SGR 2026/D1 - Superannuation guarantee: work arranged by intermediaries

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Draft Superannuation Guarantee Ruling

Superannuation guarantee: work arranged by intermediaries

Relying on this draft Ruling

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

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Table of Contents	Paragraph
What this draft Ruling is about	**1**
Date of effect	**5**
Previous rulings	6
Background	7
Ruling	**12**
Explanation	**15**
Legislative context	15
Understanding contractual arrangements involving intermediaries	22
Contract necessary for employment	25
Determining whether a contract exists	31
Odco	33
Drake	37
Swift Placements	40
Damevski	44
Control	50
Mason & Cox	51
Personnel Contracting	55
Drake	59
Work done for the benefit of the end-user	60
Drake	61
Swift Placements	62
Agency	64
Odco	72
Drake	74
Swift Placements	75
Companies and trusts	76
Examples	79
Example 1 – an employment contract with the worker must exist	79
Example 2 – employment agency label not determinative	82

Example 3 – immediate benefit to end-user not determinative 88
Example 4 – control of worker by intermediary 92
Example 5 – intermediary is a mere conduit 98
Appendix 1 – Explanation of updates 101
Appendix 2 – Your comments 104

What this draft Ruling is about

1. This draft Ruling[1] explains the Commissioner's view of which entity is the 'employer' of an 'employee' under the *Superannuation Guarantee (Administration) Act 1992* (SGAA) in the context of contractual working arrangements involving 3 or more parties (tripartite working arrangements).[2] This is important as the employer is the entity that is required to make the minimum amount of superannuation contributions to a complying fund in order to avoid a liability to pay the superannuation guarantee charge (SGC) in such arrangements.

2. Tripartite working arrangements take different forms and are often labelled in different ways. They involve various relationships (whether contractual or otherwise) between:

- an entity (end-user) requiring the services or labour of an individual
- an intermediary firm (intermediary) agreeing to supply the services or labour of an individual, and
- an individual (worker) performing the services or labour.

3. This Ruling should be read in conjunction with Taxation Ruling TR 2023/4 *Income tax and superannuation guarantee: who is an employee?* which provides a detailed explanation of the ordinary and extended meaning of 'employee' for the purposes of section 12 of the SGAA.

4. Unless otherwise indicated, all further legislative references in this Ruling are to the SGAA.

Date of effect

5. When finalised, this draft Ruling is proposed to apply both before and after date of issue.

Previous rulings

6. The issues dealt with in this Ruling were previously addressed in Superannuation Guarantee Ruling SGR 93/2 *Independent agencies: service firms, labour hire firms and employment agencies*, which was withdrawn on 1 June 2005. When finalised, this draft

[1] For readability, all further references to 'this Ruling' refer to the Ruling as it will read when finalised. Note that this Ruling will not take effect until finalised.
[2] For the avoidance of doubt, any reference in this Ruling to an 'employer' or 'employee' is a reference to those terms as understood in accordance with their ordinary and extended meanings under subsections 12(1) and 12(3) of the SGAA.

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Ruling will replace Superannuation Guarantee Ruling SGR 2005/2 *Superannuation Guarantee: work performed by intermediaries*.

Background

7. End-users that require services or labour from workers can choose to acquire such services or labour through an intermediary (tripartite working arrangements) rather than engaging the worker directly.

8. Many of these intermediaries specialise in the supply of the services or labour of workers to end-users. Such intermediaries are often referred to as 'service firms', 'labour hire firms' or 'employment or recruitment agencies'.

9. When a worker is engaged through an intermediary, it can sometimes be difficult to determine whether they are an employee of the intermediary, the end-user, or neither entity. This is because there are often a number of contracts entered into in these arrangements.

10. Under some arrangements:

- a contract exists between the intermediary and the end-user (under which the intermediary agrees to supply the services of the worker to the end-user)
- a contract exists between the intermediary and the worker (under which the worker agrees to perform work for the end-user), and
- a contract does not exist between the worker and the end-user.

11. In other arrangements, the role of the intermediary is to bring the end-user and the worker together so that the end-user and the worker enter into a contract with each other. In this case, there is no contract between the intermediary and the worker for the performance of services or labour by the worker.

Ruling

12. To identify who the employer is in a tripartite working arrangement, it is first necessary to determine whether a contract for the performance of work or supply of labour exists and with whom it exists. A contract can exist whether it is in writing, partly in writing and partly oral, wholly oral or implied from the parties' actions.[3]

13. After a contract for the performance of work or supply of labour is established, it is necessary to determine whether an 'employer' and 'employee' relationship exists, in accordance with the ordinary and extended meaning of those terms in subsections 12(1) and 12(3) of the SGAA.

14. The following principles apply when determining whether an intermediary or an end-user is the employer of a worker in a tripartite working arrangement:

- Where there is no contract between a worker and end-user, the end-user cannot be the employer of the worker.

[3] Seddon, N, Bigwood, R (2022) *Cheshire and Fifoot Law of Contract*, 12th Australian edn, LexisNexis Butterworths, Australia.

