

SUBMISSION

Submission to ATO —
TR 2010/1DC2 Income
tax: superannuation
contributions

24 January 2025

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File: 2025/02

Ms Bonita Tsang

Australian Taxation Office

Via email: PAGSEO@ato.gov.au

24 January 2025

Dear Ms Tsang

TR 2010/1DC2 Income tax: superannuation contributions

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the ATO's draft update to TR 2010/1, in the form of TR 2010/1DC2 (the draft ruling).

About ASFA

ASFA has been operating since 1962 and is the peak policy, research and advocacy body for Australia's superannuation industry. ASFA represents the APRA regulated superannuation industry with over 100 organisations as members from corporate, industry, retail and public sector funds, and service providers.

We develop policy positions through collaboration with our diverse membership base and use our deep technical expertise and research capabilities to assist in advancing outcomes for Australians. ASFA has a keen focus on matters that impact the outcomes achieved by individuals through the superannuation system, their experiences with the system, and issues that impede the industry's operational effectiveness.

Update to TR 2010/1

TR 2010/1 is a significant and important ruling, widely relied upon for guidance across the industry. ASFA welcomes the ATO's efforts to update the ruling to ensure it reflects the current regulatory environment.

ASFA members have identified a number of points where additional clarification is required or would be beneficial:

1. Scope of the draft ruling

Paragraph 1 makes it clear the draft ruling is intended to apply to contributions to a superannuation fund, an approved deposit fund (ADF) or a retirement savings account (RSA). It notes that aspects of the Ruling are relevant to the meaning of 'contribution' in the *Superannuation Industry (Supervision) Act 1993* and the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations). While these contain standards relevant to the payment of amounts to superannuation funds and ADFs, standards relevant to payment of amounts to RSAs are set out in the *Retirement Savings Account Act 1997* and *Retirement Savings Account Regulations 1997*. For completeness, we recommend that reference to these is inserted into paragraph 1.

2. Characterisation of amounts

Paragraph 17 addresses the treatment of roll-over superannuation benefits and transfers from overseas superannuation funds as 'contributions' given they increase the capital of the fund. In ASFA's view, it may be helpful to also address in this section of the draft ruling the transfer or payment of various amounts from the ATO, including unclaimed superannuation, amounts held in the Superannuation Holding Account, Government co-contributions and the Low Income Superannuation Tax Offset.

3. Deducting personal contributions

Substantial edits and deletions have been made to the section of the draft ruling dealing with the deduction of personal contributions. This is a timely update, to reflect significant reforms to the contributions acceptance, work test and deduction rules over the last several years,.

We note, however, that the revised section does not address:

- the need for a person who was under age 18 at the end of an income year to have derived income from the carrying on of a business or income attributable to employment activities, in order to claim a deduction for a personal contribution
- the need for a person aged over 67 to satisfy the work test (or an exemption) in order to claim a deduction for any personal contribution
- the inability of a person to make personal contributions and/or claim a deduction for those contributions after age 75 if the contributions are made more than 28 days after the end of the month in which the person turned 75.

This may leave readers with the false impression there are now no age or work-related conditions relevant to the making and/or deductibility of personal contributions.

4. Personal superannuation contributions that are not deductible

Paragraph 72A has been inserted to outline the types of personal contributions that are not deductible. In particular, the third dot point in paragraph 72A relates to contributions made to certain defined benefit funds where the trustee has made an election to treat the contributions as being non-deductible.

To substantiate this exclusion, footnote 24E references the *Income Tax Assessment Act 1997* (ITAA 1997) subparagraph 290-155(1)(a)(iii) and section 290-155.01 of the *Income Tax Assessment (1997 Act) Regulations 2021* (ITAR 2021). For completeness, ASFA considers the ruling should also reference paragraph 290-155(1)(b) of the ITAA 1997 and section 290-155.05 of ITAR 2021 as these provisions also treat certain contributions to prescribed funds as being non-deductible where the trustee makes an election.

Further, we note that section 290-155(3) of the ITAA 1997 allows the Commissioner to publish information about lists of funds to which contributions may not be deductible because of these elections. We recommend that the Commissioner considers publishing this list on the ATO website at a fixed location, with the address of that location specifically included in this ruling. Publication of this information would help to ensure taxpayers are fully informed about the tax treatment of personal contributions to prescribed funds.

Finally, we note that the bullet points do not provide a comprehensive list of personal contributions that are not deductible. In particular, it does not include contributions that subject to either the small business 15 year exemption or the small business retirement exemption from capital gains tax. We recommend that either the list is expanded to be comprehensive, or the introductory wording is clarified to make it clear the bullet points are not comprehensive.

5. Insurance benefits

Paragraph 138 has been updated to provide that where it is objectively determined that the purpose of the insurance payment is to benefit a member of the fund, the payment may be treated as a contribution.

It would, in ASFA's view, be helpful to clearly articulate the specific type(s) of insurance benefit to which the update to paragraph 138 refers. We note that a regulated superannuation fund is only permitted to provide limited types of insured benefits in relation to members of the fund— see for example regulation 4.07D of the SIS Regulations.

We anticipate the update to paragraph 138 is specifically referring to an additional income protection benefit feature (typically known as a 'contribution replacement benefit') that represents employer superannuation contributions to the fund while a member is unable to work and in receipt of income protection benefits. We recommend that this is confirmed or clarified prior to finalisation of the ruling. This is important to make it clear that the update to paragraph 138 is not seeking to capture proceeds from other permissible insurance benefits, such as death and total and permanent disablement (TPD) proceeds and income protection benefits that are paid directly to insured members.

If you have any queries or comments in relation to our submission, please contact Julia Stannard on (02) 8079 0819 or by email JStannard@superannuation.asn.au.

Yours sincerely

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