Status: **draft only – for comment**

Draft Superannuation Guarantee Determination

Superannuation guarantee: working out the payments in respect of a person's labour under a contract referred to in subsection 12(3) of the *Superannuation Guarantee (Administration) Act 1992*

Relying on this draft Determination

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Determination applies to you and you rely on it reasonably and in good faith, the fact that you acted in accordance with this draft Determination would be a relevant factor in your favour in the Commissioner's exercise of any discretion in regard to the imposition of penalties.

When finalised, this Determination will not be a 'public ruling' for the purposes of the *Taxation Administration Act 1953*. It will, however, be administratively binding on the Commissioner of Taxation.

Table of Contents **Paragraph**

What this draft Determination is about

1. Under the *Superannuation Guarantee (Administration) Act 1992* (SGAA), 'qualifying earnings'[1] are used to calculate the minimum level of superannuation contributions an

[1] As defined in subsection 10A(1) of the SGAA.

employer needs to make for the benefit of its employees to avoid liability to the superannuation guarantee charge under the SGAA.[2]

2. For the purposes of the SGAA, 'employee' and 'employer' have a wide meaning encompassing both their ordinary meaning[3] and an extended meaning under section 12 of the SGAA. Where a person is treated as an employee under subsection 12(3) of the SGAA, because they work under a contract ('the contract') that is wholly or principally for their labour[4], the employee's qualifying earnings are all payments under the contract that are in respect of the person's labour under the contract.[5]

3. This draft Determination[6] sets out our view, for the purposes of paragraph 10A(1)(d), of the definition of qualifying earnings in the SGAA, on:

- how that paragraph should be interpreted (paragraphs 5 to 11 of this Determination)
- what payments made under the contract *are* in respect of the person's labour (paragraphs 12 to 15 of this Determination)
- what payments made under the contract *are not* in respect of the person's labour (paragraph 16 of this Determination)
- how to work out what part of a payment is in respect of the person's labour where the payment relates to both labour and non-labour components (paragraphs 17 to 19 of this Determination).

4. All further legislative references in this Determination are to the SGAA, unless otherwise indicated.

Ruling

Qualifying earnings covered by paragraph 10A(1)(d)

5. The SGAA does not define any of the terms in the key phrases of paragraph 10A(1(d) – that is, 'all payments under a contract' or 'in respect of the person's labour under the contract'. They therefore take their ordinary meaning.

6. The word 'payment' is defined as 'that which is paid; compensation; recompense'.[7] The word payment is one which, in an appropriate context, may cover many ways of discharging obligations.[8] The terms of the contract are relevant for determining how and when the payments are made. For example, under the terms of the contract, payments may be affected by a cash transfer or by a payment in kind.

7. Qualifying earnings are exhaustively defined in subsection 10A(1). The definition effectively imposes a limit on which earnings can be used to determine the individual superannuation guarantee amount. In particular, under paragraph 10A(1)(d), qualifying

[2] See Law Companion Ruling LCR 2026/3 *Payday Super: calculation and assessment of the superannuation guarantee charge*.
[3] See Taxation Ruling TR 2023/4 *Income tax and superannuation guarantee: who is an employee?* for guidance on when a person will be an employee within the ordinary meaning of that term.
[4] See paragraphs 93 to 111 of TR 2023/4 for further information on how to determine if a contract is wholly or principally for the labour of the person for the purposes of subsection 12(3) of the SGAA.
[5] Paragraph 10A(1)(d) of the SGAA.
[6] For readability, all further references to 'this Determination' refer to the Determination as it will read when finalised. Note that this Determination will not take effect until finalised.
[7] Pan Macmillan Australia (2026) *Macquarie Dictionary Online*, www.macquariedictionary.com.au, accessed 2 July 2026.
[8] *White v Elmdene Estates Ltd* [1960] 1 QB 1, per Lord Evershed MR.

earnings are 'all payments under a contract referred to in subsection 12(3) that are in respect of the person's labour under the contract'.

