



Legal briefing

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Do you need to make super contributions for your contractors?

The ANAO is finalising its audit of agencies' compliance with the *Superannuation (Productivity Benefit) Act 1988* (the PB Act) and related superannuation obligations. The audit raised a number of issues concerning contractors and superannuation. Those issues, although not new to Commonwealth agencies, are complex.

This briefing is designed to remind clients of the key issues and to provide a broad outline of the circumstances in which superannuation obligations may arise. A brief description of the relevant legislation follows. The briefing then looks at the circumstances in which there may be obligations to make superannuation contributions. Whether an obligation to make superannuation contributions exists in a particular case can involve complex legal issues. You should seek legal advice if you are unsure whether an obligation exists in a particular case.

What does the PB Act say?

Broadly, Commonwealth agencies are obliged to make superannuation contributions under the PB Act in respect of a 'qualified employee'.¹ The question of whether a contractor is a qualified employee was one of the principal issues in the ANAO audit.

Employee at common law or engaged under a contract wholly or principally for his or her labour

A contractor is a qualified employee if he or she is:

- an employee at common law; or
- works under a contract that is wholly or principally for his or her labour.²

Whether any particular contractor is properly characterised as a common law employee or as engaged under a contract wholly or principally for their labour, and therefore is a qualified employee, will depend on the application of a number of general principles in the particular case.

When is superannuation payable under the PB Act?

When is a person a common law employee?

There is a significant body of common law dealing with the circumstances in which an employment relationship arises between an employer and employee.



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In *Stevens v Brodribb Sawmilling Co* (1986) 160 CLR 16 the High Court stated that the extent to which one party was subject to the direction and control of the other party in the manner in which they did their work under the contract was a significant factor in determining the parties' relationship. However, the Court noted that there were a number of other relevant factors to be considered in determining whether a particular relationship is one of employment or independent contractor. The factors include:

- the mode of remuneration of the worker
- who provides and maintains necessary equipment
- the obligation to work
- provision of leave and other entitlements
- place of work
- ability of the worker to delegate the work, or whether the employer has a right to insist that the worker perform the work
- whether income tax is deducted by the employer
- whether the employer has a right to the exclusive services of the worker.

The degree to which the worker is integrated into, and treated as part of the employer's enterprise may also have some relevance: *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

In *Vabu* the High Court has recently confirmed that no single factor is determinative of the character of a relationship between parties. Rather, the character of a relationship is to be determined having regard to, and weighing, all of the relevant factors. While the degree and nature of the control exercised over the worker is, and remains after *Vabu*, a significant factor, it is not the only relevant factor. Rather, 'it is the totality of the relationship between the parties which must be considered'.

When is a person engaged under a contract wholly or principally for their labour?

The courts have only considered on a few occasions the meaning of the words 'under a contract that is wholly or principally for the labour of the person'. The limited existing case law suggests that the notion of 'labour' extends to work which is physical, mental or artistic (see *Deputy Commissioner of Taxation v Bolwell* (1967) 1 ATR 862 at 873). The following indicators of a contract for the labour of a person have emerged from the cases:

- The contract must require the performance of labour by the contractor.
- Where the contractor is given a right to delegate the performance of the labour the contract is not 'wholly or principally for the labour' of the contractor (see *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419, at 424–425; *Bolwell* (above), at 871–872; *World Book (Australia) Pty Ltd v Federal Commissioner of Taxation* (1992) 108 ALR 510, at 513–514).
- A contract under which the engager has no right to direct or control the contractor in any respect whatsoever is also not 'a contract that is wholly or principally for the labour' of the contractor (*World Book* at 519).
- Where the contractor undertakes to produce a given result the contract is not 'wholly or principally for the labour of the person' because the labour is undertaken to fulfil a contractual obligation (that is to say, to achieve the result contracted for) (*World Book* at 518–519).

The totality of the relationship between the parties must be considered.

The right to delegate and the production of results are significant factors.

How do you calculate and make superannuation contributions under the PB Act?

If you think that a person is a qualified employee, you will need to refer to Superannuation Circular Number 44 dated July 2004 available from the Department of Finance and Administration website at <<http://www.finance.gov.au/super>> for information on:

- superannuation funds accepting PB Act contributions
- calculation of the amount of contributions
- when and where contributions must be made, and
- ‘safety net’ arrangements and what to do if you have not made sufficient contributions for an employee or ex-employee.

Could you have obligations under the *Superannuation Guarantee (Administration) Act 1992*?

In certain circumstances, an employer may be liable to superannuation guarantee shortfall under the SG Act in respect of a contractor. This may be the case, for example, where continuing contributions were not made in respect of a contractor who worked for less than three months.

Employers may be liable to superannuation guarantee shortfall.

Further information . . .

The Australian Taxation Office’s *Superannuation entitlements for contractors/consultants and temporary employees engaged through independent agencies* is available at <<http://www.ato.gov.au/super>>.

Also see *Superannuation Guarantee (SG) Ruling 93/1* and, in relation to people engaged through service firms, labour hire firms and employment agencies see *SG Ruling 93/2* at <<http://law.ato.gov.au/atolaw>>(public rulings).

Jenny Francis is Counsel specialising in advice on public financial law and has extensive experience advising clients on a range of matters over the last thirteen years. More recently Jenny has been closely involved with matters arising out of the ANAO’s audit on agencies’ compliance with the Superannuation (Productivity Benefit) Act 1988.

Leo Hardiman is a Senior General Counsel who has extensive experience in advising clients about all aspects of Commonwealth revenue and financial law, including superannuation and tax law. He also has an extensive background in employment law. Together with Jenny, Leo was closely involved with matters arising out of the ANAO’s audit.

Notes

- ¹ There are some specific exclusions from ‘qualified employee’. Members of the CSS or PSS are, for example, specifically excluded from being qualified employees.
- ² See Clause 5 of the Superannuation (Productivity Benefit) (Qualified Employees) Declaration No. 3 of 1993 (made under s 3F(1) of the PB Act) that provides persons who fall within the definition of employee in s 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (the SG Act) are ‘qualified employees’ for the purposes of the PB Act. This declaration has been in effect since 1 July 1992.

AGS contacts

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