


# ***TR 2013/5EC - Compendium***

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## **Ruling Compendium – TR 2013/5**

This is a compendium of responses to the issues raised by external parties to draft Taxation Ruling 2011/D3 – *Income tax: when a superannuation income stream commences and ceases*.

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

The following abbreviations are used in this compendium: *Income Tax Assessment Act 1997* (ITAA 1997), *Income Tax Assessment Regulations 1997* (ITAR 1997), *Superannuation Industry (Supervision) Act 1993* (SISA 1993), *Superannuation Industry (Supervision) Regulations 1994* (SISR 1994), Self managed superannuation fund (SMSF), product disclosure statement (PDS)

### **Summary of issues raised and responses**

<b>Issue No.</b>	<b>Issue raised</b> (Unless otherwise noted, references are to Examples and paragraphs in TR 2011/D3)	<b>Tax Office Response/Action taken</b> (Unless otherwise noted, references are to Examples and paragraphs in TR 2013/5)
<b><i>Superannuation income streams</i></b>		
1	<p><i>Types of superannuation income streams the Ruling considers – paragraphs 2 to 3</i></p> <p>It is not clear in some parts of the Ruling whether the principles discussed apply to account based pensions, to other pension types, or both. Any final Ruling should be clear what type of pensions it applies to.</p> <p>It should also be made clear whether the Ruling is intended to apply to annuities.</p>	<p><i>Types of superannuation income streams the Ruling considers – paragraphs 2 to 4</i></p> <p>Paragraphs 2 and 3 have been rewritten to clarify the types of superannuation income streams the Ruling applies to. In accordance with the legislative references in those paragraphs the Ruling does not apply to annuity products.</p> <p>Paragraph 4 has been inserted to state that the Ruling will also apply to a pension that is a transition to retirement income stream (as defined in paragraph (b) of the definition of transition to retirement income stream in subregulation 6.01(2) of the SISR 1994).</p> <p>However, the application of other rules that are particular to transition to retirement income streams are out of scope for the Ruling.</p>
2	<i>Definition of an ‘income stream’ and a ‘superannuation income</i>	<i>Definition of an ‘income stream’ and a ‘superannuation income</i>

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	<p><i>stream' – paragraph 4; 44 to 55</i></p> <p>Several submissions indicated that they broadly agreed with the current view in the Ruling about the meaning of 'income stream' and 'superannuation income stream'.</p> <p>Other submissions have provided the following alternative views:</p> <p><u>A superannuation income stream includes any payment from a 'pension' as defined in subregulation 1.06(1) of the SISR 1994</u></p> <p>Pensions paid under the SISR 1994 clearly meet the requirements outlined in paragraph 50 of the Ruling.</p> <p>In fact, the SISR 1994 appears very clear that the pension includes the ability to pay a final payment on the full commutation of a pension or a lump sum to a beneficiary on the death of a pensioner.</p> <p>Such payments are an integral part of the rules covering pensions under the SISR 1994. It is clear that they relate to other payments as they form a part of, and are paid from, the same superannuation interest.</p> <p>It is also clear that the SISR 1994 considers that such payments should be treated as one of the periodic payments made from the interest. In particular, the SISR 1994 is clear that partial commutations can be considered part of the income stream and can be used to satisfy the minimum draw down requirements for a year for certain pension types (including account based pensions).</p> <p>Paragraphs 48 to 55 of the Ruling also appear to support the argument that final commutation payments and lump sum payments on death are periodic payments and payments made</p>	<p><i>stream' – paragraphs 5 and 6; 51 to 63</i></p> <p>Given the structure of the definition of 'superannuation income stream' in regulation 995-1.01 of the ITAR 1997, it is appropriate to determine if something is an 'income stream' and to subsequently consider if it satisfies subregulation 1.06(1) of the SISR 1994.</p> <p>Within the context of the ITAA 1997 and the SISR 1994 there is clear delineation between lump sum payments and pension payments and therefore it is not accepted that an 'income stream' is simply any payment that is made from a superannuation interest once a superannuation income stream has commenced, thus potentially incorporating payments upon death or full commutation.</p> <p>It is therefore considered that the view expressed in the Ruling is the appropriate interpretation of the meaning of superannuation income stream. It has regard to the overall context of the SISA 1993, SISR 1994, ITAR 1997 and the ITAA 1997.</p> <p>To determine whether there is an income stream and thus a superannuation income stream, it is necessary to look both at the future entitlements a member has to receive superannuation income stream benefits, as well as payments that have already been made.</p> <p>This means that, for instance, the last pension payment will still be part of a stream of payments.</p> <p>The Ruling also explains the relevance of the terms and conditions as agreed by the trustee and member, the governing rules of the superannuation fund along with the relevant regulations of the SISR 1994. See paragraphs 11 and 16 and the Examples section of the Ruling.</p> <p>The reasons for not treating a commutation payment as part of an income stream considers both case law and the context of the</p>

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	<p>from the superannuation income stream.</p> <p>The current view in the Ruling would also mean that a second last payment in a market linked pension would no longer meet the definition of 'stream' as there would no longer be a 'series' of payments to be paid.</p> <p>Further, the definition of superannuation income stream in the ITAR 1997 does not refer to an 'income stream which is also a pension'. Rather it is clearly intended that a pension that satisfies the SISR 1994 requirements is to be treated as a superannuation income stream.</p> <p><u>A superannuation income stream is a series of payments of income</u></p> <p>Prior to age 60 for taxed schemes, and at all ages for untaxed schemes, any lump sum commutation payment is clearly considered to be assessable income in the hands of the pensioner.</p> <p>Further, after age 60 for taxed schemes, a lump sum benefit is not assessable income and is not exempt income. In other words such payments are also considered to be income payments (even though they are not assessable).</p> <p>As full commutation payments are clearly connected to the earlier payments and are part of a stream of such payments, then we cannot see how the draft Ruling can treat it as not being an integral part of that income stream.</p> <p><u>Cessation of superannuation income stream before final payment is made is not contemplated in the tax legislation</u></p> <p>The tax legislation does not envisage circumstances where</p>	<p>provisions clearly delineating between pension type payments and lump sum type payments and that a commutation results from a conscious decision to exchange rights for an income stream for rights to a lump sum.</p> <p>A superannuation interest that supported a superannuation income stream remains a separate superannuation interest even if the superannuation income stream ceases because, for example, there has been a full commutation of all future entitlements to superannuation income stream benefits. That a separate superannuation interest remains is the ATO view of regulation 307-200.05 of the ITAR 1997. Thus a lump sum payment made upon a full commutation from that superannuation interest is not part of what was the superannuation income stream although it is made from that separate superannuation interest.</p> <p><u>Recent amendments</u></p> <p>The view in the Ruling that a superannuation income stream (pension) ceases upon death unless the entitlement to the superannuation income stream automatically transfers to a dependant beneficiary has not changed.</p> <p>However, a recent amendment expands the meaning of the term 'superannuation income stream benefit' in regulation 995-1.01 of the ITAR for the purposes of the earnings tax exemption (sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the ITAA 1997).</p> <p>The expanded meaning of this term ensures that from the 2012-13 income year onwards, where a complying superannuation fund member was receiving a superannuation income stream immediately before their death, the superannuation fund will continue to be entitled to the earnings tax exemption in the period from the</p>

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	<p>cessation of a pension occurs before the final payment is made</p> <p>Firstly, there appears to be no provision that allows a trustee to continue treating a former superannuation income stream as a separate interest. This is despite the implication in paragraph 73 that it would remain a separate interest.</p> <p>Secondly, if the income stream has ceased some time earlier (for example on death or on lodging a commutation request) it is not clear how section 307-125 of the ITAA 1997 would apply, in particular paragraph (c).</p> <p>Any such payment might be considered to be a payment from an interest that was formerly a superannuation income stream. However, it is difficult to consider that it is a benefit arising from the commutation. It also appears in conflict with the requirement that there is only one interest in any fund (other than a pension interest).</p> <p>It would seem that the benefit would need to be treated as a lump sum resulting in the need for the tax components to be determined just before the payment. However, the legislation does not specify how this would be determined.</p> <p>We consider that a better interpretation of the legislation is that it was built around the concept that the superannuation income stream continues until all payments have been made – including any final commutation payment.</p> <p><u>Ordinary meaning of 'income stream'</u></p> <p>The term 'income stream' should be given its ordinary meaning in its context. The analysis in the ruling is inappropriate as the expression 'income stream' should not be broken down into its individual terms.</p>	<p>member's death until their benefits are cashed by paying them out as a lump sum and/or by commencing a new superannuation income stream (subject to the benefits being cashed as soon as practicable). The level of the exemption would be no greater than it was before the member's death (allowing for investment earnings after the member's death).</p> <p>New regulation 307-125.02 of the ITAR provides an alternative method for calculating the tax free and taxable components of certain superannuation benefits paid after the death of a person who was receiving a superannuation income stream immediately before their death.</p>

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	<p>The definition of 'income' from the <i>Macquarie dictionary</i> in the ruling is inappropriate as it is the definition of the noun 'income' whereas in 'income stream' is in fact an adjective.</p> <p>The draft Ruling also ignores other definitions of 'income' both in the <i>Macquarie dictionary</i> and those more generally accepted in the superannuation and tax context, and in particular that income is often considered to be merely 'something that comes in' without the nature of a periodic receipt.</p> <p>A pension would arguably never meet the definition of 'stream' as there is always a break between payments. It can never be said with certainty after one payment whether there will be a subsequent payment despite the intentions of the parties. The concept envisages some unbroken series of items and events whereas a pension is more akin to turning a tap on and off.</p> <p>The Ruling also fails to acknowledge that the requirements of subregulation 1.06(1) are not a statutory codification of what a pension is for the purposes of the SISR 1994. Rather a pension, in addition to the legislative requirements of subregulation 1.06(1), must be established under and governed by the superannuation funds deed, other documentation and a PDS. It is this documentation that will determine when a pension begins and ceases.</p> <p><u>Superannuation income stream is the pool of money payments are made from</u></p> <p>The definition of superannuation income stream in regulation 995-1.01 of the ITAR 1997 shows that it is a pension as defined in subregulation 1.06(1) of the SISR 1994. It is therefore a pool of assets/money from which a benefit is paid, akin to the concept of a superannuation interest.</p>	

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	<p>A superannuation income stream benefit is a payment from a superannuation income stream made because a person is a member or beneficiary of a deceased member. There is no separate definition of 'income stream' or mention of 'periodic payments that relate to on another' in regulation 995-1.01 of the ITAR 1997. It does not imply or require that there needs to be anything more than a 'payment'.</p> <p>The concept of 'periodic payments that relate to each other' appears to have no foundation in law.</p>	
3	<p><i>Cessation of superannuation income stream before a series of periodic payments is established – paragraph 4; 44 to 55</i></p> <p>It is important to confine the concept of there needing to be a 'series of periodic payments that relate to each other' to the 'concept' of what is an income stream, but stop short of requiring a series of periodic payments to be made in practice.</p> <p>There may be a range of circumstances whereby a series of periodic payments are not made but nevertheless an income stream should be considered to exist. For instance, the pensioner may die or commute the pension in the first year, prior to a pension payment having been made. While one pro-rata minimum payment will need to be made prior to the commutation of the pension, a 'series of periodic payments that relate to each other' will never be made.</p> <p>Alternatively, regulation 1.07D of the SISR 1994 should be amended to clarify that even if no minimum payment is made in respect of a member prior to their death, it will still qualify as a superannuation income stream.</p>	<p><i>Cessation of superannuation income stream before a series of periodic payments is established – paragraphs 13; 129</i></p> <p>Paragraph 129 has been inserted to clarify that a superannuation income stream may be payable even if no superannuation income stream benefits are actually paid due to the death of the member.</p> <p>If there are any other circumstances where it is considered a superannuation income stream had been established but no superannuation income stream benefits were paid advice can be sought from the ATO.</p>

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4	<p><i>Superannuation income stream where there is no series of payments – paragraphs 4; 44 to 55</i></p> <p>The SIS pension rules do not require a pension to be a series of payments. While this may be the norm, the rules do permit a single payment to be a pension.</p>	<p><i>Superannuation income stream where there is no series of payments – paragraphs 5; 58</i></p> <p>As outlined in the response at issue 2, it is considered that the structure of the definition of 'superannuation income stream' in regulation 995-1.01 of the ITAR 1997 first requires consideration of whether there is an 'income stream'. For there to be an 'income stream' it is considered that there must be a requirement to pay a series of payments that relate to each other over an identifiable period of time.</p> <p>A requirement to make a single payment will not satisfy as a series of payments and thus will not satisfy as an income stream. It therefore cannot be a superannuation income stream. Paragraphs 5 and 58 of the Ruling have been amended to clarify that an agreement between a trustee and member to make a single payment will not be a superannuation income stream.</p> <p>See also the response at issue 3.</p>
5	<p><i>Superannuation income stream with annual payment – paragraphs 4; 50</i></p> <p>Paragraph 4 should clarify that an annual payment will satisfy the requirements of a superannuation income stream. A reference to 'series' may not be interpreted as including one annual payment.</p> <p>The current wording suggests that the ruling is attempting to modify the definition of a pension under SISR 1994. A superannuation fund trustee could make a single payment during the year but not meet the taxation rules as outlined in the Ruling.</p>	<p><i>Superannuation income stream with annual payment – paragraphs 5 and 6; 58</i></p> <p>Paragraphs 5 and 6 of the Ruling have been updated to clarify that a superannuation income stream can include a liability to pay a member a series of periodic payments annually for a number of years. It is similarly reflected in the explanation section of the Ruling at paragraph 58.</p>



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6	<p><i>Superannuation income stream where payments are not made at recurring intervals or in equal amounts – paragraphs 4; 50</i></p> <p>If periodic payments are being made, they do not need to be paid at the same recurring intervals, as stated in paragraph 50, nor do they have to be paid in equal amounts provided the total payments in any income year is at least equal to the annual minimum requirement.</p>	<p><i>Superannuation income stream where payments are not made at recurring intervals or in equal amounts – paragraphs 5 and 6; 58</i></p> <p>The Ruling has been amended to improve clarity. The Ruling makes it clear that payments in a series do not need to be paid at the same recurring intervals and can vary in amount. However, it must nevertheless be clear that the payments are part of a series of periodic payments made over an identifiable period of time that relate to each other.</p>
7	<p><i>Meaning of superannuation income stream – paragraph 47</i></p> <p>Paragraph 47 states that the superannuation income stream refers to the arrangement or product, rather than the particular payments made under that product.</p> <p>This would appear to support the interpretation that whether a superannuation income stream exists is a function of the arrangement or product, and not the payments made under the arrangement or product. For instance, a superannuation income stream should exist even if the pension rules are not met in a financial year.</p> <p>This also appears to suggest that payments made after death would be considered to be part of the superannuation income stream as they form part of the 'product'.</p>	<p><i>Meaning of superannuation income stream – paragraph 54</i></p> <p>The Ruling has been amended to improve clarity. A superannuation income stream refers to the particular arrangement or product with features as specified by the fund's governing rules, the agreement between the fund and member and any other relevant documentation that for the purposes of this Ruling is an account based pension of the kind covered by subregulation 1.06(1) of the SISR 1994.</p> <p>That is, whether there is a superannuation income stream is not determined solely by the product, but rather the product must be an income stream that meets the requirements of subregulation 1.06(1) (which includes paragraph 1.06(9A)(a)) of the SISR 1994 to be a superannuation income stream that is an account based pension as considered in this Ruling.</p>
<b>Commencement of a superannuation income stream</b>		
8	<p><i>When a superannuation income stream commences – paragraphs 7 to 11; 63 to 70</i></p> <p>We broadly agree with the key principles expressed in this section.</p> <p>We also agree that the rules as to commencement have</p>	<p><i>When a superannuation income stream commences – paragraphs 9 to 13; 73 to 82</i></p> <p>No change required.</p>