8. 'Labour' includes mental and artistic effort as well as physical toil.[9]

9. The phrase 'in respect of' has a very wide meaning.[10] However, there must be 'some discernible and rational link' between the 2 relevant subject matters.[11] The phrase 'in respect of' must also be construed in the context in which it appears.[12]

10. In the context of paragraph 10A(1)(d), it is considered that the phrase 'in respect of the person's labour' has a limiting effect on the amounts included in qualifying earnings. The paragraph does not apply to all payments made under the contract referred to in subsection 12(3). It only applies to the amounts paid under that contract that are in respect of the labour of the person. Paragraph 10A(1)(d) requires an examination of the components that make up the total amount paid to identify the specific amounts that are referable to the person's labour. It is only those amounts paid as a reward for the person's physical, mental or artistic exertion that are included in the person's qualifying earnings.

11. Where a payment is made for both the person's labour and other non-labour components, an apportionment is required between the amounts paid for labour and the amounts that are not paid for the person's labour.

Payments in respect of the person's labour

12. Paragraph 10A(1)(d) states that all payments in respect of the person's labour under the contract are qualifying earnings. It therefore includes any payment amounts that are in respect of any part of the person's labour under the contract.

13. Paragraph 10A(1)(d) is a separate limb of the definition of qualifying earnings and operates independently of paragraph 10A(1)(a) which refers to 'ordinary time earnings'.[13] Paragraph 10A(1)(d) is therefore not limited by the phrase 'ordinary time earnings'. As such, a person's qualifying earnings under paragraph 10A(1)(d) includes all payments that relate to the person's labour, whether undertaken during ordinary or non-ordinary hours of work. It therefore includes amounts such as overtime payments.

14. Where an allowance is paid to the person in respect of the person's labour under the contract, the allowance is included in the person's qualifying earnings. For example, an on-call allowance is qualifying earnings, whether paid:

- as a loading on the person's payment rates when undertaking their work under the contract, or
- for the person making themselves available for work in respect of hours that the person would not normally be working under the contract.

15. To the extent that there is any overlap between paragraph 10A(1)(d) and ordinary time earnings under paragraph 10A(1)(a), the amount is only included in the person's qualifying earnings once.[14]

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[9] *Deputy Commissioner of Taxation v Bolwell* [1967] VicSC 172; 1 ATR 862 at [873].

[10] *Jason McCosker; Tony Johnston; Tennescee Berry; Alexander Brown; Patrick Gomes v Bindaree Beef Pty Ltd* [2021] FWC 2632 at [49]; *The Ocean Marine Insurance Company Limited v CSR Limited* [2012] NSWSC 1229 at [145].

[11] *Technical Products Pty Ltd v State Government Insurance Office (Qld)*[1989] HCA 24 *(Technical Products)*, at [5], per Brennan, Deane and Gaudron JJ.

[12] *Technical Products* at [5], per Brennan, Deane and Gaudron JJ.

[13] As defined under subsection 6(1).

[14] Subsection 10A(2).

Payments that are not in respect of a person's labour

16. As a person is an employee under subsection 12(3) where they work under a contract that is wholly or principally for their labour, it may be that some payments, or parts of payments, made under the contract are not in respect of the person's labour, and an apportionment is required. Examples of such non-labour items include:

- hire of plant or machinery
- cost of materials used in the work
- reimbursements that compensate the person exactly for an expense they have incurred on behalf of the employer
- third-party costs that are on-charged to the employer
- expenses paid for by the person as agent for the employer
- the part of the total price under the contract that reflects any goods and services tax (GST) payable.

Working out the payments in respect of labour where not clearly identifiable

17. If the labour component of a payment made under the contract is clearly identifiable, all payments in respect of the person's labour are included in the person's qualifying earnings.

18. Where the payments in respect of the person's labour **are not** clearly identifiable, an employer can use:

- a reasonable market value of the labour component of the contract[15] (for example, industry award rates) to represent the employee's qualifying earnings, or
- a reasonable market value of the non-labour components of the contract (for example, the market value of hiring similar plant or machinery on similarly favourable terms).

19. Under section 79, an employer must keep records that show how they worked out how much of the payments made under the contract were in respect of the person's labour. The records should demonstrate that the value is a reasonably accurate estimate of the market value.