- Where there is no contract between a worker and an intermediary, the intermediary cannot be the employer of the worker.
- Whether a worker is an employee of the intermediary or the end-user is determined by applying the principles and factors outlined in TR 2023/4.
- How a tripartite working arrangement is labelled or described is not conclusive in determining the nature of the relationship between the parties. Labels such as 'employment agency' and 'labour hire firm' have no precise legal meaning.
- Who has the legal right to control the work of the worker (for example, the right to determine who the worker will work for) is relevant to determining who the employer is, not the detail of the actual exercise of control (for example, supervising and directing daily tasks undertaken by the worker).[4]
- A contract between an intermediary and a worker can create an employer and employee relationship even though the work is done for the immediate benefit of the end-user.[5]
- Where an intermediary merely acts as an agent (either for the end-user or the worker) to bring about a contractual relationship between a worker and an end-user, the intermediary is not the employer of the worker.
- If a worker is not contracted personally by an end-user or intermediary to perform services or labour but rather is engaged via an interposed entity (such as a company, trust or partnership), neither the end-user nor the intermediary is the employer of the worker. This is because any contract the end-user or the intermediary has is with the interposed entity and not with the worker. The worker may, however, be the employee of the interposed entity.

Explanation

Legislative context

15. Under the SGAA, an employer is required to provide a minimum level of superannuation contributions for the benefit of their employees to a complying superannuation fund. If an employer does not provide the minimum level of contributions in respect of each of their employees, the employer will be liable to pay the SGC. The superannuation contributions necessary to avoid the SGC can also be made by persons other than the employer where the contributions are made on behalf of the employer.[6]

16. The SGAA defines 'employer' and 'employee' in section 12 and contains both an ordinary and extended meaning of those terms for the purposes of that Act. As stated in paragraphs 3 and □ of this Ruling, TR 2023/4 discusses in detail the ordinary and extended meaning of 'employee' for the purposes of section 12 and must be read in

[4] See *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) at [73–78], [89] and [198].
[5] See, for example, the characterisation of such an arrangement in *Personnel Contracting*.
[6] See subsection 6(2).

conjunction with this Ruling.[7] The following is, however, a brief summary of the relevant provisions of section 12.

17. Subsection 12(1) defines the terms as having their ordinary meaning – that is, their meaning under common law. For the purposes of the SGAA, subsections 12(2) to 12(11) expand the ordinary meaning of employer and employee[8] and make particular provision 'to avoid doubt as to the status of certain persons'.

18. The classification of a person as an employee for the purposes of the SGAA is not solely dependent upon the existence of a common law employment relationship. The definition extends to certain persons who would not be common law employees.

19. The extending provision that is the most important in the context of this Ruling is subsection 12(3). Under subsection 12(3), if a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract. Subsection 12(3) was designed to include a person who may not be an employee in the ordinary sense, but who is in fact not very distinguishable from an employee.[9]

20. Each subsection in section 12 must be considered separately in determining whether it applies to treat a worker as an employee.[10] Where more than one subsection of section 12 can apply, the question is 'what is the most appropriate application of section 12 in the circumstances?'[11]

21. Where workers are employed through intermediaries, the employer (if any) for SGAA purposes must be established as it is the employer who is required to satisfy the requirements of the SGAA in respect of these workers.

Understanding contractual arrangements involving intermediaries

22. In a tripartite working arrangement, more than one contract may be formed. In these arrangements, it is first necessary to determine whether a legal relationship exists for the performance of work and with whom it exists. Only after this has been established can consideration be given to whether the relationship is one of employment or of some other kind.[12]

23. Whether a worker is an employee of the intermediary or of the end-user is a question to be determined by reference to an objective assessment of the totality of the relationship between the parties, having regard only to the legal rights and obligations which constitute that relationship.[13] To ascertain the relevant legal rights and obligations

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[7] For the ordinary meaning of employee, see paragraphs 18 to 82 and 85 of TR 2023/4 and for the extended meaning of employee see paragraphs 88 to 145 (specifically paragraphs 93 to 113 for subsection 12(3) of the SGAA).

[8] Except for subsections 12(9A) and 12(11) which restrict the meaning of those terms.

[9] Australian Parliament (1992) *Second Report of the Senate Select Committee on Superannuation*: *Superannuation Guarantee Bills*, Australian Government Publishing Service, Canberra, at p. 146.

[10] Refer to *Australian Turf Club and Federal Commissioner of Taxation* [2024] AATA 2728 at [192–193] and [262–264].

[11] Refer to *Australian Turf Club and Federal Commissioner of Taxation* [2024] AATA 2728 at [193] and [262–264].

[12] This statement of legal principle has been expressed in such cases as *Attorney-General for New South Wales v The Perpetual Trustee Co (Ltd)* [1952] HCA 2, *Dalgety Farmers Ltd t/as Grazcos v Bruce & Anor* [1995 NSWCA] 113 and *Swift Placements Pty Ltd v Workcover Authority of New South Wales* [2000] NSWIRComm 9.

[13] *Personnel Contracting* at [61] and [172–173]; *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76 (*JMC*) at [106].

between the parties, the contract of employment must be construed in accordance with the established principles of contractual interpretation.[14]

24. The manner in which the relationship between the parties is labelled or described is not conclusive of the nature of the relationship involving an intermediary, worker and end-user. Expressions such as 'employment agency' and 'labour hire firm' are often used to describe the use of various forms of labour market intermediary. These terms have no precise legal meaning. In tripartite working arrangements, it is necessary to look beyond the labels attached to the relationships by the parties to establish their true nature.[15]

Contract necessary for employment

25. The relationship between an employer and an employee is contractual.[16] An employment relationship cannot exist in the absence of a contract.[17] The issue of whether a contract exists is a separate and distinct matter from the categorisation of a contract as one of employment or otherwise.