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	substance, such as setting a date that is bona fide taking into account the arrangements and identification of the capital amount being converted.	
9	<p><i>Contributions must be received before commencement – paragraphs 7; 72 to 75; and Example 4</i></p> <p>Paragraph 7 could specifically refer to subparagraph 1.06(1)(a)(ii) of the SISR 1994, and contain an explicit statement that it does not prevent the capital supporting a pension from being added to in other ways.</p> <p>For example, administrative practice may allow a pension to be commenced prior to physical receipt of a contribution or rollover in circumstances where there is a binding contractual obligation to pay or transfer an asset or rollover an amount. In this case the capital supporting the pension includes the trustee's interest in the payment, asset or roll-over which is promised, and subsequent receipt of the contribution will not 'add' to the capital of the pension.</p>	<p><i>Contributions must be received before commencement – paragraphs 9; 83 to 86; and Example 4</i></p> <p>The Ruling states that a superannuation income stream cannot commence before all the capital which is to support the income stream has been added by way of contribution or roll-over.</p> <p>The view in this Ruling is consistent with Taxation Ruling TR 2010/1.</p> <p>In the case of a roll-over the interest in the losing fund comes to an end upon the actual payment of funds to the gaining fund. Under TR 2010/1 the roll-over is made when the money is received by the fund.</p> <p>Similarly, with a contribution by a person to a fund, under TR 2010/1 there is no contribution until such time as the money is received.</p>
10	<p><i>When a superannuation income stream commences – commencement day after 1 June – paragraph 8</i></p> <p>The ruling should clarify that when a pension begins in June the commencement date will be in June.</p> <p>Currently, it is not clear when the 'first day of the period to which the first payment relates' occurs when a pension begins in June as Clause 4 of Schedule 7 to the SISR 1994 states that 'If the commencement day of the annuity or pension is on or after 1 June in a financial year, no payment is required to be made for that financial year'. Without mentioning this specific situation it could be argued that there is no payment that 'relates' to a period</p>	<p><i>When a superannuation income stream commences – commencement day after 1 June – paragraph 11 (footnote 11)</i></p> <p>The statutory rule in Clause 4 of Schedule 7 to the SISR 1994 applies when the commencement day of a pension occurs on or after 1 June in a financial year. Therefore, for that clause to apply it is first necessary to determine the time when the pension commences. It does not alter the general principles outlined for determining the commencement day of a superannuation income stream.</p> <p>A footnote has been added to clarify that Clause 4 of Schedule 7 to the SISR 1994 does not alter when the commencement day of a superannuation income stream occurs.</p>

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	commencing in June, which is clearly not the legislative intent.	
11	<p><i>Governing rules of superannuation fund – paragraph 9</i></p> <p>Reference to the fund's trust deed in paragraph 9 (and elsewhere in the Ruling) should be to the 'governing rules'. The term 'governing rules' is defined in subsection 10(1) of the SISA 1993 as:</p> <p><b>governing rules</b>, in relation to a fund, scheme or trust, means:</p> <ul style="list-style-type: none"> <li>(a) any rules contained in a trust instrument, other document or legislation, or combination of them; or</li> <li>(b) any unwritten rules governing the establishment or operation of the fund, scheme or trust.</li> </ul> <p>Pension rules may be contained in a document other than the trust deed, such as a PDS, which this change will help to clarify.</p>	<p><i>Governing rules of superannuation fund – paragraph 11 (footnote 10)</i></p> <p>The terminology in the Ruling has been updated to refer to a fund's 'governing rules' where appropriate.</p> <p>A footnote has been added to include the meaning of 'governing rules' from subsection 10(1) of the SISA 1993.</p>
12	<p><i>Agreement of terms and conditions of a superannuation income stream – paragraph 10 (paragraph 70)</i></p> <p>The following comments have been provided regarding how, and when, the terms and conditions of a superannuation income stream are agreed to.</p> <p><u>Agreement by way of application form</u></p> <p>Large funds may require a member to fill out an application form to apply for a pension instead of signing a formal agreement. It should be clarified that an 'agreement' includes the making of an application by the member which includes, or is deemed under the fund's governing rules to include, an acknowledgment or acceptance of the terms and conditions.</p>	<p><i>Agreement of terms and conditions of a superannuation income stream – paragraphs 12; 80 and 81</i></p> <p>Paragraphs 80 and 81 have been added to the final Ruling to provide more guidance as to when and how the terms and conditions of a superannuation income stream may be agreed to. However, it will depend on the particular facts and circumstances and will vary between funds and products (superannuation income streams).</p>

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	<p><u>SMSFs may have no formal agreement</u></p> <p>SMSFs will generally not have an agreement. Instead, the trust deed and rules would merely be written in a manner to ensure compliance with the required standards.</p> <p><u>Pensions from SMSFs may commence before formal agreement</u></p> <p>In an SMSF context it is common for trustees to resolve that a pension will be paid, and to make the first payment before the associated paperwork is completed. The pensioner may not receive the PDS or pension agreement until after one or more pension payments have been made.</p> <p>We consider that in these circumstances it can be said the income stream has clearly commenced, notwithstanding that the associated PDS has not yet been received, or the pension agreement signed.</p> <p><u>Pensions from SMSFs should not commence before the first pension payment is made</u></p> <p>As the trustee and member are the same in an SMSF they can 'agree' to pay themselves a pension in a financial year, but do nothing about it for 11 months. This is not available to members of APRA funds.</p> <p>For SMSF's the start date should not be before the first pension payment.</p>	
13	<p><i>Agreement of terms and conditions of a superannuation income stream – general – paragraph 10 (paragraph 70)</i></p> <p>It would be helpful if the Ruling outlined the minimum terms and conditions that the governing rules of an account based pension must reflect to satisfy the SISR 1994. Deeds may provide varying</p>	<p><i>Agreement of terms and conditions of a superannuation income stream – general – paragraph 12 (paragraph 79 to 80)</i></p> <p>The Ruling explains the meaning of 'superannuation income stream', which necessarily refers to certain provisions in the SISR 1994. The Ruling therefore provides guidance for a trustee when determining if</p>

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	<p>levels of detail such as:</p> <ul style="list-style-type: none"> <li>• A general power that a trustee can pay whatever type of pension is authorised by the SISR 1994, or</li> <li>• Specific details of terms and conditions as required in the SISR 1994.</li> </ul>	<p>a fund product meets the requirements of a superannuation income stream that is an account based pension. The Ruling then explains when that superannuation income stream commences and ceases. The relevance of this for income tax purposes is explained at paragraphs 66 to 71 of the Ruling. However, it is not within the scope of a Taxation Ruling to set out what terms and conditions a deed should contain for SISR 1994 purposes.</p>
14	<p><i>Example 1 – paragraphs 25 and 26</i></p> <p>The example states that the pension will commence on the application date. This is quite impractical as a fund may not receive the application that day, and it seems unlikely that any fund would operate under such rules.</p> <p>It could also mean that all the capital used to support the pension may not be in the fund at the time it commences as there could be a cheque attached to the application form, or a form authorising rollover from another fund. This contradicts the principles in the Ruling about when a pension commences.</p>	<p><i>Example 1 – paragraphs 30 and 31; 9 to 12 and 73 to 81; 83 to 86</i></p> <p>The Ruling has been amended to improve clarity in relation to the commencement of a superannuation income stream and in particular to make it clearer (see paragraphs 9 and 10) that the commencement day can never be before all of the capital that is to support that superannuation income stream has been added to the relevant superannuation interest.</p> <p>The commencement day in Example 1 is determined on its particular facts and illustrates that the commencement day can be the application date. The example has been amended to specify that the member was commencing a superannuation income stream from amounts already held within the fund.</p> <p>See also the response at issue 15.</p>

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15	<p><i>Example 1 – paragraphs 25 and 26; 10 and 68</i></p> <p>In paragraph 68 it states that the commencement day of a superannuation income stream cannot be prior to the member's application.</p> <p>Example 1 suggests that, contrary to paragraph 10, an income stream can commence before the trustee and member have 'agreed' on the terms and conditions. Presumably 'agreement' would occur for these purposes when the trustee accepts the member's application.</p> <p>We consider that, if the governing rules of the fund so allow, there should be no reason why the commencement day should not be earlier than the day on which an application is received. This apparent inconsistency between paragraph 68 and Example 1 should be clarified.</p>	<p><i>Example 1 – paragraphs 30 and 31; 9 to 12; 78 to 81</i></p> <p>The Ruling has been amended to improve clarity in relation to the commencement of a superannuation income stream.</p> <p>In particular, it has been amended (see paragraphs 12 and 79) to make it clear that the commencement day cannot be before <i>the day established as the commencement day in the terms and conditions</i> agreed between the member and the trustee that will govern the superannuation income stream.</p> <p>Thus paragraphs 12 and 79 and Example 1 of the Ruling are now consistent. In the example, the governing rules of the fund as relevant to that superannuation income stream provide that the superannuation income stream payable will commence on the date of the member's application.</p> <p>There is no change to the view that the commencement day cannot be earlier than the date of the member's application or request to commence an income stream (see paragraph 12).</p> <p>See also the response at issue 14.</p>
16	<p><i>Example 3 – paragraphs 29 and 30</i></p> <p>Further clarification should be provided about why the superannuation income stream cannot commence before the cooling off period has ceased.</p> <p>While there may be an argument that a pension does not commence until the end of the cooling off period if a rule provides for this, the majority of providers recognise commencement as occurring at the start of the free look period.</p>	<p><i>Example 3 – paragraphs 34 and 35; 9 to 12; 78 to 81</i></p> <p>The commencement day in Example 3 is determined on its particular facts. As the Ruling notes, when a superannuation income stream commences depends on the particular facts and circumstances.</p>

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17	<p><i>Example 3 – paragraphs 29 and 30</i></p> <p>The ATO accepts that a superannuation income stream may commence before the completion of the cooling off period.</p> <p>When will the ATO consider that a pension has ceased if the member chooses to cancel the pension during the cooling off period? Would the ATO consider that a breach of SISR 1994 had occurred and that the pension never commenced? (we note that our interpretation of the SISR 1994 is that the refund of the purchase price would not result in a breach).</p>	<p><i>Example 3 – paragraphs 34 and 35</i></p> <p>See comment at issue 16.</p> <p>The issue of a superannuation income stream being cancelled before the end of the cooling off period is out of scope of the Ruling because it raises questions as to the precise circumstances of the agreement between the member and the fund and its interaction with the Corporations Law.</p>
18	<p><i>Definition of ‘dependant beneficiary’ – paragraph 10 (footnote 6)</i></p> <p>This term is not defined with reference to a person in an interdependency relationship. Reference should be made to the term ‘dependant’ in regulation 6.21(2A)(a) being defined in section 10 of the SISA 1993.</p>	<p><i>Definition of ‘dependant beneficiary’ – paragraph 12 (footnote 12)</i></p> <p>In relation to the term ‘dependant beneficiary’ in the Ruling, footnote 12 refers to a person who, upon a member’s death, is entitled to a pension (that is, a superannuation income stream).</p> <p>Whether a person can be paid a pension after a members death is determined by subregulation 6.21(2A) of the SISR 1994. The footnote has been amended to refer to this subregulation, rather than replicating its terms.</p>
<b>Cessation of a superannuation income stream</b>		
19	<p><i>When a superannuation income stream ceases – paragraphs 12 to 15; 80 to 84</i></p> <p>Comments have stated that they do not agree with the statement in paragraph 12 which states when a superannuation income stream ceases.</p> <p>General comments on the cessation of a superannuation income stream are summarised as follows:</p> <p><u>Terms and conditions of pension</u></p>	<p><i>When a superannuation income stream ceases – paragraphs 14 to 17; 91 to 95</i></p> <p>The contractual obligations form part of the factual matrix in determining what the outcome is under the income tax law and regulatory law in relation to the particular facts. However, the contractual obligations do not of themselves determine the outcome.</p> <p>It remains the ATO view that the view expressed in the Ruling is the appropriate interpretation of the meaning of superannuation income stream and when a superannuation income stream is taken to have</p>

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	<p>The obligations of a trustee to make continued income stream payments will arise by virtue of the terms and conditions of the pension, including those in the trust deed and other documents as agreed by member and trustee (that is, the contractual relationship between the trustee and member). In the same way that such terms and conditions apply to the commencement of an income stream, so too should they influence when an income stream is deemed to cease.</p> <p>The ATO has determined that the cessation of a pension will be determined by reference to the trust deed, relevant SIS Regulations and particular facts and circumstances of payment of members benefit. It does not give sufficient recognition to the contractual obligations that arise through the terms and conditions in the agreement between the member and trustee regarding the income stream.</p> <p><u>Contractual obligations</u></p> <p>The contractual arrangements surrounding an income stream dictate what can happen with that income stream including when it commences and ceases. How an income stream is classified for SIS purposes is determined based on whether the terms and conditions of the income stream contract meet the requirements of the SIS legislation to be a complying income stream. Neither SIS nor tax override the contractual arrangements of the income stream unless there is a specific provision in the contract resulting in that override.</p> <p>The SIS pension standards do not explicitly prescribe when an income stream ceases nor should they. The view in the ruling does not recognise contractual obligations that should first be met before an income stream could be considered to have ceased. For example, unpaid pension liabilities accrued during</p>	<p>ceased. The view has regard to the overall policy context and interaction between the SISA 1993, SISR 1994, ITAR 1997 and ITAA 1997, and the approach taken to commutations is based on relevant case law.</p> <p>Within the context of the ITAA 1997 and the SISR 1994 there is clear delineation between lump sum payments and pension payments and therefore it is not accepted that an 'income stream' is simply any payment that is made from a superannuation interest once a superannuation income stream has commenced, thus potentially incorporating payments upon death or full commutation.</p> <p>For example, upon a member's death the SISR 1994 makes it clear that a pension (superannuation income stream) can only be paid to certain entitled recipients (as set out in subregulation 6.21(2A) of the SISR 1994) and that upon, for example, a person reaching age 18 that person must be paid a lump sum (assuming that they are not financially dependent or disabled). That is, at that point the remaining capital is to be paid out of the superannuation system as a lump sum. If the superannuation income stream did not cease at the time the person turned 18 then any subsequent payment from that superannuation interest could be treated as a further pension payment rather than a lump sum.</p> <p>See the response at issue 2 for an overview of recent amendments in relation to the death of a member.</p> <p>The view in the Ruling concerning partial commutations recognises that there remains an entitlement to an ongoing income stream notwithstanding that part of the income stream entitlement has been commuted. In contrast, upon a full commutation there is no ongoing income stream entitlement as that entitlement upon commutation is replaced with an entitlement to a final lump sum payment.</p>



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	<p>the year, particularly if only one annual pension payment would have been paid towards the end of the year, should be paid out. Similarly, any residual amount remaining on the death of the member should be considered as an income stream liability that would have been payable had the member not died at that time.</p> <p>Further, there is inconsistent recognition of the terms and conditions of a superannuation income stream between when one is considered to have commenced and ceased.</p> <p>A superannuation income stream should be considered to have ceased once all the trustees contractual obligations under the current contract have been extinguished. This approach is consistent with Subdivision 295-F of the ITAA 1997 which refers to discharging liabilities payable by the fund at that time.</p> <p><u>All payments made from the 'pension' form part of the superannuation income stream</u></p> <p>A superannuation income stream that commenced after 20 September 2007 is defined in subregulation 995-1.01 of the ITAR 1997 to be a 'pension' for the purposes of subregulation 1.06(1) of the SISR 1994. As a lump sum on cessation forms an integral part of a 'pension' it must form an integral part of a superannuation income stream. This is the case whether it is made after a member's death or is paid as a full or partial commutation before death. As the lump sum forms an integral part of the pension, the pension cannot cease until this final payment is made.</p> <p>Further, if partial commutations (other than roll-overs) can be treated as payments from an income stream and count towards the minimum payment requirements, there is no logic that a lump sum resulting from a final commutation is not from a</p>	

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	superannuation income stream.	
20	<p><i>Legal obligation to make payments may continue even if payments have ceased – paragraphs 12 to 15; 80 to 84</i></p> <p>The cessation of an income stream is a question of fact, that is, the payments have ceased being made, notwithstanding that a legal obligation to continue to make the payments may still exist. Given this, it may be preferable to state that a superannuation income stream is payable until such time as the obligation to pay, or entitlement to receive, no longer exists.</p>	<p><i>Legal obligation to make payments may continue even if payments have ceased – paragraphs 13 and 14 to 17; 91 to 95</i></p> <p>Paragraph 13 makes it clear that once a superannuation income stream commences it is payable until such time as it ceases.</p> <p>Paragraph 14 states that a superannuation income stream ceases when there is no longer a member who is entitled, or a dependant beneficiary who is automatically entitled, to be paid a superannuation income stream benefit from a superannuation income stream.</p> <p>This principle looks at entitlement in relation to a member or dependant beneficiary to determine when a superannuation income stream ceases. It is relevant to consider what the entitlement is to. No further changes have been made to the Ruling.</p>
21	<p><i>Effect of treating the amount supporting the superannuation income stream as a separate interest – paragraph 13; 77 to 79</i></p> <p><u>Always remains separate superannuation interest</u></p> <p>If the word ‘always’ in regulation 307-200.05 of the ITAR 1997 is given weight it implies that a separate superannuation interest that supports a superannuation income stream remains until the underlying assets are exhausted or the trustee chooses to commute the pension.</p> <p>It could then be argued that the separate interest would only run out of assets when the pension is commuted immediately prior to paying out a lump sum death benefit, or perhaps paying out the remaining assets as a final pension payment.</p> <p><u>Exists until commutation or exhaustion of account balance</u></p> <p>The effect of regulation 307-200.05 of the ITAR 1997 is that,</p>	<p><i>Effect of treating the amount supporting the superannuation income stream as a separate interest – paragraph 15; 88 to 90</i></p> <p>Subregulation 307-200.05 of the ITAR 1997 is directed at ensuring that a separate superannuation interest is identified at the time a superannuation income stream commences. It does not by its terms mean that the separate superannuation interest is always a superannuation income stream and nor does it deem every amount from that superannuation interest to be a superannuation income stream benefit.</p> <p>As the view in the Ruling is considered to be correct, no change has been made.</p>