Examples

Example 1 – on-call and overtime payments included in qualifying earnings

20. *Blake is contracted to provide medical services under a contract wholly or principally for their labour and is not an employee within the ordinary meaning of that term. Blake has no right to delegate their work under the contract to another person and is an employee under subsection 12(3). Blake is registered for GST.*

[15] See, for example, *Jamsek v ZG Operations Australia Pty Ltd (No 3)* [2023] FCAFC 48 at [62], where the Full Court noted that evidence of the market value of the various components of the delivery service would have been necessary to enable quantification of the value of the labour component of the service, as distinct from the other benefits obtained by the respondent under the relevant contracts.

21. *Under the contract, Blake is paid:*

- *an hourly rate for his labour*
- *an overtime rate if his hours exceed 8 hours in any particular day*
- *an allowance for 'on-call duties' that Blake may or may not perform in providing their services. The allowance is paid regardless of whether Blake performs on-call duties.*

22. *The rates under the contract include GST, as Blake is registered for GST.*

23. *The hourly rate, overtime and on-call allowance, excluding one-eleventh of the price that reflects the GST payable on such amounts, is included in Blake's qualifying earnings when paid. This is because all these amounts are made under the contract in respect of Blake's labour. It is not relevant for Blake's qualifying earnings that a higher rate is paid to Blake for certain hours worked or whether the on-call allowance is paid in respect of hours that Blake was not otherwise working.*

Example 2 – payment for equipment not included in qualifying earnings

24. *Amazing Goods Co engages Bill under a contract for a period of one month to load various goods onto trucks. Both Amazing Goods Co and Bill are registered for GST. Under the contract, Bill:*

- *is paid $26 (including GST) an hour to load the various goods onto the trucks*
- *is paid a flat fee of $800 (including GST) for the cost of hiring a forklift owned by Bill for the month, and*
- *has no right to delegate his work under the contract to another person.*

25. *Having regard to the arrangement, Bill is not an employee within the ordinary meaning of that term but is an employee under subsection 12(3).*

26. *Bill invoices Amazing Goods Co and is paid $4,700 (including GST) for the month's loading work. The day that the Amazing Goods Co makes the payment to him is the QE day. The invoice clearly itemises the labour component of the contract as $3,900 (calculated as $26 × 150, being the hours Bill loaded items for the month) and the amount of $800 as the cost of hiring the forklift.*

27. *To ascertain the amount of Bill's qualifying earnings, the $4,700 payment must be apportioned between the amounts that are in respect of Bill's labour, and the amounts that are not. The following amounts are not considered to be earnings in respect of Bill's labour:*

- $*800 (including GST) for the cost of hiring the forklift*
- *$354.55 reflecting the GST payable on the amount that relates to Bill's labour (one-eleventh of $3,900).*

28. *As a result, the amount of $3,545.45 is Bill's qualifying earnings for the QE day.*

Example 3 – determining a reasonable market value of labour

29. *Betty develops a software program called Betty Assist that provides answers to common information technology questions for particular users. IT Service Consultants Co contracts Betty principally for her labour. Betty is not an employee within the ordinary*

meaning of that term. However, she is unable to delegate her work and is an employee under subsection 12(3). Betty is registered for GST.

30. *Under the contract, IT Service Consultants Co engages Betty to provide technical support services and Betty grants IT Service Consultants Co a licence to use Betty Assist. The contract does not separately identify the amount payable for Betty's technical support services and the amount payable for the licence. Betty is paid $2,400 (including GST) per week for 20 hours of work and the grant of the licence.*

31. *As the contract doesn't specify the amount in respect of Betty's labour in providing the technical support services, IT Service Consultants Co must determine the reasonable market value of Betty's labour. They gather industry information and consider rates charged by other persons in the market who provide substantially similar technical support services to those provided by Betty and have similar levels of expertise and experience. Taking all this into account, IT Service Consultants Co calculates that a reasonable market value in respect of Betty's labour (including GST) is $2,000 per week. IT Service Consultants Co retains records demonstrating how that amount was determined and why it is a reasonably accurate estimate of the market value of Betty's labour. IT Service Consultants Co therefore determines that the remaining $400 per week is attributable to the licence to use Betty Assist.*