26. Therefore, to establish whether a worker is an employee of an intermediary or end-user under the SGAA, it is first necessary to determine whether a contract exists between the:

- worker and intermediary
- worker and end-user, and
- intermediary and end-user.

27. The contract may be written, it may be partly written and partly oral, it may be wholly oral or it may even be implied from the parties' actions.[18]

28. Determining whether a contract exists is a matter of applying the ordinary principles of contract law. An agreement between parties will not be given effect by the courts as a legally enforceable contract unless a number of elements are present.[19] In particular:

- the parties must intend to be legally bound by their agreement
- there must be an offer by one party and its acceptance by the other, and
- the promises which constitute the agreement must be supported by consideration (unless the agreement is in the form of a deed).[20]

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[14] *Personnel Contracting* at [60], [124] and [173].
[15] *Damevski v Giudice* [2003] FCAFC 252 at [144], per Merkel J.
[16] *Personnel Contracting* at [40] and [172], quoting *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 178[1].
[17] There are some limited categories within the extended definition of 'employer' and 'employee' in section 12 of the SGAA that do not depend on the existence of a contract. For example, Members of Parliament: subsection 12(4) and Payments for participation or performance or for the provision of services in relation to participation or performance: subsection 12(8). However, these categories are not addressed in this Ruling since they are not likely to be relevant in practice in the context of intermediary firms.
[18] Seddon, N, Bigwood, R (2022) *Cheshire and Fifoot Law of Contract*, 12th Australian edn, LexisNexis Butterworths, Australia.
[19] Seddon, N, Bigwood, R (2022) *Cheshire and Fifoot Law of Contract*, 12th Australian edn, LexisNexis Butterworths, Australia.
[20] Seddon, N, Bigwood, R (2022) *Cheshire and Fifoot Law of Contract*, 12th Australian edn, LexisNexis Butterworths, Australia.

29. Other ways to ask this question are:

- Whom could the end-user sue for breach of contract (as distinct from negligence) if the worker failed to appear or failed to work at an acceptable standard?

And, equally

- Whom could the worker sue for breach of contract if they performed their work, but their remuneration was not paid to them?

30. If, after applying the principles of contract law, it is found that there is no contract between the worker and the end-user in a tripartite working arrangement, the worker cannot be an employee of the end-user for the purposes of the SGAA. Similarly, if there is no contract between the worker and intermediary, the worker cannot be an employee of the intermediary under the SGAA.

Determining whether a contract exists

31. The courts and various State Industrial Relations Commissions which have considered the nature of tripartite working arrangements in industrial relations, workers compensation and pay-roll tax contexts have confirmed in a number of cases the principle that an employment relationship cannot exist unless a contract exists between the worker and either the end-user or intermediary.

32. The following 4 cases illustrate the importance of applying the principles of contract law to determine whether a contract exists.

Odco

33. In the frequently quoted decision of the Full Federal Court in *Builders Workers Industrial Union of Australia & Ors v Odco Pty Ltd* [1991] FCA 96 (*Odco*), Wilcox, Burchett and Ryan JJ, in their joint judgment, held that an employment relationship did not exist between the builder (end-user) and the worker because a contract did not exist between the worker and the end-user. The Court found that there was a contract between the worker and Odco (intermediary).[21]

34. The element of consideration, which is essential to the formation of a contract, was a key factor in the Court's reasoning that there was no contract between the end-user and the workers. The Court stated that[22]:

> The element of consideration which is essential to a contract of employment is the promise by the presumptive employer to pay for service as and when the service is rendered … In this case, on the evidence, there was no promise of payment of periodical sums by the builder to the worker, and no agreement between the builder and the workers as to what those sums should be. The builder's only obligation was to pay Troubleshooters. The worker's only entitlement was against Troubleshooters, and in accordance with a different measure.

[21] While the Full Federal Court decided the contract was not a contract of employment, it should be noted that Kiefel CJ, Keane J and Edelman J in *Personnel Contracting* state at [86] that this decision in *Odco* is 'infected' with a critical error. The critical error being the decision of the Court to attribute decisive significance to the parties' description of their relationship as a means of overcoming the ambiguity generated by the other factors in the analysis pointing in opposite directions. Kiefel CJ, Keane J and Edelman J stated 'that error involves a departure from principle which should not be perpetuated'.

[22] *Odco* at [13].

35. After stating that the payment of wages by an intermediary does not preclude the existence of a contract of employment between a worker and end-user, the Court further observed that[23]:

> … The essential inquiry … is whether the presumptive employer remains liable to pay the worker if, for any reason, the intermediary fails to do so. We can discern no term of any contract between the builder and worker in the present case which imposes any such liability on the builder in the event of Troubleshooters' failing to make appropriate payment to the worker.

36. The Full Federal Court also rejected the submission by counsel for the appellants in *Odco* that when a worker sent by the intermediary reports to and is allocated work by the end-user, he contracts with the end-user to perform that work[24]:

> In our view, the correct analysis is that the agreement to perform work is concluded earlier when the worker accedes to Troubleshooter's request to attend at a particular site on a given day. At that time, the worker assumes an obligation to attend the site and perform such work … as may be allocated to him. Correspondingly, Troubleshooters assumes an obligation to pay him for his time.