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	<p>once a superannuation income stream commences it will continue to exist until such time as it is commuted to a lump sum, or the amount in the relevant interest has been exhausted. This is supported by the use of the word 'always' in the regulation. Indeed, if this interpretation is adopted the use of the word 'always' could be considered otiose.</p> <p>The amount supporting the superannuation income stream is a separate interest and in practice is the account balance from which the superannuation income stream benefit payments are made.</p> <p>Other than providing for commutation or exhaustion of the account balance a superannuation funds deed cannot determine when a superannuation income stream ceases to be payable for superannuation or tax law purposes. Once a superannuation income stream commences it will be a superannuation income stream until commutation or exhaustion of the account.</p>	
22	<p><i>When a superannuation income stream ceases – failure to comply with the pension rules and payment standards of the SISR 1994 – paragraphs 16 to 18; 85 to 90</i></p> <p>Some comments have stated that they do not agree with the ATO view that a superannuation income stream will cease if it fails to meet the pension rules as outlined in the SISR 1994 in a financial year. The following comments have been provided:</p> <p><u>The rules of a pension are only required to meet the terms of SISR 1994, but do not need to be met in practice</u></p> <p>All that subregulation 1.06(1) of the SISR 1994 requires is that the rules meet particular requirements, including those in subregulation 1.06(9A) which requires that the <u>rules</u> ensure that certain requirements are met. It does not state that if the rules are</p>	<p><i>When a superannuation income stream ceases – failure to comply with pension rules – paragraphs 18 to 20; 96 to 102</i></p> <p>For a pension to be an account based pension for the purposes of the SISR 1994, and a superannuation income stream for the purposes of the ITAA 1997, it must meet the terms of subregulations 1.06(1) and 1.06(9A) of the SISR 1994, and regulation 1.07D of the SISR 1994 if relevant. Subregulation 1.06(9A) requires that the pension rules 'ensure' that particular requirements are met. The ATO view that this means the rules must be met or given effect to in practice is explained in the Ruling at paragraphs 98 and 99.</p> <p>As noted in response to issue 7, whether there is a superannuation income stream payable by the fund is not determined by the product itself but rather whether the product in question complies with the</p>

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	<p>not complied with there will no longer be a pension, or that the pension will cease. If the pension had the contractual and design features set out in subregulation 1.06(1) of the SISR 1994 and the trustee and member intended the pension would be paid in accordance with the regulation, there will be a superannuation income stream, whether or not the rules are complied with in practice.</p> <p><u>Breach of subregulation 1.06(9A) of the SISR 1994 will not cause a pension to cease</u></p> <p>The SISR 1994 are drafted in such a way that the definition of a superannuation income stream is conceptual and is a function of the rules of the superannuation fund. If a superannuation income stream does not comply with one or more of the prescribed standards, then it does not cease to be a superannuation income stream. Instead, it is simply a superannuation income stream which does not comply with the pension standards.</p> <p><u>Contractual obligations</u></p> <p>The contractual obligations between the trustee and member will continue (if the contractual documentation so provides) if these terms are not met. It would be expected that given the standards are required to be incorporated into the pension contract that the member would legally be entitled to the minimum payment and sue for it, again supporting the view that a pension would continue to exist even if the minimum pension payments are not made.</p> <p><u>Parliament's intent</u></p> <p>If Parliament had intended that an income stream was only considered to be a superannuation pension if it met specified standards in practice, the legislation could have clearly required</p>	<p>terms of the law.</p> <p>As the view in the Ruling is considered to be correct, no substantive change has been made. However, the heading has been changed as the pension rules do not form part of the payment standards (Division 6.3) of the SISR 1994. The heading has therefore been changed to 'Failure to comply with pension rules'.</p> <p>See also responses at issues 2 and 19.</p> <p><u>Must make election to not be income stream benefit</u></p> <p>The approach in the Ruling has been amended in relation to regulation 993-1.03 of the ITAR 1997. A person who is entitled to make an election under that provision must actually make an election before the payment is made, if the payment to that person is to be treated as not being a superannuation income stream benefit (that is, the payment is to be treated as a superannuation lump sum). See paragraphs 8 and 64 and 65.</p> <p><u>Documents published by the ATO</u></p> <p>See also the response at issue 24 and documents published by the ATO, which are relevant if the fund has not met the minimum annual payment amount for the financial year because of an honest mistake resulting in a small underpayment or matters outside the control of the trustee.</p>

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	<p>this.</p> <p>For instance, the provisions could have specified that</p> <ul style="list-style-type: none"> <li>the superannuation income stream must meet those requirements in practice, or</li> <li>the trustee must ensure the rules were met.</li> </ul> <p><u>It is impossible for any rules to 'ensure' compliance</u></p> <p>The ruling seems to suggest that pension rules must in some way secure or bring about their own compliance, and that a failure in of compliance is a failure in the rules themselves. There are no circumstances in which rules of any sort are capable of making sure they are complied with.</p> <p><u>Purposive approach</u></p> <p>As it is not possible to apply the literal meaning to the words 'ensure that', a purposive approach should be taken and they should be interpreted to mean 'require that'.</p> <p>Compliance is a matter for those to whom the rules apply, and those who are responsible for monitoring and supervision.</p> <p><u>Superannuation income stream that does not comply with rules</u></p> <p>If a pension does not comply with the pension rules or pension standards then it does not necessarily cease. This is purely a SIS compliance issue. It does not necessarily mean that the pension or annuity is not being paid for the purposes of the SISA 1993 in accordance with the SIS pension or annuity rules. This is particularly the case with regulation 1.07D of the SISR 1994 which does not actually impact on compliance with the pension and annuity rules.</p>	

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	<p><u>Must make election to not be income stream benefit</u></p> <p>We note that the ITAR 1997 refers at 995-1.03 to payments that are specifically not income stream benefits, and that the circumstances that would so exclude them refer to specific design features of the products, and also require an election by the recipient that the payment stream is not to be treated as a superannuation income stream benefit. This is the only time a payment from an interest supporting a superannuation income stream should not be treated as a superannuation income stream benefit.</p>	
23	<p><i>Failure to comply with pension rules and payment standards of the SISR 1994 – cessation occurs at the start of the income year – paragraphs 17; 88</i></p> <p>Some submissions have stated that the view that the pension ceases at the start of the year is unworkable and impractical.</p> <p>Other submissions have stated that a breach should result in a superannuation income stream ceasing at the time a breach occurs rather than at the start of the income year, particularly if a pattern of payments can be established. For instance, if pension payments are made for 11 months of the year, but missed for the last month, the pension should only be deemed to cease when the failure to pay the last payment occurs.</p> <p><u>Not Parliament's intent</u></p> <p>There is no indication that ceasing at the start of the year was Parliament's intent. It is also at odds with the definition of exempt current pension income which refers to discharging liabilities due in respect of superannuation income stream benefits at that time, not some time in the future.</p>	<p><i>Failure to comply with pension rules – cessation occurs at the start of the income year – paragraphs 19; 100</i></p> <p>Subregulation 1.06(9A) of the SISR 1994 outlines requirements that must in the ATO's view be met in practice (see response at issue 22).</p> <p>One such rule is that the total of payments in any year is at least the amount calculated under clause 1 of Schedule 7 to the SISR 1994 (that is, a minimum pension must be paid). As the requirement is established in relation to a year, if the requirement is not met the pension has failed to meet the minimum pension requirement for the entire financial year.</p> <p>As the view in the Ruling is considered correct no changes have been made.</p> <p><u>Documents published by the ATO</u></p> <p>See also the response at issue 24 and documents published by the ATO, which are relevant if the fund has not met the minimum annual payment amount for the financial year because of an honest mistake resulting in a small underpayment or matters outside the control of</p>

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	<p><u>Circular argument</u></p> <p>If a pension is taken to have ceased at the start of the year the trustee could not have breached the rules as (according to the ATO) there was no pension. This becomes a circular argument.</p>	<p>the trustee.</p>
24	<p><i>Failure to comply with pension rules and terms and conditions of SISR 1994 – circumstances of the breach – paragraphs 16 to 18; 85 to 90</i></p> <p>Comments have stated that without the ability to have materiality and discretion around the circumstances of a breach a superannuation income stream would cease no matter how insignificant the breach is, or whether out of the members control.</p> <p>It could also mean that members and superannuation funds are subject to excessive income tax penalties, including the denial of the exemption on earnings for assets supporting a superannuation income stream, for minor breaches during the year.</p> <p>Comments have stated that the circumstances of a breach should be considered when determining whether a superannuation income stream has ceased, and that the ATO should develop and release an administrative policy, or general guidelines, in regards to this.</p> <p>One comment also stated that the ATO and the prior regulators have never raised trivial amounts of breach as an issue, and it appears to be contradictory to the reporting requirements on the Auditor Contravention Report.</p> <p>The following is a list of circumstances that comments have suggested should be taken into account:</p>	<p><i>Failure to comply with pension rules – circumstances of the breach – paragraphs 18 to 20; 96 to 102</i></p> <p>Concerns were raised about failing to meet the pension requirements under the SISR 1994 and thus a superannuation income stream ceasing for the entire income year for income tax purposes. In particular failing to meet the minimum annual pension requirement.</p> <p>The ATO has published documents that explain when a fund is treated for income tax purposes as continuing to pay a superannuation income stream even though the minimum annual payment amount for the financial year has not been met (that is, because of an honest mistake resulting in a small underpayment or matters outside the control of the trustee).</p> <p>If the circumstances and conditions as outlined in the documents are met the superannuation income stream is treated as having continued meaning that the the proportioning rule does not need to be applied again to determine the tax free and taxable components; the trustee of the fund can continue to claim an income tax exemption for earnings on assets supporting that pension, notwithstanding the fund's failure to meet its obligations under the SISR 1994; and any payments made to the member during that income year are treated as superannuation income stream benefit payments (assuming the election under regulation 995-1.03 of the ITAR 1997 is not relevant) and not superannuation lump sums. It is expected that this will address the majority of cases which occur through inadvertent error.</p> <p><i>See APRA-regulated funds – starting and stopping a superannuation</i></p>

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	<ul style="list-style-type: none"> <li>• The size of the breach</li> <li>• Whether earlier payments were made during the year or there was a pattern of making payments</li> <li>• Intent to comply with the requirements</li> <li>• Ability to comply within the appropriate time frames (for instance, whether assets were frozen).</li> <li>• Whether the breach was inadvertent (for instance, system error)</li> <li>• The person who is at fault (if trustee is at fault may be harsh to penalise member)</li> <li>• Whether the breach was beyond the control of the member/trustee</li> <li>• Member/trustee illness or injury</li> <li>• Inability of trustee to pay amount due to breakdown in bank systems, closure of bank account or return of cheque (if member has not updated their details).</li> <li>• Administrative error/miscalculation</li> <li>• Whether an inadvertent error was rectified within a reasonable time.</li> <li>• If miscalculation occurred because a fund used a historical</li> </ul>	<p><i>income stream (pension); and Self-managed superannuation funds – starting and stopping a superannuation income stream (pension).</i></p> <p>These documents are available at <a href="http://www.ato.gov.au">www.ato.gov.au</a>.</p> <p><b>TR 2013/5</b></p> <p><b>SMSFD 2013/2</b></p>



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	<p>value of the funds balance as a current one was not available.</p> <ul style="list-style-type: none"> <li>• Other circumstances (for example technical insolvency, APRA has issued a no action letter or exemption from meeting the minimum requirements, or a family law splitting order has been received).</li> <li>• If a pensioner dies close to the end of the year it and it is not possible to arrange payment by the end of the year to a reversionary pensioner.</li> </ul> <p><u>Comments of an administrative nature</u></p> <p>Submissions have outlined various administrative difficulties, and other impacts, which would result from treating a superannuation income stream as having ceased at the start of the income year when a breach of the SISR 1994 occurred. The impacts outlined are as follows:</p> <ul style="list-style-type: none"> <li>• It would affect the calculation of exempt current pension assets under section 295-385 of the ITAA 1997. This may include having to retrospectively unsegregate assets after the income year has finished.</li> <li>• ECPI calculations involve an actuary, their calculations should be able to hold good for several years. If retrospective amendments are required their calculations become impossible as they are not based on certain data.</li> <li>• It would require payments to be retrospectively classified as lump sums from an accumulation interest. This may affect social security payments</li> <li>• If an asset was sold, and it was later determined that a</li> </ul>	

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	<p>superannuation income stream was no longer payable, capital gains tax may be payable on that asset. This would affect the allocation to member accounts, and income calculations of the fund. It could also cause problems if a member had rolled money out of their account.</p> <ul style="list-style-type: none"> <li>• Large funds are required to treat superannuation income streams as payable to determine crediting ratings and unit pricing and for the application of ECPI. It may not be possible to revisit these calculations if it is determined that a superannuation income stream was not payable. ECPI could not be applied on a 'wait and see' approach.</li> <li>• A requirement that different credit ratings or unit prices to be applied to different members of a particular pension type or division may raise issues of perceived fairness.</li> <li>• If superannuation funds are required to calculate pensions on an income stream by income stream basis it would require abandoning orthodox practices. This would be controversial and disruptive to current practices.</li> <li>• It may result in funds breaching subregulation 6.21(2) of the SISR 1994 which allows the payment of a maximum of two lump sums on the death of a member.</li> <li>• It may require calculations of tax free and taxable component in the next year if a 'new' pension commences. This could be to the detriment of the taxpayer. It could also cause complexity if a trustee is unaware of the breach until part way through the year, if the member has subsequently received pension payments or died.</li> <li>• The tax free and taxable component will need to be</li> </ul>	

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	<p>determined between when the pension was taken to have ceased and when a new pension is taken to have commenced. Any earnings applied to the taxable component during the accumulation phase may affect the deductible amount for social security purposes.</p> <ul style="list-style-type: none"> <li>• It will affect assets invested in a PST only accepting assets backing current pensions. These assets would need to be retrospectively withdrawn (which may not be possible).</li> <li>• In a large fund the pensioner could seek compensation from the trustee or fund administrator. The cost of these damages would ultimately be met by the other member of the fund, the administrator, shareholders or by an insurer. This would result in higher running costs and detriment to members.</li> <li>• The superannuation fund would retrospectively go out of 'pension phase' for the year in question, causing the fund trustee to go back and unwind the tax and accounting position of the fund and potentially to lodge amended assessments.</li> <li>• If a member is under 60 they may need to lodge amended assessments on changing from a pension to a lump sum due to taxation changes that may occur.</li> <li>• If a member has rolled out their superannuation, and a trustee discovers an incorrect amount of tax was deducted, the remaining members will bear the cost of the additional tax.</li> <li>• The fund may not realise for the whole year if it qualifies to recommence a pension or not. This will impact on what a fund pays, investments they undertake etcetera.</li> <li>• The fund may be penalised for not withholding the appropriate amount of tax or for varying instalments incorrectly. The ATO</li> </ul>	

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	<p>should clarify whether they will be penalised for this.</p> <ul style="list-style-type: none"> <li>• It may give rise to thousands of dollars in professionals fees, many documents to be prepared (PDSs, applications etcetera) and financial analysis, including valuation of the superannuation interest both when it ceases and recommences.</li> <li>• It may have significant effects on transition to retirement pensions including removal of the ECPI exemption, and possibly cause payments to be illegal early access.</li> <li>• It may result in a reduction of tax free component if a pension was commenced with 100% tax free component. This may affect estate planning.</li> </ul>	
25	<p><i>Failure to meet pension rules and requirements of the SISR 1994 – effect on exempt current pension income – paragraphs 16 to 18; 85 to 90</i></p> <p>A pension as defined in the SISR 1994 is a bundle of rights that a member has to receive their entitlement from the fund. There is a strong argument that where a pension arrangement incorporates a number of rights all of these rights/obligations form part of the pension. If they are part of the pension they must be part of the superannuation income stream because it is defined to be a pension. As such, while any one of the trustee's obligations is unfulfilled, and the trustee holds assets for the purposes of meeting that obligation, sections 295-385 and 295-390 of the ITAA 1997 are still operative.</p> <p>Sections 295-385 and 295-390 exempt from tax in a year income from all assets held to discharge pension liabilities, not just those for the current year's pension liabilities.</p>	<p><i>Failure to meet pension rules and requirements of the SISR 1994 – effect on exempt current pension income – paragraphs 18 to 20; 96 to 102</i></p> <p>The Ruling considers when a superannuation income stream commences and ceases. The exemption from income tax for earnings on assets supporting the superannuation income stream is outside the scope of this Ruling and therefore is not specifically dealt with in this Ruling.</p> <p>However, if a pension ceases as the minimum pension requirement for the entire financial year is not met, a pension may subsequently commence again in the following income year if all relevant requirements are met in that following income year. As a consequence, the exemption from income tax for earnings on assets supporting that superannuation income stream will again apply. However, if a pension commences in that following income year this would require application of the proportioning rule at that time.</p>

