SUPERANNUATION AND CONTRACT FOR SERVICES

What is the superannuation guarantee charge (SGC)?

The SGC is a quarterly levy or charge imposed by the federal government which is payable by employers if they fail to provide the prescribed level of superannuation support for their employees. The operative provisions of the SGC are contained in the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**the Act**).

Superannuation contributions

The requirement is for most employers to contribute to a regulated fund not less than 9% of the gross salary or wages of each employee.

If insufficient contributions are made, the SGC (plus interest, administration fees and penalties) applies in respect of the "shortfall".

Employee contributions

Contributions made directly by employees to their own personal superannuation funds do not count in determining whether or not the employer has contributed the SGC.

Employer contributions

Contributions made to a regulated fund on behalf of the employee are both "vested" (which means that the benefit remains with the employee when they change employers or stop working) and "preserved" (which means that the benefit is payable on retirement only when the employee is aged 55 or over).

Award funds

Where an employer is making superannuation contributions on behalf of employees who are employed under awards, they should already be contributing to the Award Fund (eg. JEST for entertainers). Where the award contributions equal or exceed the SGC requirement there will generally be no further contributions required.

Choice of superannuation fund – employee eligibility

The Choice of superannuation fund law confers on certain employees the right to choose the superannuation fund that will receive their employer's SGC, except in the following circumstances:

1. Superannuation is paid under a state award or industrial agreement.
2. Superannuation is paid under a certified agreement or an Australian Workplace Agreement.
3. Employees are public servants and individuals who work for government agencies excluded from choice by law or special regulations.
4. Employees are members of a 'defined benefit' fund.

If any of the above circumstances apply, the applicable State laws, the relevant agreement, employer or fund manager must be consulted. Further information to help determine eligibility may be obtained from: SuperChoice (www.superchoice.gov.au) (eligibility criteria and the position in each State); WageNet (www.wagenet.gov.au) (wages and conditions of employment for work covered by federal awards and agreements in Australia); and Australian Securities and Investments Commission (**ASIC**) (www.asic.gov.au) publication *Super Choices for employees*.

Employer compliance with the law

The Superannuation *Legislation Amendment (Choice of Superannuation Funds) Act 2004* (Cth) commenced on 1 July 2005. To comply employers must:

1. identify eligible employees,
2. have provided existing eligible employees with a *Standard Choice Form* by 29 July 2005 and new eligible employees within 28 days of their starting date, and
3. act on their employees' choice.

The *Standard Choice Form* is available from the SuperChoice website (www.superchoice.gov.au), or through their infoline on 13 28 64.

An employee may request a *Standard Choice Form* in writing but an employer is not obliged to comply with such a request within 28 days if a form has already been provided in the previous 12 months. Employees can make any number of requests to choose a new superannuation fund but an employer is only obliged to act on one choice every 12 months. An employer is also obliged to provide a *Standard Choice Form* to an employee if they are unable to contribute to the employees existing fund where it has become non-complying (see below).

An employer must keep appropriate records to show compliance with their SuperChoice obligations.

Employer funds

If an employee does not exercise their right to choose a superannuation fund, their SGC must be paid into a fund nominated by their employer. This employer fund must be a complying fund (discussed below). The employer fund may be changed but all employees must then be provided with a *Standard Choice Form* within 28 days of the change. More information can be obtained from the SuperChoice website and ATO publication *Choice of Superannuation fund – guide for employers.*

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What is a complying fund?

A complying fund is one which operates in accordance with the law. It must also offer a minimum amount of life insurance for members. Most banks and insurance companies have developed relatively low cost funds specifically to meet the SGC requirements, as have a number of industry and trade union organisations. You can check whether a fund is a complying fund by phoning the trustee or authorised representative of the superannuation fund to ensure that it is complying. You can also search the Register of Complying Super Funds (ROCs) on the ATO website (www.ato.gov.au).

Other important SGC concepts

To understand the requirements for compliance with the SGC it is necessary to understand the definitions of employer, employee, ordinary time earnings and salary or wages under the laws governing superannuation.

Distinction between employees and people who are self employed

The definition of **employer** is very broad: in practical terms there are no employers who are exempt from the obligation to contribute. An employer is somebody who employs persons under an employment contract (oral or written) on a full-time, part-time or casual basis. A person may be an employer if they have some control over their employees; are responsible for the payment of wages or salary; or have the power to dismiss or hire employees. This may include someone who makes payments under a contract that is wholly or principally for labour. A contract is wholly or principally for labour if the value of the labour component of the contract is more than 50% of the value of the whole of the contract.

Employee has a corresponding meaning. An **employee** is an individual who receives payment in the form of salary or wages in return for labour or service (as defined by the common law) but also includes someone who is paid for work under a contract which is wholly or principally (that is, more than 50%) for labour. Labour includes mental and artistic effort.

Agency arrangements may be covered, depending on whether an employer/employee relationship exists, whether the contract is wholly or principally for labour, and who the contracting parties are.

The following people could all be considered employees for the purposes of the superannuation legislation depending on their relationship with the person to whom they provide their services:

1. people who receive payment for performing, presenting, participating or providing services in connection with any music, play, dance, entertainment, sport, display or promotional activity, or any similar activity involving the exercise of intellectual, artistic, musical or other creative talents.
2. people who receive payment to perform or provide services in connection with the making of any film, tape or disk or of any television or radio broadcast.

People that do work under contract but who are not employees are generally considered *self-employed* and called independent contractors.

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To determine whether a person is "self employed" or is an "employee" for SGC purposes there are two key questions:

1. Under whose "control" is the person working? Who has the right to control how, when, where and who is to perform the work? Does the worker have discretion to accept or reject work?
2. Is the person "integrated" with the business of the employer? Does the provider of the labour or service do so as a truly independent contractor carrying on their own business (as a contract for services: not an employee) or individually as an integral part of another business organisation (as a contract of service: an employee)? Is the worker presented to the public as part of the business of the hiring organisation? For whose benefit is the work performed?

For example, if the person you have contracted with is free to hire other people to perform the work, even if the person ends up performing the work themselves, or if the person is being paid for the result rather than their labour then they are likely to be an independent contractor rather than an employee.

People for whom employers do not have to make superannuation contributions

There is a limited range of employees for whom employers do not have to contribute to a regulated fund, the most common of which are employees who:

1. earn less than $450 gross per month;
2. are under the age of 18 and work for not more than 30 hours in a week;
3. perform work of a domestic or private nature for not more than 30 hours a week for a non-business employer;
4. are aged 70 or over; or
5. who are not resident in Australia and whose work is done outside Australia.

Do self employed people have to contribute?

Generally (although there are qualifications) self employed people are not required to contribute on their own behalf, but will of course be liable for contributions on behalf of any employees they have. Directors of companies will usually be regarded as employees of the company, and the company will be liable to make contributions.

Meaning of salary, wages and ordinary time earnings

Under the SGC salary or wages have their ordinary meanings, and include payment to a person for work or services by the day, week or month; allowances (but excluding expense reimbursements and allowances and other payments which are fringe benefits); bonuses, commissions and ex gratia payments; overtime and penalty rates; annual leave, long service leave, sick leave and leave loading. Ordinary time earnings means earnings for ordinary hours of work and could include overtime, shift loading or commission.

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Further information

For further information call the Superannuation Guarantee Hotline tel: 13 1020; the Insurance or the Superannuation Commission Hotline tel: 13 1060; or the Australian Tax Office (www.ato.gov.au); SuperChoice website (www.superchoice.gov.au).

Need more help?

Contact Arts Law for more information.

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457.

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