Drake

37. In *Drake Personnel Ltd & Ors v Commissioner of State Revenue* [2000] VSCA 122 (*Drake*), the Victorian Supreme Court of Appeal examined the question of whether Drake (the intermediary), or its client (the end-user) was the employer for payroll tax purposes, of the workers provided by Drake.

38. In holding that the intermediary was the relevant employer in the tripartite working arrangement, both Ormiston JA and Phillips JA, in their respective judgments, placed emphasis on the fact that there was no contract between the end-users and the workers.

39. In the course of his reasoning, Phillips JA stated that the contract between the intermediary and the workers arose only as and when work was accepted by the worker.[25] In doing so, he cited with approval the Full Federal Court's conclusion in *Odco* that the agreement to perform work in the facts of that case was concluded when the worker acceded to the intermediary's request to attend at a particular site on a given day.

Swift Placements

40. In a matter concerning occupational health and safety, the Full Bench of the NSW Industrial Relations Commission, in *Swift Placements Pty Limited v WorkCover Authority of New South Wales (Louise May)* [2000] NSWIRComm 9 (*Swift Placements*), considered the nature of the relationship established between Swift Placements (the intermediary) and a worker supplied by Swift Placements to perform work for a client of the intermediary (end-user). The issue for determination was whether the worker was a common law employee of Swift Placements within the meaning of the *Occupational Health and Safety Act 1983*

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[23] *Odco* at [22]. The decision in *Odco* was followed by the Supreme Court of New South Wales in *Forstaff and Ors v The Chief Commissioner of State Revenue* [2004] NSWSC 573, a case concerning the liability of Forstaff (the intermediary) to pay-roll tax in respect of workers contracted and supplied by it to end-users. In applying the enquiry by the Full Federal Court in *Odco* as to whether the presumptive employer remains liable to pay the worker, if for any reason, the intermediary fails to do so, the Court held that there was no contract, whether of employment or otherwise, between the end-user and worker. This was because the end-user in the tripartite working arrangement under consideration did not have an obligation to pay the workers.

[24] *Odco* at [17].

[25] *Drake* at [34].

(NSW) (now repealed) at the time the worker sustained injuries at the premises of the end-user.

41. Before establishing the nature of the relationship between Swift Placements and the worker, the Full Bench first looked at the circumstances of the arrangement to determine whether a legal relationship existed, either between the worker and the end-user, or between the worker and the intermediary. By doing so, the Full Bench followed the process referred to in cases such as *Dalgety Farmers Ltd t/as Grazcos v Bruce and Anor* [1995] NSWCA 113, which is[26]:

> In determining whether a contract of service has been entered, and if so with whom, it is necessary to look at the circumstances of the engagement and to ascertain who it was that offered employment, and whether the worker accepted the offer. To determine whether what then ensued was indeed employment … it is necessary to look at the whole of the relationship.

42. It was submitted by counsel for the intermediary that a contract existed between the worker and end-user on the basis of the 'control' test and other indicators of employment. In rejecting this contention and finding that there was no evidence of any contract between the worker and end-user, the Full Bench emphasised that ascertaining whether a legal relationship exists is necessary before determining the nature of the relationship and held that the submission was flawed because it[27]:

> … did not attend to the primary question arising, namely, whether there was an intention to create a legal relationship between Mr Terkes [the worker] and Warman [end-user client] but rather assumed such a relationship and characterised it according to various criteria, principally control, as an employment contract.

43. The Full Bench went on to state that[28]:

> … Mr Terkes obtained the work from the appellant and agreed to perform it on the appellant offering it to him; attendance by him at Warman's premises to commence and continue performance of the work involved no separate or distinct offer by Warman nor acceptance by Mr Terkes. It follows, in our view, that to the extent any legal relationship existed it did so between the appellant and Mr Terkes, although, of course, the nature of such relationship is another question.

Damevski

44. The Full Federal Court decision in *Damevski v Giudice* [2003] FCAFC 252 (*Damevski*) provides a particularly pertinent example of the application of the principles of contract law to a tripartite working arrangement.[29]

45. The matter concerned Endoxos' (the end-user) endeavours to:

- terminate the existing employment relationship they had with Damevski (the worker), and
- enter into a new contract with MLC (the intermediary) for the provision of the same services by the worker that they had previously provided in their

[26] *Swift Placements* at [33].
[27] *Swift Placements* at [37].
[28] *Swift Placements* at [38].
[29] Essentially, this arrangement involved the conversion of a direct employment relationship between a company and worker to that of a supposed tripartite working arrangement using an intermediary. As observed by Wilcox J, the sole purpose of the arrangement was to attempt to allow the employer to avoid its legal obligations as an employer.

> capacity as an employee of the end-user (but purporting to characterise the worker as an independent contractor rather than employee).[30]

46. The issue for consideration by the Court was whether, after the purported termination of his employment, the worker provided his service to the end-user as an employee or independent contractor.

47. In 3 separate judgments, Wilcox, Marshall and Merkel JJ found, among other things, that there was no contract between the intermediary and the worker.

48. In coming to this conclusion, Wilcox J stated that[31]:

> There is no evidence that Mr Damevski entered into either a written or oral agreement with MLC. No evidence was adduced of any conversation between Mr Damevski and any representative of MLC. No document addressed to MLC, and signed by Mr Damevski, was put into evidence. There is a total absence of material that would be necessary to enable either Mr Damevski or MLC to prove the existence of a contract between them.