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	<p>There is an underlying assumption in the legislation that the fund will continue to pay the pension in future years. The assumption must also be that the pension that is paid will meet the requirements necessary to attract the exemption. Otherwise, the exemption would just apply for the current year.</p> <p>If a fund pays less than the minimum in the current year these assumptions should still be valid. Even if a fund 'failed' in the current year, it is not appropriate to assume the pension will fail in every subsequent year and withdraw the full tax exemption.</p>	<p>See also the response to issue 23 and the documents referred to in response to issue 24.</p>
26	<p><i>Failure to meet pension rules and requirements of the SISR 1994 – legislative alternatives – paragraphs 16 to 18; 85 to 90</i></p> <p>Comments have suggested legislative amendment as an alternative to the view in the Ruling. The suggestions are:</p> <ul style="list-style-type: none"> <li>• If a pension fails to meet the standards of SISR 1994 it would be preferable if the breach were met with a direct administrative or tax penalty, as opposed to determining that the pension had ceased with effect from the start of the financial year. Such a penalty would be more equitable (it would relate to the 'harm' the breach represented) and would be easier to administer for the ATO and the superannuation fund. It would also enable the ATO to exercise discretion not to impose a penalty in circumstances where the breach was minor, inadvertent or was not the fault of the member.</li> <li>• It may be more appropriate in these cases to have a flat dollar penalty, perhaps in line with the new administrative penalties the ATO is soon to be granted. Another alternative would be to require a fixed percentage of the income and capital gains arising from a pensioner's entitlement be subject to tax. This could be 14%, the maximum percentage of drawn down</li> </ul>	<p><i>Failure to meet pension rules – legislative alternatives – paragraphs 18 to 20; 96 to 102</i></p> <p>These are policy suggestions for legislative change and are therefore outside the scope of the Ruling.</p> <p>However, see also the response at issue 24 and documents published by the ATO, which are relevant if the fund has not met the minimum annual payment amount for the financial year because of an honest mistake resulting in a small underpayment or matters outside the control of the trustee.</p>

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	<p>required in any year under Schedule 7 to the SISR 1994. Or alternatively some combination of penalty and tax could be implemented.</p> <ul style="list-style-type: none"> <li>We believe that the government should introduce measures to allow once off concessions for minimum pension payments. The government has recently allowed once off concessions for excess contribution assessments, we believe application of a similar system for minimum pension payments should also be applied to assist superannuation funds and trustees to ensure their systems and procedures are adequate to meet the requirements of the superannuation and income tax rules.</li> </ul>	
27	<p><i>When a superannuation income stream ceases – exhaustion of capital – paragraphs 19; 91</i></p> <p>We broadly agree with the views expressed in this section as it relates to account based pensions.</p>	<p><i>When a superannuation income stream ceases – exhaustion of capital – paragraph 22</i></p> <p>No changes required.</p>
28	<p><i>When a superannuation income stream ceases – full commutation – paragraphs 20 to 23; paragraphs 92 to 108</i></p> <p>One submission stated that, subject to their views that future dated commutation requests should result in the superannuation income stream ceasing on the date requested, they support the view in the Ruling on full commutation.</p> <p>Other submissions have stated that they do not agree with the view in the Ruling that a commutation will occur when the request to commute is received. Submissions have suggested that a superannuation income stream will cease at other times including:</p> <p><u>Ceases on payment of lump sum</u></p> <p>A better interpretation of the legislation is that a pension does not</p>	<p><i>When a superannuation income stream ceases – full commutation – paragraphs 23 to 28; 103 to 120</i></p> <p>The Ruling now states that a commutation takes effect when a superannuation fund trustee's liability to provide periodic superannuation income stream benefits has been substituted with a liability to provide a lump sum payment. The superannuation income stream therefore ceases at this time rather than when a valid request to commute is received. This view takes account of the case law as discussed in the Ruling.</p> <p>As the liability to pay the lump sum resulting from the commutation arises as a consequence of the full commutation having taken effect, the superannuation income stream ceases before the time when the lump sum payment to the member or beneficiary is made.</p>

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	<p>cease until the balance is exhausted (via payment of a benefit or via internal or external roll-over), and furthermore this is the policy intent.</p> <p><u>Cessation determined by fund rules</u></p> <p>Whether a superannuation income stream has been commuted is to be determined by the superannuation fund rules and/or the contractual agreement between the fund trustee and the member.</p> <p>It is this contractual relationship that determines when a commutation takes effect. That is, the time when the member can legally enforce an obligation on the trustee to commute the pension. This view is also consistent with the view expressed in the Ruling about when a superannuation income stream commences.</p> <p><u>Commutation only effected by lump sum</u></p> <p>We consider that the date on which an income stream is commuted is a matter of fact, dependent on matters such as the governing rules of the fund, the decision made by the trustee, and the actual date of payment or transfer of the proceeds of the commutation.</p> <p>The exchange of entitlements is not all that is required for a commutation to take place, the request must be brought to fruition by way of payment in case or a transfer <i>in specie</i>.</p> <p><u>Same approach as commencement</u></p> <p>We are of the view that the approach taken for commencement should also apply for cessation.</p> <p>As a superannuation income stream is defined to be an income</p>	<p>As the payment resulting from the commutation is made after the superannuation income stream has ceased it is a superannuation lump sum.</p> <p>The alternative views suggested would in effect require a conclusion that a superannuation income stream continues even if the trustee's liability to make periodic payments that relate to each other over an identifiable period of time has ceased because the liability has been exchanged for a liability of a different kind. This approach would not be consistent with the meaning attributable to superannuation income stream as explained in the Ruling. It is the exchanging of one type of liability for another that concludes the superannuation income stream, not the subsequent full commutation payment which merely reflects that there has been an exchange of one form of liability for another. We also do not consider that a fund's governing rules can determine the outcome irrespective of the law.</p> <p>The discussion on commutation has also been divided into sections to make it clear what principles are being discussed. These sections are:</p> <ul style="list-style-type: none"> <li>• The meaning of commutation</li> <li>• Determining if there has been a commutation</li> <li>• Consequences upon a full commutation and</li> <li>• Consequences upon a partial commutation.</li> </ul>

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	<p>stream that is taken to be a pension or annuity for the purposes of subregulation 1.06(1) of the SISR 1994, the taxpayer must refer to the SISR 1994 to determine whether the obligations under a pension cease.</p> <p>The SISR 1994 also covers arrangements which include the provision of both income stream payments and the amounts to be paid on commutation and /or death. In some income arrangements 'Nil residual capital value' is a specific payment condition. This further supports the view that the payment of residual capital from a pension is contemplated as part of the terms of the specific income stream.</p> <p>For any income stream the original capital amount will be held to enable the payment of all income stream payments over the duration of the income stream including the final amount which may be paid as a lump sum. Until the final amount is actually paid, any residual capital amount will continue to be held to support the payment of all income stream benefits.</p> <p><u>Must be a superannuation income stream at the time of commutation</u></p> <p>In order to be an exchange of entitlements there must be an income stream at the time of commutation. This means that a superannuation income stream cannot cease until the payment is actually made. Until the income stream is actually commuted there is an entitlement to an income stream (with an ability to commute which has been exercised but not yet effected). This is supported by the cases <i>Hammerton</i> and <i>Cooper</i> which both require that there must be a series of periodical payments in order for a commutation to be able to occur.</p> <p>We agree that whether a commutation has been undertaken is a</p>	



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	<p>question of fact. The fact of a commutation is that payment of a lump sum to the member representing an amount which, under the rules of the fund, is equivalent to the value of the member's entitlement to receive future superannuation income stream benefits. It is irrelevant whether the superannuation income stream ceases, the act of commutation will cause the benefit to be a lump sum.</p> <p><u>Contrary to typical transaction based treatment</u></p> <p>A superannuation income stream will cease when the commutation payment is made, not when the request is received.</p> <p>There is no recognition in the ruling of the outstanding contractual obligations or accrued unpaid pension liability that may exist until the commutation payment is made. Further, the view in the ruling appears to be contrary to the typical transaction based treatment of payments in superannuation and tax law where an event is taken to have occurred when an actual payment is made or received and not when a request is made.</p> <p><u>Ceases on payment of final benefit and member notification</u></p> <p>A full commutation requires a process to work through under many superannuation funds governing rules and procedures and the ATO needs to consider these processes and revise its view accordingly. We submit that a pension does not finally cease upon a full commutation until the member has been paid their full entitlement from that interest and has been notified and agreed that their interest has so ceased unless the governing rules prescribe some other manner of cessation.</p> <p><u>Various options</u></p> <p>A commutation payment is an integral part of the pension and</p>	

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	<p>should be considered part of a superannuation income stream.</p> <p>The very earliest a pension could be deemed to have ceased would be the latest of the following dates. This would generally be no earlier than the time immediately before the commutation payment is made.</p> <ul style="list-style-type: none"> <li>• The date the request for full commutation is received.</li> <li>• The date the trustee approves the commutation (where required).</li> <li>• The date it is certain that no further payments are necessary to satisfy the SIS pension requirements (for example minimum payments for the year).</li> <li>• The date that the commutation can be made without breaching the SIS pension requirements.</li> <li>• The date beyond which the member cannot change their mind and cancel the commutation request.</li> </ul> <p><u>Comments of an administrative nature</u></p> <p>Submissions have raised the following administrative impacts of the view that a commutation will cease at the time the request to commute is received:</p> <ul style="list-style-type: none"> <li>• The ruling states that a pension is commuted at the time a trustee receives a valid request to commute the pension in full. If assets are subsequently sold to fund the commutation, the fund would not be in 'pension phase' and therefore tax could apply including tax on capital gains. This policy will lead to strategies involving selling assets in pension phase which may lead to sub-optimal asset allocations.</li> <li>• For an SMSF a trustee will arrange to realise all capital gains</li> </ul>	

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	<p>before a full commutation request is lodged. All capital losses will be realised after the request is received.</p> <ul style="list-style-type: none"> <li>• The member could elect to receive their full benefit as a superannuation income stream benefit</li> <li>• A member could elect to receive all their remaining balance except \$1 as a superannuation income stream benefit, meaning the superannuation income stream continued. This could also be ensured by amending the rules of the fund.</li> <li>• If a rollover is considered to be a commutation it will trigger significant capital gains tax liability where assets are realised to make a cash transfer.</li> <li>• It may require governing rules and disclosure documents (including PDSs) to be amended</li> <li>• It may result in members being disadvantaged if they then receive a 'cash rate' for the period from the 'deemed' commutation rate until the actual commutation date</li> <li>• It would create insuperable practical difficulties where, for example, a valid commutation request may be received but be unable to be given effect because a fund asset cannot be sold, or in large funds where part of the pensioner's balance is invested in an illiquid option.</li> <li>• If a request was not intended to have effect funds could easily modify a commutation request so they only become 'valid' on payment.</li> <li>• If a future dated request takes effect when it is provided it will prevent members from providing trustees with advance notice of their intention to case an income stream.</li> </ul>	

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	<ul style="list-style-type: none"> <li>If the current administration of exempt current pension assets changes it will present serious practical difficulties, and require significant immediate disclosure and notification obligations for affected customers.</li> </ul>	
29	<p><i>What is a valid request to commute – paragraphs 20; 105</i></p> <p>Paragraph 20 and 105 refer to a ‘valid’ request to commute a superannuation income stream. However, comments have stated the Ruling does not provide a view of what a ‘valid’ request to commute is. Comments have said that if a pension ceases on the day that a request to commute is received it may not be in line with the fund rules or SISR 1994 requirements which may require particular conditions to be met before a pension can be commuted such as:</p> <ul style="list-style-type: none"> <li>Trustee consent may be required for any commutation. Whether consent is provided may depend on a number of factors such as whether there are illiquid assets (including if a member has requested an illiquid asset option), how the commutation may affect other members, whether valuations need to be conducted for <i>in-specie</i> transfers and the timeframe required to liquidate assets.</li> <li>A commutation may not be able to occur until the minimum payment amount calculated under Schedule 7 to the SISR 1994 is paid. The payment would remain an obligation of the trustee and would mean that the income stream was still on foot until such payment had been made.</li> <li>A commutation may be lodged with a future date of effect. In this case it is considered that the superannuation income stream should not cease until the date of effect, particularly since future pension payments made be required to be made</li> </ul>	<p><i>What is a valid request to commute – paragraphs 23; 111</i></p> <p>See response at issue 28. The view in the Ruling as to when a commutation takes effect has changed.</p> <p>Paragraph 111 now explains when a commutation is valid.</p> <p>Footnote 51 to paragraph 111 has been inserted to clarify that a request to commute may be subject to certain conditions being satisfied, which may affect the time when the commutation occurs.</p>

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	<p>between the date the commutation is requested, and the date of effect requested. In certain circumstances the member may also have the right to withdraw the commutation request after it is given to the trustee.</p> <ul style="list-style-type: none"> <li>• A member may have invested in an illiquid asset option, or have frozen assets. Assets will remain within the fund for some time after the commutation request is received.</li> <li>• A commutation can only occur on particular days.</li> <li>• Other administrative steps may need to be undertaken, or other conditions may need to be met.</li> </ul>	
30	<p><i>Invalid request to commute – paragraphs 20; 105</i></p> <p>What happens if a commutation request is ‘invalid’? If a payment is made to an individual it would be a superannuation income stream benefit. However, if it goes back to the accumulation phase in the same superannuation fund, would the commutation never have occurred and the pension still exist?</p>	<p><i>Invalid request to commute – paragraphs 23 and 24; 111 and 112</i></p> <p>See response at issue 28. The view in the Ruling as to when a commutation takes effect has changed.</p> <p>We cannot provide a specific response to this question without having a greater understanding of the particular factual circumstances contemplated. As the Ruling only deals with the more common reasons for a pension ceasing and not, for example, because the money funding a pension is transferred to accumulation phase on the basis of what is subsequently found to be an invalid commutation request, advice from the ATO can be sought if this is an issue.</p>
31	<p><i>What is a commutation – paragraphs 22 to 23; 92 to 106</i></p> <p>Comments have raised that the Ruling does not provide a view of what a commutation is and when it can occur, particularly in relation to account based pensions. It has been suggested that clarification should be provided about the following points:</p> <ul style="list-style-type: none"> <li>• Whether a member can commute a pension payment before it</li> </ul>	<p><i>What is a commutation – paragraphs 23 to 28; 103 to 120</i></p> <p>See response at issue 28.</p> <p>Paragraphs 104 to 109 explain the meaning of commutation while paragraph 110 summarises when there is a commutation. Paragraphs 111 to 114 explain about determining when a commutation takes effect. As explained at paragraph 114, if an</p>

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	<p>is paid.</p> <ul style="list-style-type: none"> <li>• Whether a member can elect to commute a future year entitlement.</li> <li>• Whether a member can continue drawing down pension payments over the period to which the commutation relates.</li> <li>• In what circumstances a member can choose to take a payment in excess of previous agreed drawdown amounts and have it treated as a superannuation income stream benefit (rather than a partial commutation amount).</li> <li>• Can a member request that the whole account balance be paid as part of the next pension payment without it automatically being classified as a commutation. Would this answer change if the member subsequently requested (but before the payment is made) that the payment be made as a lump sum.</li> </ul>	<p>alteration does not result in an exchange of the member's entitlements to receive periodic superannuation income stream benefits for an entitlement to receive a superannuation lump sum there is no commutation. For example, it may be that there has just been an increase in the amount of the superannuation income stream benefit payments.</p> <p>It is necessary to apply the principles in the Ruling to the particular facts and circumstances to determine if there has been a commutation. The consequences upon a full commutation are set out in paragraphs 115 to 118 and upon a partial commutation are set out in paragraph 119.</p> <p>In relation to partial commutations, the effect of the election that may be available under regulation 995-1.03 of the ITAR 1997 is set out in paragraph 120.</p>
32	<p><i>Commutation – paragraphs 102 and 104</i></p> <p>The reference to commutation in paragraphs 102 and 104 is ambiguous as the following paragraphs then start distinguishing between partial and full commutations.</p>	<p><i>Commutation – paragraphs 103 to 120</i></p> <p>New headings have been inserted into the explanation section to make it clear what principles each section is outlining. See also responses at issues 28 and 31.</p>
33	<p><i>Before a commutation can occur total amount of, and total number of, periodic superannuation benefits to be made must be agreed upon – paragraph 102</i></p> <p>It would be impossible for account based pensions to set out in advance the total number and total value of periodic payments to be made each year. The value of the superannuation income stream benefit is determined by the change in value (through earnings) of the account and the members' decisions, having</p>	<p><i>Determining if there has been a commutation – paragraphs 111 to 114</i></p> <p>This section of the Ruling has been revised. It now states that whether, and the time when, a commutation takes effect is a question of fact to be determined from the particular circumstances. The Ruling no longer requires the account based pension to set out in advance the total number and total value of periodic payments to be made each year.</p>

