Superannuation and contract for services

This information sheet provides a summary of, and guide to, the superannuation guarantee charge, including the different aspects of superannuation and the responsibilities of employers, employees and self employed workers.

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).

Superannuation contributions

As at 1 July 2022, the employer's superannuation contribution rate currently sits at a minimum contribution of 10.5% of the employee's earning base (generally ordinary time earnings, income for ordinary hours of work).

It will continue to increase by 0.5% per financial year until it reaches 12% by 1 July 2025.

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

Prior to 1 July 2022, there was a threshold that an employee must be paid $450 per calendar month (before tax) in order to qualify for superannuation. From 1 July 2022, this threshold for super guarantee eligibility has been removed, as part of changes brought by the Australian Government in the 2021-22 federal Budget. These changes have come into effect as part of the Treasury Laws Amendment (Enhancing Superannuation Outcomes For Australians and Helping Australian Businesses Invest) Act 2021. This means that employers will generally be required to make super guarantee contributions to their eligible employees' super funds, regardless of how much the employee is paid.

It is important to check the superannuation conditions of any relevant collective employment agreements as they may provide for employer's superannuation contributions at rates above the minimum contribution. For example the performers' collective agreements negotiated by the Media, Entertainment & Arts Alliance (MEAA) in 2017 provide for employer's superannuation contributions of 10% of the total fee for actors in television and 10.5% in film.

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.

Is there an upper age limit for employer contributions

From 1 July 2013, there is no upper age limit for making super guarantee contributions for an employee. This means you may need to make super guarantee payments for eligible employees, however old they are.

Choice of superannuation fund – employee eligibility

The current superannuation statutory scheme provides the majority of Australian employees with the right to choose the superannuation fund that will receive their employer's SGC. Some workers may, however, still be unable to choose their own super fund, including in the following circumstances:

1. Superannuation is paid under a state award or industrial agreement.

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2. Superannuation is paid under a certified agreement or an Australian Workplace Agreement, which specifies the fund or funds into which payments must be made.
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' that meets certain conditions.

If any of the above circumstances apply, the applicable State laws, the relevant agreement, employer or fund manager must be consulted as some awards, enterprise agreements and other registered agreements may provide for extra terms about superannuation. Further information to help determine eligibility may be obtained from the FairWork Ombudsman (information on Tax & superannuation including wages and conditions of employment for work covered by federal awards and agreements in Australia) and the Australian Securities and Investments Commission (**ASIC**) (information via ASIC's 'Moneysmart' website on choice of superannuation).

Employer compliance with the law

The *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* (Cth) sets out the 'SuperChoice obligations'. The three key obligations of an employer when engaging a new employee are to:

1. identify if your new employees are eligible to make a choice of fund;
1. provide a *Standard Choice Form* to eligible new employees within 28 days of their starting date; and
1. act on your employee's choice of superannuation fund.

The Australian Taxation Office (**ATO**) has a free online course which helps employers understand their superannuation obligations. If you are unsure about superannuation and your obligations to your employees, this could be a quick and easy way to get up to speed.

The ATO also publishes the Standard Choice Form. 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).

Superannuation payments must be made at least four times a year and by the quarterly due dates. For more information on the relevant due dates, visit the ATO website.

An employer must keep appropriate records to show compliance with their statutory superannuation obligations. This information must be recorded and reported through the Government's 'SuperStream' data standard. For more information on SuperStream, visit the ATO website.

Employer funds

If an employee does not exercise their right to choose a superannuation fund or does not provide sufficient information regarding their choice of fund, their SGC must still be paid into a fund nominated by their employer by the relevant due date. This employer fund must be a complying fund (discussed below). The employer may choose to change the default fund 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 ATO website.

What is a complying fund?

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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 Super Fund Lookup database which includes funds regulated by the ATO and the Australian Prudential Regulation Authority (APRA). Employers can utilise the Super Fund Lookup database to determine whether employer contributions qualify as superannuation guarantee payments.

Some super funds are regulated by APRA and also have reporting and administrative obligations to the ATO and their members. APRA supervises regulated superannuation funds, other than Self-Managed Superannuation funds (which are supervised by the Australian Taxation Office), Approved Deposit Funds and Pooled Superannuation Trusts, all of which are regulated under the *Superannuation Industry (Supervision) Act 1993* (Cth).

The ATO publishes information on Self-Managed Superannuation funds, which can accept mandated employer contributions, such as payment of the SGC from an employer.

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.

A contractor is deemed to be an employee for purposes of requiring superannuation to be paid if they are engaged under a contract where their labour is half the dollar value of the contract; they are being paid for their personal labour and skills (whether physical, mental or artistic) rather than to achieve a particular outcome and the person must carry out the work personally and cannot delegate to another.

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.

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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. The employer is not responsible for paying superannuation for independent contractors.

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.

The ATO guide to employer superannuation obligations includes a 'Super guarantee eligibility tool' and an Employee/contractor decision tool to work out if you must make super contributions for your workers.

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. are under the age of 18 and do not work more than 30 hours in a week;
2. perform work of a domestic or private nature for not more than 30 hours a week for a non-business employer; or
3. who are not resident in Australia and whose work is done outside Australia (an Australian employee that has been temporarily sent overseas for work will still be eligible for super contributions).

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.

Further information

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ASIC's website provides useful information on superannuation, including guidance for the industry, reports and articles. There is also a wealt of information on superannuation on ASIC's MoneySmart website.

APRA also publishes a range of information on Superannuation.

Need more help?

Contact Arts Law for more information.

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

Also visit the Arts Law website (www.artslaw.com.au) for more articles and information sheets or to submit a request for assistance with a superannuation related legal question.

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The Arts Law Centre of Australia has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.