49. Marshall J also found the Full Bench of the Industrial Relations Commission, in their earlier decision on the arrangement, to have been in error for not considering whether the elements of a contract were present for there to be an implied contract between the worker and the end-user.[32] Specifically, Marshall J stated[33]:

> Although there is no evidence of an express contract between Mr Damevski and Endoxos, the Full Bench failed to properly apply established principles of contract law and address, after considering all the relevant evidence, whether there was a contract which could be implied to exist based on the conduct of the parties.

Control

50. In considering the relevance of control in tripartite working arrangements, the Courts have held that it is the legal right to control the work of the worker that is relevant rather than the detail of the actual exercise of control. Further, a contract will not be inferred between the worker and end-user in a tripartite working arrangement merely because the end-user exercises the day-to-day or practical control over the worker. If there is no contract between the end-user and worker, there cannot be an employment relationship and the fact that the worker performs the work for the end-user at their premises and under the end-user's direction and control will not affect this conclusion.

Mason & Cox

51. This principle was illustrated in the decision of the Full Court of the Supreme Court of South Australia in *Mason & Cox Pty Ltd v McCann* (1999) 74 SASR 438 (*Mason & Cox*). The issue in this case was whether there was a contract of employment between the worker and Mason & Cox (the end-user) under the *Workers Rehabilitation and Compensation Act 1986* (SA) (now repealed).[34] The end-user argued that there was an

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[30] This arrangement involved all the other employees of Endoxos.
[31] *Damevski* at [5].
[32] The Industrial Relations Commission at first instance did consider the elements of a contract to determine incorrectly that there was no contract between Damevski and Endoxos.
[33] *Damevski* at [81].
[34] If there was a contract of employment between the parties, the worker had no right of action against the end-user at common law.

implied contract of employment between them and the worker on the basis that the worker performed work for them at their premises and under their direction and control.[35]

52. The Full Court unanimously held that there was no contract of employment between the end-user and the worker. Doyle CJ in his judgment held that it was not enough to say that the worker was performing work at the premises of the end-user and under their direction and control. As to the issue of control, his Honour stated[36]:

> The fact of control alone cannot lead to a conclusion that there was a contract of service between Mr McCann [the worker] and Mason & Cox [the end-user], or indeed that there was a contractual relationship at all.

53. Doyle CJ considered that the fact that the worker complied with the directions given by the end-user as to the manner in which the worker was to carry out his work does not of itself indicate any legal right by the end-user to direct him. If the worker had failed to follow their directions, his Honour considered the end-user would not have been able to take action against him, their only rights being to reject the worker's further services and to exercise any contractual rights against the intermediary.

54. Doyle CJ went on to state that what is important is '… the legal right to control, rather than the practical fact of control'.[37]

Personnel Contracting

55. This approach to the application of the indicia of control in the context of tripartite working arrangements is consistent with that applied by the High Court in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*).

56. The case concerned whether Mr McCourt (the worker) was a common law employee of Construct (the intermediary) under a labour hire arrangement through which the worker performed building labouring work for a client of the intermediary, Hanssen (the end-user).[38] Under the arrangement:

- The intermediary and the end-user had entered into a 'labour hire agreement' (LHA).[39]
- The intermediary and the worker had entered into an 'administrative services agreement' (ASA).[40]
- There was no contractual relationship between the worker and the end-user.[41]

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[35] It was not argued that there was an express contract of service between the end-user and the worker.
[36] *Mason & Cox* at [26].
[37] *Mason & Cox* at [29]. As authority for this proposition, Doyle CJ, at [28], cited the following comments of Dixon J in *Humberstone v Northern Timber Mills* [1949] HCA 49; 79 CLR 389 at [404]:
> The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority of the man in the performance of his work resided in the employer so that he was subject to the latter's orders and directions.

[38] *Personnel Contracting* at [1–6].
[39] *Personnel Contracting* at [10].
[40] *Personnel Contracting* at [2].
[41] *Personnel Contracting* at [10].

57. The majority, consisting of Kiefel CJ, Keane J, Edelman J and Gordon J[42], found that the intermediary had retained a contractual right to control the worker in the ASA, which was a core part of its labour-hire business and a key asset of its business.[43] Such control was integral to a finding that the relationship between the intermediary and the worker was one of common law employment. The control in this context did not relate to control over the day-to-day directions given to worker, but rather the legal control over the worker by the intermediary (for example, determining for whom the worker will work).

58. Specifically, Kiefel CJ, Keane J, Edelman J stated (footnotes omitted)[44]:

> Under the ASA, Construct was entitled to determine for whom Mr McCourt would work. Once assigned to a client, Mr McCourt was obliged by cl 4(a) to "[c]o-operate in all respects with Construct and the builder in the supply of labour to the Builder".
>
> …
>
> Mr McCourt's performance of that obligation was unambiguously central to Construct's business of supplying labour to builders. In referring Mr McCourt to Hanssen, Construct was exercising, and commercialising, its right to control the work that Mr McCourt would do and how he would do it. The marketability of Construct's services as a labour-hire agency turned on its ability to supply compliant labour; without that subservience, that labour would be of no use to Construct's clients. That right of control was therefore the key asset of Construct's business. Its significance was not diminished by the circumstance that the minutiae of Mr McCourt's performance of daily tasks were at the direction of Hanssen. Indeed, the right of control held by Construct over Mr McCourt explains why there was no need for any contractual relationship between Mr McCourt and Hanssen in order to support Hanssen's ability to issue day-to-day directions to Mr McCourt.