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	<p>regard to the minimum payment standards with respect to the amount and frequency of payments.</p> <p>Instead, there must be an agreement for one or more payments of an amount, or amounts, which are either agreed expressly or by reference to a formula or other criteria to be made to the member. It is this agreement which creates the superannuation income stream benefit.</p> <p><u>Inconsistent with requirements of the SISR 1994</u></p> <p>The requirements outlined at paragraph 102 are inconsistent with the requirements of the SISR 1994 which prescribes a minimum annual payment that must be made, but does not prescribe a maximum.</p>	<p>For it to be clear that a commutation has taken effect, it must be clear following the member or dependant beneficiary exercising their choice that some or all of the previous liability to pay future superannuation income stream benefits has been exchanged for a liability to pay a lump sum instead.</p> <p>Paragraphs 5 and 58 make it clear that a single payment for one year will not satisfy as a liability to pay a member a series of payments and thus will not satisfy as an income stream or superannuation income stream.</p> <p>See also responses at issues 28 and 31.</p>

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34	<p><i>Commutation cannot occur if unspecified amount to be paid each year at unspecified time – paragraph 104</i></p> <p>Many account based pensions (particularly from SMSFs) are established on the basis that at least the minimum amount required under Schedule 7 to the SISR 1994 will be taken each year, but do not specify the actual payments made. It is not clear if this arrangement would meet the terms of paragraph 104, or if an account based pension established in this way could never be commuted.</p> <p>It appears that some account based pensions can be commuted and others cannot depending on the rules of the fund and agreement between the trustee and member. If an account based pension cannot be commuted in these circumstances how can it be rolled back to accumulation phase or rolled over into another fund?</p> <p>Other comments provided suggest that it is difficult to understand this paragraph, and it should be revised.</p>	<p><i>Determining if there has been a commutation – paragraphs 5; 63; 110 to 114</i></p> <p>See response at issue 33.</p> <p>The Ruling no longer refers to a requirement for the amount and number of payments to be made in a year to be specified before a commutation can occur.</p> <p>A superannuation income stream exists if a superannuation fund trustee has a liability to pay to a member a series of periodic payments that relate to each other over an identifiable period of time. The payments need not be periodic in that they are paid at the same recurring intervals and may also vary in amount. See further at paragraph 5.</p> <p>A commutation occurs if a member or dependant beneficiary exchanges their entitlement to receive future superannuation income stream benefits for an entitlement to be paid a lump sum. See further at paragraph 110. Paragraphs 111 to 114 then explain about determining if there has been a commutation.</p> <p>The question concerning the rules of a fund not permitting commutation and the ability to then roll back to accumulation phase is outside the scope of this Ruling. If this is an issue specific advice may need to be sought.</p>



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35	<p><i>Lump sum on full commutation does not count towards minimum payment requirements – paragraph 106</i></p> <p>We understand that regulation 1.07D was intended to ensure that a minimum payment would be cashed in favour of a pensioner in each income year, and note that the wording of the regulation does not make a distinction between the types of payments that might be made from a relevant interest. Subregulation 1.06(9A) also does not distinguish between the types of payments made.</p> <p>We do not agree that a payment made from the full commutation of the pension does not count towards the minimum annual payment. A superannuation lump sum is any superannuation benefit that is not a superannuation income stream benefit. If made from an interest supporting a superannuation income stream it will be a superannuation income stream benefit unless the pensioner elects otherwise.</p> <p>Payment of the proceeds of the full commutation is, in our view, a payment from an interest supporting a superannuation income stream benefit – it is the final payment from that interest and brings about the cessation of the income stream. As such, the payment of a full commutation counts towards the minimum payment requirement for the purposes of regulation 1.07D and Schedule 7 to the SISR 1994.</p> <p>If the Commissioner's view was correct this would require that a member who is fully commuting their income stream must receive two payments, one to meet the minimum payment requirements, made immediately before cessation, and the other as a consequence of the commutation. This requires an artificiality that is not required under the SISA 1993 or SISR 1994 and is not required for the 'minimum cashing policy' to be met.</p>	<p><i>Lump sum on full commutation does not count towards minimum payment requirements – SMSFD 2013/2</i></p> <p>The view as to whether a partial or full commutation payment counts towards the minimum annual payment requirement has been removed from the Ruling and is addressed in the separate regulatory product SMSFD 2013/2.</p> <p>However, consistent with the view that a pension ceases upon a full commutation taking effect, the view has not changed. That is, a payment made as a result of a full commutation cannot count as the account based pension ceases before the payment is made.</p> <p>In relation to regulation 1.07D of the SISR 1994, the particular requirements of that provision are not addressed in the SMSFD. We do not however consider that the provision has the effect of altering the view that a pension ceases upon full commutation and before the full commutation payment is made (paragraph 26 of the Ruling). If you have particular enquiries as to the operation of regulation 1.07D in relation to an SMSF advice may be sought from the ATO.</p> <p>See also the response at issues 28 and 36.</p> <p><u>Transition to retirement income streams and commutations</u></p> <p>The SMSFD does not cover transition to retirement income streams as there are additional qualifications in relation to when commutations are able to be made (see paragraph (b) of the definition of non-commutable allocated pension in regulation 6.01(2) of the SISR 1994). Consideration is being given to a further product for transition to retirement income streams and commutations in relation to the minimum and maximum payment requirements.</p>

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36	<p><i>Part of payment made as a result of commutation treated as a pension payment – paragraph 106</i></p> <p>Most providers have procedures in place to treat a portion of the final payment as a minimum payment where the minimum payment requirements have not previously been met. If the commutation request causes the superannuation income stream to cease it is unclear how this amount should be treated. If this is the case it could cause the superannuation income stream to be non-complying for the whole of the final year. From a SIS perspective a breach of the pension standards is a penalty on the trustee, so there would be a mismatch between prudential and taxation requirements.</p> <p><u>Failure where commutation does not count</u></p> <p>If a final commutation payment is not counted towards the minimum payment requirements, the minimum payment may not be made in some circumstances. This is because arrangements involving quarterly, half yearly or annual pension payments have not occurred prior to the commutation date.</p> <p>If this is considered to be a serious breach, legislative amendment should be sought.</p>	<p><i>Part of payment made as a result of commutation treated as a pension payment</i></p> <p>When a commutation takes effect is a question of fact as explained in the Ruling at paragraphs 111 to 114.</p> <p>Leaving aside the circumstances covered by paragraphs 1.07D(1)(a) to (c) of the SISR 1994, to avoid any question as to whether the minimum payment requirement has been met where there is a full commutation, a member and their fund should ensure that a full commutation relates only to the remaining entitlements (that is, the entitlements that remain after taking into account the amount required to fund the minimum payment requirement). This will not be achieved if the full commutation exchanges all entitlements to superannuation income stream benefits for a lump sum payment.</p> <p>See also the response at issue 35.</p>
37	<p><i>Partial commutation – does not cause superannuation income stream to cease – paragraph 107</i></p> <p>We agree with the conclusion that a superannuation income stream will not cease upon receipt of a person's application to partially commute some of their entitlements. We also agree that it would not cease when the partial commutation actually occurs.</p>	<p><i>Partial commutation – does not cause superannuation income stream to cease – paragraphs 27 and 28; 119 and 120</i></p> <p>No change. A superannuation income stream does not cease upon a partial commutation including upon a partial commutation payment being made.</p>

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38	<p><i>Partial commutation – election taken to have been made under regulation 995-1.03 – paragraphs 12; 107</i></p> <p>The ruling states that an election will be taken to have been made under regulation 995-1.03 of the ITAR 1997 when a partial commutation occurs. The legislation does not appear to make this link, and the draft Ruling provides no reasoning for the view. An election would be required to be separately made for the payment to be a superannuation lump sum, even where the payment is as the result of a partial commutation.</p>	<p><i>Partial commutation – separate election required to be made under regulation 995-1.03 – paragraphs 28; 120</i></p> <p>The view in the Ruling has been revised. The Ruling now states that a payment resulting from a partial commutation will be a superannuation income stream benefit for income tax purposes, unless before that payment is made an election is made by the member under paragraph 995-1.03(b) of the ITAR 1997 (noting the requirements at subparagraphs 1.03(a)(i) to (iv)) for that payment to not be a superannuation income stream benefit. If such an election is made by the member the payment will be a superannuation lump sum.</p> <p>As this view has changed from the draft Ruling, the date of effect (paragraph 48 of the Ruling) states that the requirement to actually make the election will apply from the date of issue of the final Ruling. Thus for a partial commutation payment made before 31 July 2013 that payment is a superannuation lump sum or a superannuation income stream benefit according to how the person has treated the payment.</p>
39	<p><i>Election made under regulation 995-1.03 of the ITAA 1997 where there is no partial commutation – paragraph 107</i></p> <p>The draft ruling does not provide a view on whether a member is able to elect to have payments from a superannuation income stream treated as lump sums where there is no partial commutation.</p> <p>Regulation 995-1.03 of the ITAR 1997 provides the pensioner with an option to treat any payment from a superannuation income stream as a lump sum rather than the default treatment as an income stream benefit. This section does not just refer to commutations, it applies to all payments. All payments can be</p>	<p><i>Election made under regulation 995-1.03 of the ITAA 1997 where there is no partial commutation – paragraphs 8 and 64</i></p> <p>Paragraphs 8 and 64 of the Ruling now state that a payment made from a superannuation interest supporting a superannuation income stream will be a superannuation lump sum if, before the payment is made, a member makes an election under regulation 995-1.03(b) of the ITAR 1997.</p> <p>For a member to be able to make an election it must be in line with the superannuation fund's governing rules and the circumstances of regulation 995-1.03 of the ITAR 1997 must be met.</p>

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	counted towards meeting the minimum drawdown amount for the year (with the exception of rollover amounts). In effect there is no nexus between the term commutation and an ability to elect for a payment to be a lump sum. A lump sum payment does not have to be a commutation.	See also response at issue 38.
40	<p><i>Partial commutations count towards minimum requirements – paragraph 108</i></p> <p>Some comments have supported the view that all payments made from a superannuation interest count towards the minimum payment requirement, whether the payments are made in cash or <i>in specie</i>.</p> <p>Other comments have stated that it is their understanding that a payment made as the result of a partial commutation would not count towards the minimum payment requirements in subregulation 1.06(9A) of the SISR 1994.</p> <p>In fact, paragraph 1.07A(2)(c) of the SISR 1994 states that a pension cannot be commuted, in whole or in part, unless the pension has paid, in the financial year in which the commutation is to take place, at least the minimum amount under subregulation (3). It would not be necessary to specify this with respect to partial commutations if the payment made as a result of a partial commutation counted towards the minimum payment requirements.</p>	<p><i>Partial commutations count towards minimum requirements – SMSFD 2013/2</i></p> <p>The view as to whether a partial or full commutation payment counts towards the minimum annual payment requirement has been removed from the Ruling and is addressed in the separate regulatory product SMSFD 2013/2.</p> <p>However, consistent with the view that a pension does not cease upon a partial commutation taking effect, the view has not changed. That is, a payment made as a result of a partial commutation counts towards the minimum annual payment requirement.</p> <p>In relation to regulation 1.07D of the SISR 1994, the particular requirements of that provision are not addressed in the SMSFD, however, we acknowledge the merit of the view put forward as it relates to paragraph 1.07D(1)(c) of the SISR 1994.</p> <p>Having said that we also considered that paragraph 1.06(9A)(a) refers to ‘total of payment in any year’ and only excludes from counting towards the minimum annual payment requirement those payments rolled over within the superannuation system. If partial commutation payments are paid out of the superannuation system it was ultimately considered that such payments made by SMSFs counted towards the minimum payment requirement. This is the view reflected in SMSFD 2013/2. See also response at issue 35.</p>
41	<i>Can a pension payment be made in specie – paragraph 108</i>	<i>Can a pension payment be made in specie – SMSFD 2013/2</i>

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	<p>The Ruling and subregulation 1.06(9A) of the SISR 1994 imply that a member could satisfy their minimum payment requirements by making <i>in specie</i> partial commutation payments. This is consistent with the definition of 'lump sum' in subregulation 6.01(2) of the SISR 1994 which states a lump sum can include an asset.</p> <p>However, it is arguably inconsistent with APRA circular 1.C.2 which states that a payment cannot be made in specie where the payment is in respect of a pension or annuity.</p> <p>The lack of express wording in relation to pension payments should not prevent them from being able to be paid <i>in specie</i>. The SISR 1994 is poorly drafted, and this appears to be an intended result that serves no tangible purpose.</p> <p>Allowing pension payments to be paid in specie would result in no revenue impact and would allow funds to manage liquidity issues and avoid transaction fees by transferring listed shares as a pension payment.</p> <p><u>Inconsistent with APRA circular 1.C.2</u></p> <p>The interpretation in the Ruling which states that a partial commutation payment can be made in specie is arguably inconsistent with APRA Circular 1.C.2 which states that a payment cannot be made <i>in specie</i> where it is in respect of a pension or annuity. We would therefore like clarification on the situation where total pension payments are satisfied by an <i>in specie</i> distribution of assets (that is partial commutation). If this view is confirmed it could transform the nature and payment of (illiquid) assets held in pension phases, subject to the superannuation funds' investment strategy and the Covenants found in section 52 of the SISA 1993.</p>	<p>SMSFD 2013/2 (paragraphs 9 and 15) makes it clear for SMSFs that a partial commutation payment counts towards the minimum annual payment requirement whether it is paid in cash or in specie.</p> <p>In relation to the APRA circular 1.C.2, we do not consider there to be any inconsistency as the partial commutation payment is a lump sum payment for SISR purposes. It is for income tax purposes that the payment is a superannuation income stream benefit unless an election is able to be made, and is made, under regulation 995-1.03(1) of the ITAR 1997 for the payment to in effect be treated as a superannuation lump sum. See paragraphs 28 and 120 of the Ruling.</p>

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42	<p><i>Cessation of a pension paid to child under 25</i></p> <p>A reversionary pension paid to a child of the deceased can generally only be paid to age 25 at which stage they must be commuted. No request from the child pensioner may be received. The ruling should clarify when ATO considers that such a pension ceases.</p>	<p><i>Cessation of a pension paid to child under 25 – paragraph 21</i></p> <p>A further reason for cessation has been inserted into the Ruling entitled 'By operation of the payment standards of the SISR 1994'. Paragraph 21 explains that a superannuation income stream may cease due to the requirements of the SISR 1994.</p> <p>Specific reference is made to the requirement that if a superannuation income stream is being paid to a financially dependent child of the deceased it must be cashed as a lump sum under subregulation 6.21(2B) when they attain the age of 25 (unless the child has a relevant disability). Thus the superannuation income stream ceases at the earlier of the time specified in the governing rules (if any) or the day the child attains age 25.</p>
43	<p><i>Does a commutation occur when an amount is rolled over – paragraphs 20 to 23; 92 to 108</i></p> <p>The Ruling does not consider the effect of a member requesting a rollover payment, whether to a new fund or back to accumulation phase in their current fund. The Ruling should clarify whether a commutation occurs, and whether the superannuation income stream ceases.</p> <p>It could also be clarified that a superannuation lump sum arises in these circumstances. This is important for the application of the proportioning rule to the notional lump sum, and to any subsequent pension which commences.</p>	<p><i>Does a commutation occur when an amount is rolled over – paragraphs 23 to 28; 103 to 120</i></p> <p>The Ruling provides principles which can be used to determine if a commutation has occurred. Only a lump sum amount can be rolled over. The Ruling does not look, however, at what happens after the commutation occurs, for instance whether it is paid to the member or rolled over to either a new fund or to a new account in the existing fund.</p> <p>This question therefore goes into a level of detail not contemplated by the Ruling and is out of scope.</p> <p>Further, advice can however be sought from the ATO in relation to particular circumstances if required.</p>