32. *As a result, $1,818.18*[16] *(the reasonable market value for the labour, excluding GST) per week represents the amount paid under the contract in respect of Betty's labour and is Betty's qualifying earnings for each weekly QE day. The $400 per week attributable to the licence to use Betty Assist does not form part of Betty's qualifying earnings.*

Example 4 – using industry award rates to determine reasonable market value of labour

33. *Moparoo Cleaning contracts 22-year-old Kiaan principally for his labour for office cleaning. Kiaan decides the exact times he works and how he performs his cleaning services. Kiaan is not an employee of Moparoo Cleaning within the ordinary meaning of that term. However, Kiaan is unable to delegate his work and is an employee under subsection 12(3). Kiaan is not registered or required to be registered for GST.*

34. *Under the contract, Kiaan is paid $415 for 15 hours of cleaning work per week, working 3 hours each weeknight. In addition to his labour, the contract also requires Kiaan to provide the cleaning consumable supplies he needs such as detergents, disinfectants, rubbish bags and cleaning cloths. The contract does not specify separate amounts for Kiaan's labour or the cleaning supplies.*

35. *In these circumstances, a reasonable market value of the payments made under the contract in respect of Kiaan's labour is the relevant industry award weekly rate of pay for a cleaner, performing the same duties as Kiaan. For the purposes of this example, the relevant industry award weekly rate that applies to 22-year-old cleaners who carry out the same duties as Kiaan is $410 per week.*[17]

36. *As a result, $410 per week is the amount that represents the payment made under the contract in respect of Kiaan's labour and is Kiaan's qualifying earnings for each weekly*

[16] Calculated as $2,000 × (10 ÷ 11).
[17] Reference to the $410 under the relevant industry award in this example is only for illustrative purposes and may not reflect the actual amount under the relevant award that would otherwise apply to a cleaner on any given day.

QE day. The remaining $5 per week, attributable to the cost of the cleaning supplies, does not form part of Kiaan's qualifying earnings.[18]

Date of effect

37. When the final Determination is issued, it is proposed to apply to payments of qualifying earnings to or for an employee by an employer on or after 1 July 2026.

Commissioner of Taxation
2 September 2026

[18] The actual amount attributable to the non-labour portion of a contract will depend on the facts and circumstances of the arrangement and which award applies (in calculating the labour component). The figures used in this example are for illustrative purposes only.

Appendix – Your comments

38. You are invited to provide comments on this draft Determination. Forward your comments to the contact officer by the due date.

39. A compendium of comments is prepared as part of the finalisation of this Determination. An edited version of the compendium (with names and identifying information removed) is published to the ATO Legal database on ato.gov.au.

40. Advise the contact officer if you do not wish for your comments included in the edited compendium.

Due date:	2 October 2026
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References

Previous draft:

Not previously issued as a draft

Related rulings and determinations:

LCR 2026/3; TR 2023/4

Previous rulings and determinations:

SGD 96/2

Legislative references:

- SGAA 1992 6(1)
- SGAA 1992 10A(1)
- SGAA 1992 10A(1)(a)
- SGAA 1992 10A(1)(d)
- SGAA 1992 10A(2)
- SGAA 1992 12
- SGAA 1992 12(3)
- SGAA 1992 79

Cases relied on:

Deputy Commissioner of Taxation v Bolwell [1967] VicSC 172; 1 ATR 862
Jamsek v ZG Operations Australia Pty Ltd (No 3) [2023] FCAFC 48 296 FCR 336; 2023 ATC 20-858; (2023) 323 IR 302; [2023] ALMD 2740
Jason McCosker; Tony Johnston; Tennescee Berry; Alexander Brown; Patrick Gomes v Bindaree Beef Pty Ltd [2021] FWC 2632
The Ocean Marine Insurance Company Limited v CSR Limited [2012] NSWSC 1229
Technical Products Pty Ltd v State Government Insurance Office (Qld) [1989] HCA 24; 167 CLR 45; (1989) 63 ALJR 392
White v Elmdene Estates Ltd [1960] 1 QB 1; [1959] 2 All ER 605

Other references:

Pan Macmillan Australia (2026) *Macquarie Dictionary Online*, www.macquariedictionary.com.au

ATO references

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