Drake

59. In *Drake*, the Victorian Court of Appeal rejected the contention made by Drake (the intermediary) that there could be no employment relationship between them and the worker because the day-to-day control of the work vested in the end-user rather than the intermediary. Phillips JA concluded that[45]:

> … Rather, in a case like this, it may be that control, day-to-day, is not as significant as it was in the cases cited to us … the fact that the client exercises day-to-day control may be referred back to the contract made between Drake and the temporary; for it is under and by virtue of that contract that the temporary accepts direction from Drake's client …

Work done for the benefit of the end-user

60. The Courts have also affirmed the principle that a contract of employment between the intermediary and the worker will not be denied simply because the work is being performed for the immediate benefit of the end-user and not the intermediary. A worker engaged by an intermediary may be directed to work for the benefit of the end-user without altering the nature of the relationship between the intermediary and the worker.

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[42] Although forming a majority, Gordon J handed down a separate judgment to Kiefel CJ, Keane J, Edelman J in *Personnel Contracting*.
[43] *Personnel Contracting* at [73–78], and [193–198]
[44] *Personnel Contracting* at [75–76].
[45] *Drake* at [55]. In *Mason & Cox*, there was an implied term in the contract between the intermediary and worker to the effect that the work to be performed by the worker supplied by the intermediary would be subject to the direction and control of the end-user.

Drake

61. In *Drake*, Phillips JA, rejected the contention that there was no contract of employment between Drake (the intermediary) and the worker because the work was not being performed for Drake. Phillips JA stated that[46]:

> … in a case like the present where A makes an agreement with B under which A supplies to B the services of C for the performance of work and A also makes a contract with C for C to perform the work for B, it can be said … that in performing the work C not only benefits B but is also advancing the business of A, to the benefit of A ... it seems to me to follow that a temporary, in accepting an engagement to perform work for Drake's clients, is doing the work as much for Drake as for the client. The temporary is, in a relevant sense, working for Drake while working for the client. In the one case he or she is working pursuant to a contract (with Drake) and in the other that is not so (the temporary making no contract with the client). But the contract between Drake and the temporary should not … be denied the character of employment according to ordinary concepts of the common law merely because when the work is done it is done for the immediate benefit of a client of Drake.

Swift Placements

62. In *Swift Placements*, the Full Bench quoted a passage from the judgment of Kitto J in *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* [1952] HCA 2 which explained the essential elements of an employer and employee relationship and applied the principle cited in the passage that[47]:

> … the statement that the doing of work must be for the benefit of the master does not mean, of course, that the direct benefit from the work itself must necessarily accrue to the master; he may, without altering the relationship, direct his servant to do work which will benefit another.

63. The Full Bench in *Swift Placements* also referred to the observations made by the High Court in *Accident Compensation Commission v Odco Pty Ltd* [1990] HCA 43 which were made in the context of the consideration of whether workers engaged by Troubleshooters (the intermediary) and supplied to builder clients (the end-users) had employment status by virtue of deeming provisions in the *Accident Compensation Act 1985* (Vic)[48]:

> … Once it is accepted that there was (1) an agreement between TSA and the builder for the supply of a tradesman to the builder to do certain work on terms that the builder was to remunerate TSA for supplying the tradesman and for the work which he did, and (2) an agreement between TSA and the tradesman whereby the tradesman agreed to perform work at the site at the builder's direction for remuneration to be paid by TSA, it follows … that the tradesman supplies services to TSA by attending the site and doing work there. By attending there and doing work, he supplies services to TSA for the purposes of its business, notwithstanding that he also at the same time supplies the same services to the builder for the purposes of its business.

Agency

64. There may be circumstances in tripartite working arrangements where an intermediary is authorised by another party (the principal) to do something on that party's behalf as their agent.

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[46] *Drake* at [54].
[47] *Swift Placements* at [32].
[48] *Swift Placements* at [67].

65. At general law, agency is the relationship existing between 2 parties whereby the agent is authorised, either expressly or impliedly, by the principal to do, on the principal's behalf, certain acts which affect the principal's rights and duties in relation to third parties.[49] In cases of actual authority, the relationship between the principal and an agent is a consensual one so that no party can claim to be a principal's agent unless both parties consent to the creation of the agency.[50] Where an agent uses his or her authority to act for a principal, then any act done on behalf of that principal is an act of the principal.

66. In certain situations, the agent is authorised by the principal to bring about a contractual relationship between the principal and a third party. Where the agent acts within the scope of his or her authority and accordingly brings about a contractual relationship between the principal and the third party, the contract is between the principal and the third party. The agent is not a party to the contract but is essentially the intermediary or conduit that brings about the contractual relationship between the principal and the third party.[51]

67. In some tripartite working arrangements, the intermediary may perform an agency role to bring about a contractual relationship between the worker and the end-user.[52] The intermediary may be authorised by the:

- worker to bring about a contractual relationship for the performance of work or the supply of labour between the worker and the end-user, or
- end-user to find suitably qualified workers for the end-user.

68. Where an agency relationship exists between the intermediary and either the end-user or the worker, and the intermediary brings about a contractual relationship between the end-user and the worker, the worker cannot be an employee of the intermediary. The contract is between the worker and the end-user. The intermediary is not a party to the contract.