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44	<p><i>Example 6 – paragraphs 37 to 39</i></p> <p>The member only made half the required payment required under Schedule 7 to the SISR 1994. Could the member have met his minimum payments, if at the beginning of the year he had made an internal partial commutation of half of the assets backing the pension to his accumulation account (with no change to tax free/taxable proportions)? Or would he have had to commute the total assets back to accumulation and then rolled back ½ the assets, possibly changing the tax free/taxable proportions in the process?</p>	<p><i>Example 6 – paragraphs 42 to 44</i></p> <p>This question contemplates issues which go beyond the circumstance illustrated by Example 6 and beyond the scope of the Ruling.</p> <p>The view as to whether a partial or full commutation payment counts towards the minimum annual payment requirement has been removed from the Ruling and is addressed in the separate regulatory product SMSFD 2013/2. As set out in the SMSFD, a partial commutation amount that is rolled over within the superannuation system on or after 6 June 2009 cannot count towards the minimum annual payment requirement.</p> <p>Further, advice can be sought from the ATO in relation to particular circumstances if required.</p>
45	<p><i>Cessation on commutation – alternative policy – paragraphs 20 to 23; 92 to 108</i></p> <p>There would be little, if any, harm resulting from adopting a policy position that a superannuation income stream was considered to continue until the commutation to an income stream.</p> <p>Accordingly we submit that, if necessary, the legislation be amended to confirm that a pension continues until it is commuted by being paid as a lump sum.</p>	<p><i>Cessation on commutation – alternative policy – paragraphs 23 to 28; 103 to 120</i></p> <p>This comment raises issues of policy and legislative change and is therefore out of scope for this Ruling.</p> <p>Although the law was amended in relation to the meaning of ‘superannuation income stream benefit’ in regulation 995-1.01 of the ITAR 1997 for the purposes of the earnings tax exemption (sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the ITAA 1997) where a member dies, the law has not changed in relation to commutations.</p> <p>See further mention of this amendment in the response to issue 2.</p>
46	<p><i>Cessation on commutation – ECPI effects</i></p> <p>Under the segregated approach to determining exempt income of a superannuation fund, fund assets must be held to discharge</p>	<p><i>Cessation on commutation – ECPI effects</i></p> <p>This comment primarily concerns the exempt current income provisions, segregation of assets and matters of timing and thus is</p>

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	<p>liabilities for superannuation income stream benefits payable by the fund at the relevant time. This includes those amounts held by the fund to support the payment of any residual capital amounts under the specific pension arrangement.</p> <p>Similarly, the definition of 'average value of current pension liabilities' refers to superannuation income stream benefits paid 'in that year'. Therefore, if a pension still exists after the death of a pensioner (including to pay a residual capital amount), and it was a pension that was payable during that year, then there will be a current pension liability in that year. This approach is consistent with the Institute of Actuaries of Australia Guidance Note 451, issued November 1994, and historically by taxation rulings such as IT 2480.</p> <p>Unless residual capital amounts can be regarded as superannuation income stream benefits there would arguably be the need from the outset to separate such amounts from the original capital when determining the assets used to support current superannuation income stream liabilities.</p> <p>For account based pensions, there is always the prospect of a final lump sum to be paid from the account, signifying the balance of the account is not solely held to enable just regular income stream payments. This occurs as a function of the variable investments returns that arise with these types of income streams.</p> <p><u>Timing</u></p> <p>The pension exemption not only encompasses actual liabilities but also contingent liabilities. Therefore the exemption applies to assets resulting from the realisation of assets to pay for the commutation of a pension. The law should not fuss with split</p>	<p>beyond the scope of this Ruling.</p> <p>However, the view in the Ruling as to a superannuation income stream ceasing upon full commutation has not changed.</p> <p>The law was only amended in relation to the meaning of 'superannuation income stream benefit' in regulation 995-1.01 of the ITAR for the purposes of the earnings tax exemption (sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the ITAA 1997) where a member dies. See further mention of this amendment in the response to issue 2.</p>



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	second timing such as whether the CGT related to the exact realisation was immediately prior to or immediately after the pension ceasing. We submit that provided the assets are realised prior to or around the same time as the commutation, the pension exemption should be available.	
47	<p><i>Cessation of superannuation income stream on death – paragraphs 24; 109 to 118</i></p> <p>Some comments have stated that they agree with the view that a pension ceases on the death of a member. They have also stated that it is a common view held in the superannuation industry.</p> <p>Other comments have stated they do not agree with this view and have provided the following alternative views:</p> <p><u>A superannuation lump sum includes any payment made from a 'pension'</u></p> <p>A benefit payable after the death of the member forms an integral part of the 'pension' as defined in subregulation 1.06(1) of the SISR 1994. As such, a superannuation income stream should not cease until the final payment from the pension is made.</p> <p>Following death a trustee is normally required to determine the relevant beneficiaries. Time needs to be given for this process to occur. In our view there is unlimited time for this to occur, subject to regulation 6.21 of the SISR 1994, which required payment of death benefits to occur 'as soon as practicable' after death.</p> <p><u>Final payment of residual balance</u></p> <p>A better interpretation of the legislation is that the pension does not cease until the payment of the residual balance on death, and this is the policy intent.</p>	<p><i>Cessation of superannuation income stream on death- paragraph 29; 121 to 129</i></p> <p>In relation to these comments it is relevant that a recent amendment expands the meaning of the term 'superannuation income stream benefit' in regulation 995-1.01 of the ITAR for the purposes of the earnings tax exemption (sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the ITAA 1997). See further mention of this amendment in response to issue 2.</p> <p>This amendment in effect addresses both practical and exemption issues that flow from the view in the Ruling that a superannuation income stream ceases upon a member's death unless a dependant beneficiary is automatically entitled to continue receiving the superannuation income stream benefits.</p> <p>See further mention of this amendment in response to issue 2.</p> <p>As to concerns the role of any contractual obligations and applying the law, see the response at issue 19.</p>

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	<p>Regulation 6.21 of the SISR 1994 requires death benefits to be paid 'as soon as practicable' after death, so money cannot be held indefinitely in a tax free environment after a pensioner dies.</p> <p><u>Terms of agreement/contract</u></p> <p>The time a pension ceases should be determined by reference to the terms outlined in the agreement between the trustee and member which govern the payment of the superannuation income stream, and not necessary on date of death.</p> <p><u>Should not cease until contractual obligations are met</u></p> <p>The superannuation income stream should not cease until all required contractual obligations are met, such as the payment of any unpaid accrued pension liability and residual future pension liability.</p> <p><u>Rules of the fund</u></p> <p>When a pension ceases on death should be determined by the contractual relationship between the superannuation fund trustee and member, and the governing rules of the superannuation fund. This method is consistent with the way the commencement of the pension is determined.</p> <p>For example, if a superannuation fund's documentation states that it will convert to accumulation phase on death, it will cease at that time. However, if the documentation states that the pension continues until such time as there is a nil balance in the pension account and the trustee has the power to pay pension benefits to the member's dependants or legal personal representative (whether in the form of a pension or lump sum), then the pension exists until that time.</p>	

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	<p><u>Pension may continue after death</u></p> <p>It is possible for pensions to continue to be paid to the estate of a member for a period after death, and for the legal personal representative to receive the pension, depending on the rules of the pension.</p> <p>We do not see that subregulation 1.06(1) of the SISR 1994 requires that a pension cease as at the date of death of the primary pensioner.</p> <p><u>Entitlements may continue after death</u></p> <p>There is no reasoning provided in the Ruling, and it is unclear whether it is a natural result of the member's death, or the result of the application of provisions of the SISA 1993 and SISR 1994.</p> <p>Subregulation 6.21(1) of the SISR 1994 does not appear to be inconsistent with an entitlement to receive a pension continuing after death (if the funds governing rules allow). Many entitlements continue after death, and are enforceable by the legal personal representative. There is also nothing in the SISA 1993 or SISR 1994 that states that a pension will cease on a member death, and it seems reasonable to expect that if it was the intent it would have been specified in the legislation.</p> <p><u>Discharge of liabilities</u></p> <p>Upon a pensioner's death, the pension (including any residual capital amount) will continue to exist depending on the terms of the fund's deed or pension agreement.</p> <p>Unlike lump sums taken during the life of the pensioner, a final lump sum payment is not a discretionary commutation of the pension. Rather it is the final discharge of the liabilities of the superannuation income stream benefit payable by the fund, albeit</p>	

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	<p>in the form of a lump sum. Therefore, up until the time of this last payment, the fund has a liability to continue to pay superannuation income stream benefits.</p> <p>The policy and practical problems would be eliminated if the ruling stated cessation did not arise provided realisation occurred and payments were made as soon as possible. Guidance in this could be taken from the regime that governs deceased estates or section 307-5 of the ITAA 1997.</p> <p><u>Commutation</u></p> <p>The fact that a deceased member no longer has an entitlement to receive superannuation income stream benefits does not in and of itself stop an account from being an account which supports an account based pension. There is an argument that, on the death of a member, a superannuation income stream still exists depending on the terms of the trust deed.</p> <p>If there is no entitlement for a superannuation income stream to automatically transfer to a beneficiary on the death of a member the superannuation income stream remains on foot until such time as the trustee determines that it is necessary to commute to a lump sum in order to pay the benefit. Until such time as the potential beneficiaries are determined and their dependency status ascertained it is impossible for a trustee to know to whom, and in what form, a death benefit is going to be paid. Until the income stream is commuted to a superannuation lump sum (if necessary) it remains a superannuation income stream.</p> <p><u>Should be in line with section 307-5 of the ITAA 1997</u></p> <p>A more appropriate definition of cessation would be in line with the terms of a member benefit contained in subsection 307-5(3) of the ITAA 1997. The terms and conditions outlined in the</p>	

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	<p>agreement between the trustee for the payment of the superannuation income stream should also be given due consideration.</p> <p><u>Commutation</u></p> <p>Whilst a member who dies no longer has an entitlement to receive superannuation income stream benefits, the obligations of the fund in respect of the pension are not completed until the pension is commuted and the final death benefit paid. There is nothing in the legislation that requires the trustee to commute the pension instantaneously on the member's death. Therefore there is nothing that would prevent income from assets remaining exempt current pension income until trustees process the commutation of the pension.</p> <p><u>Common law</u></p> <p>A court may rule the fund's pensions terms and conditions are a legally binding agreement between the trustee and members, which gives the trustee no option but to continue paying the pension in accordance with the pension terms and conditions. The application of common law should not be able to be overridden by the Ruling.</p> <p><u>Comments of an administrative nature</u></p> <p>Comments have stated that administrative impacts would occur if the view that a pension ceases on a members death is adopted. A list of these is provided below.</p> <ul style="list-style-type: none"> <li>• Trustees could regularly churn assets in order to minimise the amount of capital gains arising on death or commutation.</li> <li>• Fund with liquid assets would be able to realise them, but it would be inefficient and costly. It also produces an inequity</li> </ul>	

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	<p>between funds, as funds with illiquid assets would be unable to do this.</p> <ul style="list-style-type: none"> <li>• It would not be possible to remove assets from a segregated asset pool immediately on death, meaning that funds would not be able to run segregated asset pools.</li> <li>• Taxation Ruling IT 2167 states that it is not possible to retrospectively segregate assets. Presumably this means it is not possible to retrospectively unsegregate assets. It may be difficult to administer segregated asset pools if this is not possible as the trustee may only be informed of certain events (such as death or failure to make the minimum payment requirements) after they have occurred.</li> <li>• A member with a WRAP account would be able to convert assets to cash before lodging a commutation request to avoid incurring capital gains tax.</li> <li>• It is unlikely that it would be practical to pass on any tax consequences resulting from the cessation of an income stream to the relevant member. In reality it would be necessary to pass those tax impacts onto other members through the unit pricing mechanism. This would mean that pensioner members may incur tax.</li> <li>• It may not be practical to move money to non tax paying PST's as it would not be practical to remove assets from them on the date of death.</li> <li>• If a payment is subsequently discovered to be a lump sum where a trustee thought it was a pension the trustee will need to:</li> </ul>	

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	<ul style="list-style-type: none"> <li>– issue a revised payment summary.</li> <li>– amend records.</li> <li>– issue revised statements to Centrelink.</li> <li>• If a trustee discovered that an asset was not a segregated current asset when it was sold it would have made no provision for withholding of tax. If a pensioner is not longer a member of the fund the trustee would not be in a position to recoup tax from them.</li> <li>• A fund may have no historical data for assets in pension phase. This means they would not be able to determine capital gains tax.</li> <li>• A trustee may sell or purchase an asset believing they are in pension phase when they are not. This would impact on a number of functions of the fund.</li> <li>• A trustee may have to incur expense and inconvenience by obtaining actuarial certification to determine which assets were subject to capital gains tax on realisation or transfer.</li> <li>• If assets supporting the pension are segregated no tax calculation processes may exist for the product. If notified some time after death historical calculations would need to be performed which would require an extensive system build which would be costly. It would also have the following impacts: <ul style="list-style-type: none"> <li>– Income or gains derived between death and notification would be subject to 15% tax.</li> <li>– Segregated assets would be partly taxable. They may</li> </ul> </li> </ul>	

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	<p>need to be transferred back to accumulation phase.</p> <ul style="list-style-type: none"> <li>– Any capital gains may be problematic to calculate as the cost base for any assets may not be maintained once the pension begins.</li> <li>• Funds may not be able to unwind calculations and allocations that have already occurred if not notified on the date of death.</li> <li>• If payments are made after death as superannuation income stream benefits (as the trustee had not been told of the death) they may be unauthorised payments out of the fund, and taxed at the estates marginal tax rates. This may also expose trustees to penalties for breach of the payment standards.</li> <li>• The trustee would need to apply a crediting rate or unit price other than the rate or price applicable to the pension product. This may require that the balance is transferred to an accumulated division which creates its own problems (who would the member be? What rate or price is to be applied? Is there a corresponding investment product in the accumulation division?)</li> <li>• This may result in a fund being required to lodge multiple amendments to tax returns and obtain a revised actuary's certificate.</li> <li>• If income payments had been made between death and the time the trustee was notified of the death it would be taxable income of the estate, and a further impost on surviving family members.</li> <li>• If death is imminent a trustee may realise CGT assets before death</li> </ul>	



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	<ul style="list-style-type: none"> <li>• There may be issues determining if there is a reversionary beneficiary (or applicable binding death benefit nomination) as the beneficiary may have died or cannot be found.</li> <li>• Trustees and fund administrators would be required to: <ul style="list-style-type: none"> <li>– Review and amend governing rules, pension terms, PDS's administration systems and call centre scripts.</li> <li>– Consider whether a 'significant event notice' is required under the <i>Corporations Act 2001</i> and issue notice if required.</li> </ul> </li> <li>• Consider whether pensions that have no reversionary beneficiary nominated should be individually contacted.</li> <li>• A pension which satisfies the requirements set out in SISR 1994 would not necessarily be considered to be a superannuation income stream for tax purposes.</li> </ul>	
48	<p><i>'Automatic entitlement' to a dependant beneficiary – paragraphs 24; 113 to 115</i></p> <p>One comment has stated that the law does not require an automatic entitlement as specified in the ruling, so it is inappropriate to look at whether an 'entitlement' exists when determining if a pension has ceased.</p> <p>Comments have suggested that the ruling should outline whether the following circumstances are considered to be the automatic entitlement of a dependant beneficiary:</p> <p><u>'Mere wish' not 'legal certainty'</u></p> <p>The Ruling should clarify what is meant by this term as most reversionary nomination requests are no more than a mere wish</p>	<p><i>'Automatic entitlement' to a dependant beneficiary – paragraphs 29; 125 and 126</i></p> <p>Paragraph 126 of the Ruling provides the Commissioner's view on when a superannuation income stream is considered to have automatically transferred upon a member's death. It states that the governing rules of the superannuation fund, or other rules of the superannuation income stream, must specify the superannuation income stream will be transferred to the dependant beneficiary on the member's death. For an automatic transfer to occur the rules must specify both who the benefit will be paid to, and that it will be paid in the form of a superannuation income stream.</p> <p>This is considered to be the one circumstance where the superannuation income stream continues, albeit the recipient of the</p>

