personal superannuation contributions must give to their superannuation provider a valid notice in the approved form before lodging their income tax return for the year (or within 12 months of the end of the income year if they have not lodged their return by that time). The trustee must also acknowledge receipt of the notice.[92]

264. It should be noted that a person may choose how much of their contributions to deduct and this notice is used to give effect to that choice. For example, a person may choose not to deduct a portion of their personal contributions to ensure they are entitled to the superannuation co-contribution.

265. Usually, an individual would personally give the notice to their superannuation fund. However, an agent may also do this for the individual.

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[89] *Thornton v. Federal Commissioner of Taxation* 97 ATC 2117; (1997) 36 ATR 1109, *Edmonds-Wilson v. Federal Commissioner of Taxation* 98 ATC 2276; (1998) 40 ATR 1071, *Northey v. Federal Commissioner of Taxation* [2001] AATA 1035; 2002 ATC 2001; (2001) 49 ATR 1016*, Norris v. Federal Commissioner of Taxation* [2002] AATA 749; 2002 ATC 2091; (2002) 50 ATR 1250, *Falson v. Federal Commissioner of Taxation* [2007] AATA 1668; 2007 ATC 2438; (2007) 68 ATR 299.

[90] [2007] AATA 1668.

[91] Aspects of the 10% test set out in section 82AAT of the ITAA 1936 were retained in the maximum earnings test set out in section 290-160 of the ITAA 1997.

[92] Subsections 290-150(2) and 290-170(1).

266. In particular, a legal personal representative may give a superannuation provider a notice of intention to deduct on behalf of a deceased person who made a contribution prior to death. The legal personal representative must meet the remaining notice requirements. If the legal personal representative of the deceased intends to lodge a section 290-170 notice of intention to claim a deduction they must do so before lodgment of the deceased's final tax return (or within 12 months of the end of the income year in which the deceased died if that is earlier).

267. As stated in paragraph 263 of this Ruling, the notice must be valid. A notice will not be valid in several circumstances.

268. For example, a notice will not be valid if the superannuation provider no longer holds the contribution when the notice is given. A notice will also not be valid if the superannuation provider has begun to pay a superannuation income stream based in whole or part on the contribution.[93]

269. The Explanatory Memorandum to Tax Laws Amendment (Simplified Superannuation) Bill 2006 gives some indication as to when a contribution will no longer be held by the superannuation provider. It states an example is where the member has requested a partial roll-over of a superannuation benefit which includes the contribution covered in the notice.

270. The Explanatory Memorandum also states that a contribution is still held by a fund even if the trustee has transferred its tax liability to a life insurance company or pooled superannuation trust under section 295-260.

271. Example 1.2 on page 19 of the Explanatory Memorandum contains a simple example to illustrate when a contribution is no longer held by a superannuation provider. It deals with a case where a member's superannuation interest comprises only the member's undeducted personal contributions and no earnings. While this example provides some assistance, it does not go into sufficient detail to clarify Parliament's policy intention in other circumstances such as where part of the value of a person's interest in a superannuation fund is either paid out as a lump sum or used to commence a superannuation income stream and that interest has both a tax free component and taxable component.

272. It is the Commissioner's view that any superannuation benefit paid from a superannuation interest may affect the validity of a notice of intention to deduct a contribution. In particular, the Commissioner takes the view that any superannuation income stream commenced from a superannuation interest is based 'in whole or in part on' a contribution made to that superannuation interest. This is so regardless of whether the value of the superannuation income stream is less than the value of the interest as reduced by the relevant year's contributions. Further, any superannuation lump sum paid from the interest reduces the contributions held by the superannuation provider.

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[93] Paragraph 290-170(2)(c).

273. This approach is taken because it is consistent with the integrity of the rules that determine how superannuation benefits are taxed. Subsection 307-125(1) states that the tax free and taxable components of a superannuation benefit are worked out by first determining the proportions of the value of the superannuation interest that the components represent and then applying those proportions to the benefit. Paragraph 307-125(3)(a) states that, in the case of a superannuation income stream, the value of the superannuation interest and the amount of each of its components is worked out when the income stream commences.
Paragraph 307-125(3)(b) states that, in the case of a superannuation lump sum, the value of the superannuation interest and the amount of each of its components is worked out just before the benefit is paid.

274. Therefore, a deduction notice covering all of the contributions made in a particular year will be invalid if it is given by a member after any superannuation benefit has been paid to the member because the components of the benefit will have been worked out on the basis that the current year's contribution was not deductible.

275. Examples 10 and 10A show how to work out how much of a particular contribution a superannuation provider continues to hold and therefore can be the subject of a valid deduction notice after a superannuation lump sum has been paid from an interest. The valid deduction notice will be limited to a proportion of the tax free component of the superannuation interest that remains after the roll-over or withdrawal. That proportion is the value of the relevant contribution divided by the tax free component of the superannuation interest immediately before the roll-over or withdrawal. Example 10A shows that the amount of contributions that can be included in a valid deduction notice must take into account all superannuation lump sum payments to which the proportioning rule in section 307-125 applies and that have been paid from an interest after the contributions were made. This is so even though the payments may occur in a different income year to the year in which the contributions were made.

276. A superannuation provider will no longer hold a contribution if a member's interest in the fund has been transferred to a successor fund.[94] The member cannot give a notice of intention to deduct to the trustee of that fund after the person's interest has been transferred. The member also cannot give the notice to the successor fund.

[94] If all of the members' interests in one fund are transferred to a second fund, the second fund is known as the successor fund. This may occur for example, when there is an amalgamation of funds.

Appendix 2 – Detailed contents list

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TR 2001/10; TR 2005/24;
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- notice
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