69. The manner in which the relationship between the worker, the intermediary and the end-user in a tripartite working arrangement is labelled or described is not conclusive of the nature of the legal relationship between the parties. The nature of the relationship between the parties is determined by an examination of the facts, the actions and conduct of the parties, and other documentary evidence to ascertain whether they give rise to contractual rights and obligations and what those contractual rights and obligations are. A clause in an agreement which states that an agency relationship exists must be considered with all the other terms of the agreement. Such a clause cannot receive effect according to its terms if it contradicts the effect of the agreement as a whole. The parties to the agreement cannot alter the true substance of the relationship by simply giving it a different label.

70. If the intermediary has the legal responsibility for paying the worker, whether or not the intermediary itself receives payment from the end-user, an agency relationship will not exist between the intermediary and the end-user.

71. The question of whether the intermediary was acting as an agent in tripartite working arrangements has been considered in various cases.

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[49] *International Harvester Company of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* [1958] HCA 16.
[50] *Equiticorp Finance Ltd (in liquidation) v Bank of New Zealand* (1993) 32 NSWLR 50 at [132].
[51] Turner, C (2003) *Australian Commercial Law*, 24th edn, Lawbook Co, Sydney, p. 215.
[52] The intermediary is often referred to commercially as an 'employment agency' or 'recruitment' or 'placement' firm.

Page status: **draft only – for comment**

Odco

72. In *Odco*, the Full Federal Court rejected the contention made that the intermediary was acting as the agent for the builder (end-user) in procuring the services of the workers, or as agent for the workers in finding work. The Court stated[53]:

> An alternative analysis … was that Troubleshooters was the agent of the builder in engaging the services of the worker and brought about a contract of employment between its presumptive principal and the worker. The chief objection to this analysis arises from the evidence that it was Troubleshooters which fixed, and adjusted from time to time, the remuneration to which each worker was entitled. That was apparently done without any reference to the builder who was only concerned to know the gross amount which he was obliged to pay Troubleshooters in respect of the workers made available by it.
>
> To accommodate this alternative analysis … counsel for the appellants postulated a further relationship of agent and principal between Troubleshooters and each worker whom it made available to a builder … However, this contention cannot be reconciled with the clear expression of intention that Troubleshooters is liable to pay remuneration at the agreed rate to the worker, whether or not it is itself paid by the builder.

73. The Court also noted that the use of the word 'agency' did not necessarily connote a legal relationship of principal and agent.[54]

Drake

74. In *Drake*, the question of whether Drake (the intermediary) was acting as an agent was addressed and rejected by Phillips JA. He stated[55]:

> The business of Drake was that of an 'employment agency' as that term is commonly understood. It does not mean that Drake was in any sense an agent bringing its client (for whom the temporary was to work) into a direct contractual relationship with the temporary (who did the work); rather Drake entered into a contract with the client to supply the services of a temporary and Drake also entered into a contract with the temporary to work for the client. So much seems to flow from the method of payment … the client paid Drake for the services of the temporary and Drake paid the temporary for working for the client … there was no direct contractual relationship between the client and the temporary.

Swift Placements

75. Similarly, in *Swift Placements*, the Industrial Relations Commission rejected the categorisation by counsel for Swift Placements (the intermediary) that the relationship between the intermediary and the worker was one of agency, notwithstanding the fact that the business of the intermediary was described as an employment agency.[56] The Full Bench stated that[57]:

> There was no issue that some relationship existed between the appellant [Swift Placements] and Mr Terkes [the worker]. The appellant categorised it as one of agency by

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[53] *Odco* at [40–41].
[54] *Odco* at [18].
[55] *Drake* at [29].
[56] It was submitted by counsel for Swift Placements that Swift Placements was the agent of the worker by which it arranged a contract of employment between the worker and the client.
[57] *Swift Placements* at [49]. The Full Bench also rejected the submission by Swift Placements (the intermediary) that it was an 'outsourced resources department' of its client (the end-user) in providing labour. The document setting out the agreement between the intermediary and the end-user stated that the workers were the intermediary's employees and that where an end-user itself employs one of their employees or

> which the appellant arranged a contract of employment between Warman [end-user client] and Mr Terkes … In view of our earlier finding that no legal relationship existed between Warman and Mr Terkes, it is strictly unnecessary to consider further the question of agency. All we need to say about it, given the general proposition that the relationship of agency exists where one person (the principal) agrees that the other person (the agent) should act on his behalf so as to affect his relations with third parties … is that there was no evidence in the proceedings to support such a contract. Indeed, to the contrary, the acceptance by Mr Terkes of the offer of casual employment made by the appellant on 31 October 1995 directly negates any agency …

Companies and trusts

76. Sometimes a worker is not contracted personally to perform services or labour but rather is engaged via an interposed entity. Typically, this is a closely held company or partnership or a family trust. The company, partnership or trustee enters into a contract instead of the worker, although the worker still performs the services or labour.

77. In this situation neither the end-user, nor the intermediary, will be an employer because they would not be party to any contract with the worker as an individual.[58] Rather, the intermediary (most likely) will have entered into a contract with the company, partnership or trustee.

78. In these situations, the worker may be the common law employee of the company, partnership or trustee, or an employee of the company, partnership or trustee under a contract wholly or principally for their labour. This will depend upon the particular factual circumstances.