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	<p>as a trustee's discretion cannot be limited (or fettered) unless the deed allows. This is because both constitute a fetter on a trustee's discretion. Finkelsten J summarised the position succinctly in <i>Fitzwood Pty Ltd</i> [2001] FCA 1628:</p> <p style="padding-left: 40px;">Speaking generally, a trustee is not entitled to fetter the exercise of discretionary power... in advance... If the trustee makes a resolution to that effect, it will be unenforceable, and if the trustee enters into an agreement to that effect, the agreement will not be enforced.</p> <p>It is possible to validly fetter a trustee's discretion where the governing rules of the SMSF allow. See, for example, <i>Muir</i> [1966] 1 WLR 1269, 1283. This must be done via the superannuation funds deed, or a binding death benefit nomination which specifies both to whom and how the benefit will be paid. It is unusual for a deed to not allow the trustee to have the 'upper hand' when determining whether a pension will revert.</p> <p>The Ruling should confirm whether a mere wish or legal certainty is required. We submit that a mere wish should suffice, otherwise every deed in the country where a pension is being paid will need to be updated, including deeds for non-SMSFs such as Industry funds.</p> <p><u>Standing policy of paying pension on death</u></p> <p>If a superannuation fund has a policy of paying a pension on death, but the fund governing rules technically give them the discretion as to whether they will continue paying the pension, the trustee has made a decision to continue paying a pension prior to the members death.</p> <p>The question is not whether the trustee is bound as against the reversionary beneficiary to make the payment in accordance with</p>	<p>superannuation income stream benefit payments has changed.</p> <p>Consistent with the view in the Ruling, flexibility for either the trustee or dependant beneficiary as to whether a benefit is taken as a lump sum or pension will not suffice that the superannuation income stream payable to the member prior to death has automatically transferred to a dependant beneficiary.</p> <p>The draft Ruling stated that a superannuation income stream would be considered to have transferred if a binding death benefit nomination was in place that specified both the beneficiary and that it would be paid in the form of a superannuation income stream. This has been removed from the Ruling as it raises detailed issues that are out of scope for this Ruling.</p> <p><u>Recent amendments</u></p> <p>In relation to these comments it is relevant that a recent amendment expands the meaning of the term 'superannuation income stream benefit' in regulation 995-1.01 of the ITAR 1997 for the purposes of the earnings tax exemption (sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the ITAA 1997).</p> <p>This amendment in effect addresses both practical and exemption issues that flow from the view in the Ruling that a superannuation income stream ceases upon a member's death unless a dependant beneficiary is automatically entitled to continue receiving the superannuation income stream benefits.</p> <p>See further mention of this amendment in response to issue 2.</p>

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	<p>the pension standards but whether the trustee, having already exercised discretion to pay the pension, is required by the governing rules to pay it in accordance with the pension standards and does in fact materially do so.</p> <p><u>Decision to continue the pension soon after death</u></p> <p>In circumstances where a member dies, and a dependant beneficiary and a trustee agree soon after death to continue the pension as from death but this is not formally documented for some time, would it be considered that the pension has continued after the death of the member? In such a case there may be a binding death benefit nomination, but one which does not specify the form of the benefit.</p> <p><u>Decision to continue pension as from death</u></p> <p>In the SMSF environment it is common for a spouse or trustee to decide the deceased's benefits will be paid out as a pension some time after death on the basis that the income stream is to be commenced as from the date of death. As a practical matter the income stream may have continued to be made in the expectation the 'formalities' would be attended to as soon as possible.</p> <p>It should be up to the governing rules of the fund to establish when the commencement of the new pension occurs in these circumstances.</p> <p><u>Beneficiary (not trustee) election</u></p> <p>If a binding death benefit nomination allows a beneficiary the flexibility to determine whether they want to receive the deceased member's entitlements as a pension or lump sum, does this constitute an automatic transfer as the trustee did not exercise a</p>	

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	<p>discretion?</p> <p><u>Terms of pension</u></p> <p>Will there be an 'automatic entitlement' where the terms are subject to a dependant surviving to a particular date, or being a dependant for the purposes of the SISR 1994 at the time of death</p>	
49	<p><i>Pension will not cease if binding death benefit nomination specifying beneficiary and payment as superannuation income stream – paragraph 115</i></p> <p>Paragraph 115 of the Ruling implies that a death benefit nomination can specify the form of payment as well as nominate a beneficiary. This would be a breach of section 59 of the SISA 1993 for funds other than SMSFs.</p> <p><u>Should not invalidate existing nominations</u></p> <p>Subsection 59(1A) of the SISA 1993 outlines the requirements of binding death benefit nominations. This subsection makes no reference to the form of the benefit when dealing with binding death benefit nominations.</p> <p>The Ruling should be consistent with the binding death benefit nomination requirements. Existing nominations should not be made invalid by this requirement in the draft Ruling.</p>	<p><i>Removal of binding death benefit nomination from the Ruling</i></p> <p>The draft Ruling stated that a superannuation income stream would be considered to have continued after a member's death if a binding death benefit nomination was in place that specified the form of the benefit, and the beneficiary to whom it would be paid.</p> <p>Reference to binding death benefit nominations has been removed from the final Ruling as it raises detailed issues that are out of scope for this Ruling.</p> <p>The Ruling now states that a superannuation income stream will be automatically transferred only where the governing rules of the fund, or rules of the pension, state it will be transferred.</p> <p><u>Recent amendments</u></p> <p>In relation to these comments it is relevant that a recent amendment expands the meaning of the term 'superannuation income stream benefit' in regulation 995-1.01 of the ITAR 1997 for the purposes of the earnings tax exemption (sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the ITAA 1997). See further mention of this amendment in response to issue 2.</p>
50	<p><i>Cessation of a superannuation income stream on death – policy comments</i></p> <p>The following comments have been provided about what the policy should be when a member receiving a superannuation</p>	<p><i>Cessation of a superannuation income stream on death – policy comments</i></p> <p>These comments raise issues of policy and legislative change.</p>

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	<p>income stream dies:</p> <p><u>There should be a time delay after death</u></p> <p>There should be time allowed after the date of death to allow for notification by dependants to the superannuation fund. Any pension payments made within this period should be considered pension income streams paid to the estate of the member.</p> <p><u>Period between death and cessation</u></p> <p>Serious practical considerations will arise on death, involving communication between trustee and beneficiary and liquidation of assets. A practical solution must involve a period during which the trustee and beneficiaries can begin to make arrangements for the desired payments to beneficiaries, and where sudden changes in the status of a superannuation income stream do not occur.</p> <p>Practical issues also arise involving communication between trustees and members and liquidation in assets.</p> <p><u>Cost base established at death</u></p> <p>A cost base could be established at the time of death to ensure that only income and capital gains from that date are subject to tax at superannuation rates. Alternatively the Ruling could be applied so that if the Pension Fund is liquidated within three months of the death of the pensioner or reversionary beneficiary, or such further time as the Commissioner may allow, then the assets so liquidated in order to wind up the Fund would not lose their non assessable taxation status.</p> <p><u>Other policy comments</u></p> <p>There might be a process whereby funds have to be able to value</p>	<p>However, in relation to these comments it is relevant that a recent amendment expands the meaning of the term 'superannuation income stream benefit' in regulation 995-1.01 of the ITAR 1997 for the purposes of the earnings tax exemption (sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the ITAA 1997).</p> <p>This amendment in effect addresses both practical and exemption issues that flow from the view in the Ruling that a superannuation income stream ceases upon a member's death unless a dependant beneficiary is automatically entitled to continue receiving the superannuation income stream benefits.</p> <p>See further mention of this amendment in response to issue 2.</p>

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	<p>and pay reasonable benefit entitlements as they arise (with reasonable time for administration requirements. Or, perhaps under SIS 'unsettled' death benefits entitlements could be paid in instalments (with an absolute cut off date) where the valuation/accounts aren't settled. This would be a targeted response to any mischief which would avoid the systemic consequences that would flow from the approach suggested in the draft Ruling</p> <p><u>Should be retained until the latest item in section 307-5 of the ITAA 1997</u></p> <p>If it is considered that treating the superannuation interest as a superannuation income stream until the benefits are paid out 'as soon as practical' is unreasonable, then we would suggest that the income stream status should be retained until the latest of items (i) to (iv) of subsection 307-5(3) in the ITAA 1997.</p> <p>We suspect that legislation change would be required to impose such a time limit.</p> <p><u>Safe harbour of three or six months</u></p> <p>We propose that an appropriate position in respect of when a pension tax exemption stops may be to provide a short term 'safe harbour' of three or six months, within which residual assets from the pension need to be paid out of the fund. Perhaps something akin to the provisions of paragraph 307-5(3)(c) of the ITAA 1997 might be appropriate.</p>	
51	<p><i>Cessation on death – Trustee not notified immediately</i></p> <p>A superannuation fund may not be informed of a member's death for some months after a pensioner's death. The ATO interpretation would mean that the trustee may be unaware that</p>	<p><i>Cessation on death – Trustee not notified immediately</i></p> <p>In relation to this comment it is relevant that a recent amendment expands the meaning of the term 'superannuation income stream benefit' in regulation 995-1.01 of the ITAR 1997 for the purposes of</p>

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	<p>the pension is no longer a superannuation income stream until several months after the death.</p> <p>This is very impractical as certain actions may be required to occur at the time the pension ceases, and a trustee may continue to make 'superannuation income stream benefits' believing that the member is still alive.</p>	<p>the earnings tax exemption (sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the ITAA 1997).</p> <p>This amendment in effect addresses both practical and exemption issues that flow from the view in the Ruling that a superannuation income stream ceases upon a member's death unless a dependant beneficiary is automatically entitled to continue receiving the superannuation income stream benefits.</p> <p>See further mention of this amendment in response to issue 2.</p>
52	<p><i>Pension payments accrued but not paid on death</i></p> <p>The right to receive pension payments is usually outlined in the fund's trust deed and is a matter of common law. In most cases pension payments that accrue while a member is alive, but not paid until after the death of the member, would meet any pension contract conditions to be characterised as a pension payment, even after death. We believe in this case that the fund remains in pension phase until the final pension payment is made.</p> <p>If the ATO confirms that the pension ceases on the date of death, where there is a vested and indefeasible interest in the member then:</p> <ul style="list-style-type: none"> <li>• The remaining vested entitlement ought to be able to be paid post date of death, to either the estate of the member or the reversionary pensioner, depending on the circumstances and relevant documents, and</li> <li>• Where that occurs, the trustee ought to be taken to have been paying a superannuation income stream during the relevant income year, at least until the date of death of the member.</li> </ul>	<p><i>Pension payments accrued but not paid on death</i></p> <p>In relation to this comment it is relevant that a recent amendment expands the meaning of the term 'superannuation income stream benefit' in regulation 995-1.01 of the ITAR 1997 for the purposes of the earnings tax exemption (sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the ITAA 1997).</p> <p>This amendment in effect addresses both practical and exemption issues that flow from the view in the Ruling that a superannuation income stream ceases upon a member's death unless a dependant beneficiary is automatically entitled to continue receiving the superannuation income stream benefits.</p> <p>See further mention of this amendment in response to issue 2.</p>
53	<i>Cessation on death – exempt current pension income</i>	<i>Cessation on death – exempt current pension income</i>

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	<p><u>Payment after death is a liability in respect of a superannuation income stream benefit</u></p> <p>The definition of segregated current pension assets in subsection 295-385(3) of the ITAA 1997 refers to 'liabilities ... in respect of superannuation income stream benefits that are payable by the fund at that time'.</p> <p>We submit that a benefit payable as a result of the death of a pensioner and the commutation of their pension is one of the fund's 'liabilities... in respect of' the superannuation income stream' and, accordingly, the underlying assets are segregated current pension assets and remain so until the death benefit has been paid.</p> <p>Had the legislation intended to confine the exemption to the payment of superannuation income stream benefits alone it could have been drafted to specify this.</p> <p>The SISR 1994 provide for the residual capital value of some pensions to be a particular amount, while account based pensions provide for the balance of the account to be payable. In any event, these amounts are liabilities in respect of the pension, payable in the event of the death of the pensioner to one of more beneficiaries.</p> <p>If there are concerns that there may be an undue delay in paying death benefits, a period of time could be specified, say six months, during which assets are still considered to be segregated current pension assets. For SMSFs this period could begin when a trustee becomes aware of the death. For large funds it would start at the end of the 'claims staking period'. Industry should be consulted about how this time period should apply.</p>	<p>Consideration of the exempt current pension income provisions is beyond the scope of this Ruling.</p> <p>However, in relation to this comment it is relevant that a recent amendment expands the meaning of the term 'superannuation income stream benefit' in regulation 995-1.01 of the ITAR 1997 for the purposes of the earnings tax exemption (sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the ITAA 1997).</p> <p>This amendment in effect addresses both practical and exemption issues that flow from the view in the Ruling that a superannuation income stream ceases upon a member's death unless a dependant beneficiary is automatically entitled to continue receiving the superannuation income stream benefits.</p> <p>See further mention of this amendment in response to issue 2.</p>



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	<p><u>Definition includes contingent liabilities</u></p> <p>Subsection 295-485(4) of the ITAA 1997 defines segregated current pension assets by reference to the purpose at a particular time for which the assets are held. Therefore the state of mind of the trustee is important. They will still meet this definition until at least such time as they learn of the member's death.</p> <p>Further, it expressly includes 'contingent liabilities' This would cover a situation where the original pensioner has died and the trustee's liability to continue to pay the pension is contingent upon making a decision to do so. If a trustee is honestly and reasonable contemplating the continuation of payments then the relevant assets should continue to be segregated pension assets until either the trustee has decided not to continue the pension or a reasonable period has continued without the trustee making a decision. For example, a period similar to that in section 307-5 of the ITAA 1997 could be used.</p> <p><u>Payment on death is a contingent liability</u></p> <p>Section 295-385 of the ITAA 1997 states that assets remain segregated current pension assets as long as there is a present liability (which can include a contingent liability) to pay a superannuation income stream.</p> <p>The draft Ruling focuses on the automatic transferring of an income stream to maintain the exemption. A contingent liability is, on the authority of <i>Rothwell's</i> case, a liability that has not yet crystallised. It cannot by definition be automatic. The contingency must be satisfied before that liability becomes an actual liability.</p> <p>In our view if the payment of a death benefit is contingent on the trustee making a decision on how the benefit should be paid, the relevant assets should continue to be segregated current pension</p>	

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	<p>asset, until such time as the trustee decides not to continue the pension. Subregulation 6.21(1) of the SISR 1994 states that the trustee must pay the benefits as soon as practical after the member dies, so there is limited time the trustee can delay the payment.</p> <p>The exemption has also been allowed to be claimed historically for all assets used to support a pension, even those that will be paid out as a residual capital value. Ceasing the benefit at the date of death is not consistent with this approach. There has also been at least some acknowledgement from the ATO that a pension account balance is not used to solely enable regular pension payments. To suggest otherwise would require a 'notional residual balance' to be kept separate from commencement.</p>	
54	<p><i>Further questions raised that are out of scope</i></p> <p>Comments have stated that the following issues should be addressed in the ruling, or in subsequent interpretive advice products:</p> <p><u>Other pension types</u></p> <ul style="list-style-type: none"> <li>• Annuities</li> <li>• Other pension types</li> </ul> <p><u>Other providers</u></p> <ul style="list-style-type: none"> <li>• Life companies</li> </ul> <p><u>Failure to meet SISR 1994 requirements</u></p> <ul style="list-style-type: none"> <li>• Impact on funds with a substituted accounting period that fail to meet the minimum payment requirements in a year.</li> </ul>	<p><i>Further questions raised that are out of scope</i></p> <p>Consideration of the issues raised is beyond the scope of this Ruling.</p> <p>Whether further public rulings or other products are needed to address particular matters raised is routinely considered taking account of things such as the number of requests for advice received on a particular matter, the complexity of issues raised and perceived levels of uncertainty concerning the ATO view of the law.</p>

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	<ul style="list-style-type: none"> <li>• Effect on exempt public sector schemes that do not technically need to meet the requirements.</li> <li>• Effect on lifetime pensions.</li> <li>• How a breach of the minimum payment standards should be reported on an ACR and formal audit report including:               <ul style="list-style-type: none"> <li>- Whether the auditor is able to ignore the underpayment if it is less than 5% of assets and the \$30,000 threshold.</li> <li>- Is the underpayment or the amount paid used to determine the materiality (especially in relation to a transition to retirement pension)?</li> <li>- Does the formal audit report need to be qualified for any breach of this regulation now that it is included in the formal audit report, or can the auditor exercise professional judgement for small underpayments and not qualify or report on an ACR?</li> </ul> </li> <li>• Will section 304-10 of the ITAA 1997 apply where the minimum payment requirements are not met?</li> <li>• Rules specific to transition to retirement income streams including:               <ul style="list-style-type: none"> <li>– The consequences if this pension type does not meet the requirements of subregulation 1.06(1) of the SISR 1994 including                   <ul style="list-style-type: none"> <li>– As the Ruling states any payments made during the year will be superannuation lump sums, will they be early access benefits and assessed under Division 304 of the ITAA 1997</li> </ul> </li> </ul> </li> </ul>	

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	<p>(regardless of the age of the member)?</p> <ul style="list-style-type: none"> <li>– How are the amounts to be included in the superannuation funds return and accounts?</li> <li>– How are they treated in the pensioners return?</li> <li>– Will the fund be in breach of an operating standard (potentially causing a trustee to be liable for a penalty for the breach)?</li> <li>– What consequences arise if the 10% maximum in the definition of transition to retirement income stream in subregulation 6.01(2) of the SISR 1994 is exceeded? <ul style="list-style-type: none"> <li>– Will this cause the pension to cease?</li> <li>– Will this amount to a breach of an operating standard?</li> </ul> </li> <li>• The effect on other pension types with commutation rules that do not match those for account based pensions</li> </ul> <p><u>Exhaustion of capital</u></p> <ul style="list-style-type: none"> <li>• The view in the ruling may not apply to defined benefit pensions that may require contributions after commencement.</li> </ul> <p><u>Commutation</u></p> <ul style="list-style-type: none"> <li>• The effect of a successor fund transfer, including whether it will cause a pension to cease.</li> <li>• Whether a partial commutation will not cause a fund to leave pension phase and continue to be exempt from tax on earnings (including capital gains tax)</li> <li>• The fact that partial commutations count for account based</li> </ul>	

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	<p>pensions but not allocated pensions.</p> <p><u>Death</u></p> <ul style="list-style-type: none"> <li>• Whether a new pension can be paid to a beneficiary if it ceases on a members death. Are there any restrictions under the SISA 1993 or SISR 1994 to a new pension being commenced on the day after the member's death? Does the ATO have any view on whether issues such as granting of probate, appointment of an LPR as trustee in the deceased member's place affect the timing of when a new pension can be commenced?</li> <li>• If a pension ceases on death, can a new pension be paid to a dependant beneficiary?</li> <li>• Rules for establishment of reversionary beneficiaries including: <ul style="list-style-type: none"> <li>– Whether a reversionary pensioner or binding death benefit nomination must be established at the commencement of a pension, or can be changed/added while a pension is payable.</li> <li>– Can a reversionary pensioner be revoked while a pension is payable.</li> <li>– Will a binding death benefit nomination or reversionary beneficiary take precedence.</li> <li>– Scenario where a reversionary pension is treated as a new pension (via internal rollover).</li> </ul> </li> <li>• Where a member dies, is the minimum payment requirements under Schedule 7 determined using the original pensioners values, or at death for the reversionary beneficiary.</li> </ul>	

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	<ul style="list-style-type: none"> <li>• Can a trustee make a final payment to the member's estate to satisfy minimum payment requirements before the pension reverts to a reversionary beneficiary?</li> <li>• Examples and implications covering the following scenarios where a member receiving a superannuation income stream dies: <ul style="list-style-type: none"> <li>○ Payment of a new (non reversionary) superannuation income stream (that is no automatic reversion)</li> <li>○ Payment of a death benefit to a tax dependant</li> <li>○ Payment of a death benefit to a tax non dependant.</li> </ul> </li> <li>• Can regulation 1.07D of the SISR 1994 apply on death? In particular, will it exempt funds from making the minimum payment in the year of death to the deceased?</li> </ul> <p><u>Taxation consequences</u></p> <ul style="list-style-type: none"> <li>• All taxation consequences should be outlined, including specifically exempting the commutation of multiple income streams into a single income stream from tax.</li> <li>• Operation of the proportioning rule and superannuation interest concept including covering the following issues when a superannuation income stream ceases for each of the common circumstances outlined in the Ruling: <ul style="list-style-type: none"> <li>– It remains a separate superannuation interest and the legislative provisions that allow this</li> <li>– How the proportioning rule is to apply (including how earnings are to be applied)</li> </ul> </li> </ul>	

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	<ul style="list-style-type: none"> <li>– How are the tax components of the eventual payment calculated?</li> <li>• The application of the exempt current pension income provisions including               <ul style="list-style-type: none"> <li>– whether the exemption ceases on death</li> <li>– whether residual amounts of pensions are exempt until they are paid out</li> <li>– whether the interpretation in the Ruling means that any amount that will be a residual when the pension ceases must be removed from segregated assets</li> </ul> </li> </ul>	
55	<p><i>Issues with legislation</i></p> <p>The following issues with legislation have been raised</p> <ul style="list-style-type: none"> <li>• The current law appears to be defective as partial and full commutations from defined benefit pensions and market linked pensions can only be treated as income benefits, not lump sums. These pension types will not meet the requirements of regulation 995-1.03 of the ITAR 1997.</li> <li>• Defined benefit pensions may not contain all the capital which is to support the pension at commencement, either because the pensions are financed by regular contributions or because the fund's assets are not sufficient to cover the full pension liabilities for other reasons. This is a flaw in subparagraph 1.06(1)(a)(ii) of the SISR 1994 for defined benefits pensions.</li> <li>• Section 295-385 of the ITAA 1997 applies to an actual liability in respect of a benefit payable at a point in time. It also applies to a contingent liability payable at a point in time. However, a contingent liability cannot be payable in a point in time, which</li> </ul>	<p><i>Issues with legislation – out of scope</i></p> <p>The comments are noted, however, raise issues that are broader than the area of law dealt with in the Ruling. Additionally, they are matters of policy and legislative change and thus outside the scope of the Ruling for this reason also.</p>

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	shows a flaw in the legislation.	
56	<p><i>General comments</i></p> <p>The following general comments about the Ruling have been provided.</p> <p><u>General support</u></p> <p>We agree with and support the Ruling in its current form. However, we understand that other bodies representing SMSF's do not support the interpretation of a superannuation income stream ceasing upon the death of the member. Rather, these bodies support the interpretation that the income stream continues until the final payment has been paid out in respect of the death of the member.</p> <p>We do not have a problem with this alternative view, provided any payments made to dependants continue to be lump sums for the purpose of the anti-detriment provisions (section 295-485) of the ITAA 1997.</p> <p><u>General support</u></p> <p>I agree with and support the Ruling in its current form.</p> <p>The superannuation environment receives generous tax concessions (0% tax for pensions) on the basis that the assets are there to support a member in retirement. Under the present life expectancies and retirement ages for some members this may be more than 30 years.</p> <p>The rules and regulations that govern superannuation pension accounts should not:</p> <ul style="list-style-type: none"> <li>• perpetuate the transfer of assets between generations under the guise of a person's dependency on a member, for example</li> </ul>	<p><i>General comments</i></p> <p>These comments are either considered not to require a response or to otherwise raise issues that are matters of policy and legislative change and thus are outside the scope of the ruling.</p> <p>For some comments a recent amendment that expands the meaning of the term 'superannuation income stream benefit' in regulation 995-1.01 of the ITAR 1997 for the purposes of the earnings tax exemption (sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the ITAA 1997) is relevant.</p> <p>This amendment in effect addresses both practical and exemption issues that flow from the view in the Ruling that a superannuation income stream ceases upon a member's death unless a dependant beneficiary is automatically entitled to continue receiving the superannuation income stream benefits.</p> <p>See further mention of this amendment in response to issue 2.</p>



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	<p>grandchildren.</p> <ul style="list-style-type: none"> <li>benefit some funds members over another, for example SMSFs or APRA funds.</li> <li>encourage lax succession planning or administration by members or their Trustees.</li> <li>compensate Funds for not putting in correct investment strategies (for example loan liabilities, capital gains liabilities, cash income) to deal with members dying or retiring.</li> </ul> <p>Once a Condition of Release is met there is nothing stopping a member from removing his/her assets out of superannuation environment to support his/her 'dependants'. Also a member who has genuine dependants has the option to take out a reversionary pension or insurance, if they fear capital gains tax will be affecting his/her final benefit.</p> <p>There have also been SMSFs that have withdrawn their pension balance before death and/or refreshing the cost base of their superannuation assets with no detriment to the industry.</p> <p>The draft Ruling confirms the standard processes carried out for many decades by APRA regulated Funds and many SMSFs on their pension accounts. Unfortunately there are SMSFs and advisors who have not been following these processes, and they now fear the tax consequences.</p> <p><u>Legislative change required</u></p> <p>The issues covered in the draft Ruling should be clarified by legislative change rather than by an ATO ruling. The SIS and tax legislation relating to pensions is unclear and internally inconsistent.</p>	

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	<p>We intend on writing separately to Government recommending a review be undertaken.</p> <p><u>Death tax</u></p> <p>The proposal in the draft Ruling amounts to a form of death tax.</p> <p>The implication where a reversionary beneficiary has not been nominated is that as soon as a member dies the superannuation income stream ceases. This could result in significant tax being payable in the form of capital gains tax, particularly if the fund holds assets with large capital gains.</p> <p>Note that death benefits from superannuation funds are already subject to taxation when paid to non-tax dependants of 16.5% on the taxed (taxable) component and 31.5% on the untaxed (taxable) component. The draft Ruling has the effect of placing an additional tax impost on superannuation death benefits which could have the effect of reducing the popularity of superannuation and encouraging people to exit the superannuation system earlier to avoid any taxation imposition whatsoever.</p> <p>In the current form the Ruling will result in a loss of confidence in the superannuation system to deliver a tax effective outcome, particularly when a member passes away. We believe it may cause superannuation fund members to exit the superannuation environment and sell assets while in pension phase to avoid taxation. This result appears contrary to the Government's retirement income objectives.</p> <p><u>Unfair to SMSF's</u></p> <p>The Ruling will disadvantage SMSFs and small APRA funds as they will be required to realise assets immediately on death whereas large funds may not have to, as they can be reasonably</p>	

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	<p>expected to hold large cash reserves.</p> <p>The disadvantage would be in the form of large capital gains tax liabilities, incurred while converting assets to cash to make payouts, or selling down assets in adverse market conditions.</p> <p>It also leads to significant fund and administrative complexity while achieving little taxation benefit as trustees could minimise or negate tax effects with careful planning. The harsh nature of the Ruling will probably result in deliberate early termination of income streams.</p> <p><u>Not unfair to SMSFs</u></p> <p>I refute the idea that the Ruling is unfair vis SMSF as compared to public offer funds. The latter involves investments which are 'unitised' and subject to the same changes in Unit Price as are shares on the ASX with equal ability of discovery. Or in other words, capital gains can be measured by changes in Unit Price with the same amount of ease and Units are in fact sold down in order to liquidate an investment.</p> <p><u>Consideration for different reasons of cessation</u></p> <p>The ruling appears to be deficient in that consideration should be given to the difference between a commutation (voluntary deliberate action) and an involuntary cessation caused by the death of a member.</p> <p><u>Cessation on death – sudden vs expected</u></p> <p>Apart from circumstances where a member dies suddenly, a member can make provision to withdraw their entire superannuation benefits and pass those benefits on to their dependants tax free, meaning no payment after death need</p>	

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	<p>occur.</p> <p>If death occurs suddenly this cannot occur. Discrepancies should not arise as a result of the manner in which a member dies.</p> <p><u>Same tax consequences should arise</u></p> <p>The issues in the draft Ruling apply equally to annuities. The tax consequences should be the same regardless of:</p> <ul style="list-style-type: none"> <li>• Whether the income stream is an annuity or pension under the SIS legislation.</li> <li>• What type of superannuation entity is providing the income stream (for example an APRA regulated fund, SMSF or other type of fund).</li> <li>• The number of members in the fund at the date of death or at the date of final payment.</li> </ul> <p><u>Choice – age pension or tax</u></p> <p>A reversionary pension can result in a lower annual amount that can be received without affecting eligibility under the age pension income test. The effect of the draft Ruling is that people with lower wealth will have to decide whether they'd like a little more age pension and get hit with extra tax when the first spouse passes away, or have less age pension but not have the tax issue. The tax issue may well result in an Actuarial Certificate being required, which can cost from \$400 upwards. People with vast wealth, for whom the age pension isn't a consideration, can simply choose the reversionary income stream and not have the tax issue. From a policy perspective the draft Ruling simply hurts those with less wealth.</p> <p><u>Desired outcomes</u></p>	

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	<p>It appears to us that the ruling is written with a specific outcome in mind, and the ATO has attempted to build logic that leads to that desired outcome. These outcomes are:</p> <ul style="list-style-type: none"> <li>• To ensure that a final payment on death is not a pension payment, and subject (to some extent) to the 16.5% benefits tax.</li> <li>• To limit the time after a pensioner dies that the fund would continue to enjoy the exemption provided in Subdivision 295-F of the ITAA 1997. This means assets may be subject to capital gains tax if sold after the member's death.</li> <li>• To withdraw the tax exemption for the whole year if the prescribed minimum or maximum pension limits are not met.</li> </ul>	
57	<p><i>The Ruling should not interpret SISR 1994</i></p> <p>Some elements of the Ruling appear to attempt to define or restate superannuation fund operational rules. The legislative framework for superannuation funds is outlined in the SISA 1993 and SISR 1994.</p> <p>The ITAA 1997 legislates the taxation of transactions, including those of superannuation funds. We believe it is the role of the income tax rulings to outline the interpretation of how the ITAA 1997 should be applied, rather than the interpretation of other legislation.</p>	<p><i>The Ruling should not interpret SISR 1994</i></p> <p>The definition of superannuation income stream as considered in TR 2013/5 relies on an income stream that is taken to be a pension for the purposes of subregulation 1.06(1) of the SISR 1994. The Ruling therefore has regard to requirements of the SISR 1994 so far as those SISR requirements are relevant to determining for income tax purposes whether a superannuation income stream has commenced and has or has not ceased.</p> <p>The view in relation to payments counting for the minimum annual payment requirement (regulation 1.06(9A)(a) of the SISR 1994) are now included in SMSFD 2013/2.</p>
58	<p><i>Date of effect – paragraph 40</i></p> <p>Comments have stated that the view in the Ruling should not apply from 1 July 2007 as they consider this is a retrospective application of the Ruling. Suggested dates of application include</p>	<p><i>Date of effect – paragraphs 45 to 48</i></p> <p>The date of effect of the ruling (1 July 2007) is considered to be appropriate as this is the date the legislation the Ruling is interpreting</p>

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	<p>1 July 2011, 2012 or 2013, or from the publication date of the final Ruling.</p> <p>Specific comments provided regarding why 1 July 2007 is not an appropriate date for commencement are:</p> <p><u>Interpretation of law in the ruling is different to commonly held interpretations by Industry.</u></p> <p>Notwithstanding the narrow view in ATO ID 2004/688, the interpretation of the law by trustees of some superannuation funds and advisers differs from that in the Ruling. It is also different to the current administration of pension products.</p> <p>There has also been significant legislative change since that view was published, and the ATO view has remained unclear. The ATO has previously indicated that they did not have a settled view on these issues (at the March 2008 Superannuation Technical Sub-group of the NTLG).</p> <p>The following transitional arrangements have been suggested:</p> <ul style="list-style-type: none"> <li>• Commonly held practices should be allowed to continue for a period after the publication of the final Ruling to allow funds time to amend systems, product specifications and member communication material.</li> <li>• These transitional provisions could exclude the specific situation covered by ATO ID 2004/688.</li> <li>• Taxation of pension products existing at the date of the Ruling should not change. The Ruling should only apply to new products taken out after the date of effect of the final Ruling.</li> </ul> <p><u>Administration effects of 1 July 2007 date of effect</u></p> <p>The ATO and superannuation funds are able to amend returns</p>	<p>was introduced.</p> <p>However, the Commissioner understands that there are a range of current practices which derive from views that are different from those expressed in this Ruling. Having regard to the need to allocate compliance resources the Commissioner considers that it is not appropriate for the ATO to take compliance action to apply the views of the law expressed in this Ruling with regards to when a superannuation income stream ceases on the death of a member before the 2012-13 income year.</p> <p>If the Commissioner is asked or required to state his view formally (for example giving a private ruling or in a litigation matter), then he will do so consistent with the views expressed in this Ruling.</p> <p>Further, the view in the Ruling on when an election under regulation 995-1.03 of the ITAR 1997 would be taken to have occurred has changed from the draft Ruling, as explained in response to issue 39.</p> <p>As this view has changed from the draft Ruling, the date of effect (paragraph 48 of the Ruling) states that the requirement to actually make the election will apply from the date of issue of the final Ruling. Thus for a partial commutation payment made before 31 July 2013, that payment is a superannuation lump sum, or a superannuation income stream benefit if that is how the person has treated the payment.</p>

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	<p>for the last four years, and review whether a pension has ceased and restate fund transactions. This creates uncertainty and does not provide for an equitable superannuation system, particularly where trustees have made every attempt to comply.</p> <p>The ATO should clarify what actions the Commissioner will take towards funds that failed to make the minimum pension payments in the years ended 30 June 2008-2011.</p> <p><u>Other</u></p> <ul style="list-style-type: none"> <li>• It should be noted that trustees may be unable to recover amounts, and it would also be administratively difficult and costly.</li> <li>• The retrospective nature could expose administrators to litigation.</li> <li>• The view in the Ruling should not be finalised until: <ul style="list-style-type: none"> <li>– the policy intent is confirmed with Government.</li> <li>– the law is amended to improve consistency and remove ambiguity.</li> </ul> </li> <li>• The ATO should fund a number of test cases confirming the view is correct.</li> </ul>	