Examples

Example 1 – an employment contract with the worker must exist

79. *PBS Ltd is a large security company which carries on a business of supplying security guards, mobile patrols, bodyguards, crowd control and other similar services for commercial, industrial, and government clients. PBS Ltd is contracted by Explosive Ltd a company specialising in the design and manufacture of explosives and demolition equipment, to provide mobile security guards to patrol Explosive Ltd's premises at night. Separately, PBS Ltd engaged mobile security guards under contracts to provide those services to Explosive Ltd. Under the terms of these contracts, the mobile security guards are remunerated by PBS Ltd and are required to:*

- *work as directed by PBS Ltd and Explosive Ltd, including by patrolling the premises between 11:00 pm and 3:00 am every night*
- *wear uniforms bearing the PBS Ltd logo, and*
- *inform PBS Ltd if they cannot work a particular shift.*

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former employees, the end-user was to immediately notify the intermediary, and they may be charged a permanent placement fee. In relation to the permanent placement fee, the Full Bench noted that 'the traditional reward to a labour agency of a placement fee only occurs where the client ceases the temporary placement and assumes full responsibility for the person concerned'.

[58] See *Jamsek v ZG Operations Australia Pty Ltd (No 3)* [2023] FCAFC 48 at [33–48] and [71], where the Full Federal Court confirmed that only a natural person who enters into a contract in that capacity can be deemed to be an employee for the purposes of subsection 12(3).

80. *In this scenario, there is:*

- *A contract between PBS Ltd and Explosive Ltd under which PBS Ltd agrees to supply a guard service to Explosive Ltd.*
- *Another contract between PBS Ltd and the guards under which the guards agree to perform work for Explosive Ltd.*
- *No contract has been entered into between Explosive Ltd and the guards.*

81. *On these facts, the guards are common law employees of PBS Ltd and are not employees of Explosive Ltd, as there is no contract between the guards and Explosive Ltd. Accordingly, PBS Ltd is the employer of the guards and has the responsibility under the SGAA to make superannuation contributions in respect of the guards*.

Example 2 – employment agency label not determinative

82. *NurseCo Ltd, which describes itself as an 'employment agency', carries on a business of recruiting and supplying the services of nurses on a temporary basis to various hospitals. There is:*

- *A contract between NurseCo Ltd and the nurses under which the nurses agree to work as directed by NurseCo Ltd and provide their services to the hospitals.*
- *A contract between NurseCo Ltd and each hospital under which NurseCo Ltd agrees to supply the services of nurses to the hospital.*
- *No contract between the hospitals and the nurses.*

83. *The nurses are interviewed by NurseCo Ltd and, if assessed as suitable, are placed on NurseCo Ltd's books for placement with suitable hospitals, following the execution of the written agreement. On request from a hospital, NurseCo Ltd will assess the particular assignment and send a nurse to attend the hospital. Once a particular assignment with the hospital is finished, NurseCo Ltd will place the nurse with another hospital as needed. NurseCo Ltd remunerates the nurses and invoices the hospital based on the remuneration paid plus commission.*

84. *Under this arrangement, there is no contract between the hospitals and nurses. Since there is no contract between the hospitals and nurses, the nurses are not employees of the hospital.*

85. *The terminology used by NurseCo Ltd to describe its business as an 'employment agency' may give the appearance that NurseCo Ltd is simply acting as an agent for the nurses in procuring them offers of employment with the hospitals.*

86. *However, despite NurseCo Ltd's description of itself as an employment agency, NurseCo Ltd's role in the arrangement is not one of agency in any legal sense. NurseCo Ltd is contractually liable under its employment contract to pay the nurses even if NurseCo Ltd itself does not receive payment from the hospital. In addition, NurseCo Ltd is contractually liable to the hospital if a nurse does not attend work at the hospital or if the nurse fails to perform work to an acceptable standard.*

87. *As there is an employment contract between NurseCo Ltd and the nurses, the nurses are common law employees of NurseCo Ltd under the SGAA. Accordingly, NurseCo Ltd is the employer of the nurses and has the responsibility under the SGAA to make superannuation contributions in respect of the nurses.*

Example 3 – immediate benefit to end-user not determinative

88. *HighTech Resources Ltd (HireTech) is a firm specialising in the supply of the services of engineers to various firms in the engineering sector in New South Wales and Victoria. HighTech enters into a written contract with Big Audio, an engineering firm, to provide engineers to Big Audio for a 6-month to 12-month engineering project being conducted by Big Audio in the Murray-Darling region. Big Audio pays HighTech a fee for the provision of that labour.*

89. *HighTech enters into a contract with Jill, an engineer, under which Jill undertakes to perform the services as directed by HighTech and all other assignments within the scope of the contract that may be given to her Big Audio. Under the contract, Jill must perform the services on the days and locations specified by Big Audio. Jill is provided by Big Audio with the necessary tools and equipment to complete these tasks. Jill cannot delegate her tasks (she must perform the work personally). HighTech makes payments to Jill in accordance with the records of services performed (she must fill in a weekly timesheet recording the hours worked) and PAYG withholding is deducted from the payments.*

90. *In this scenario, Jill is an employee of High Tech. Jill has entered into a written contract which, on an objective assessment, indicates a common law employment relationship. Jill is not an employee of Big Audio as there is no contract between Jill and Big Audio. The fact that Jill is performing work for the immediate benefit of Big Audio and the fact that Big Audio exercises the day-to-day control over Jill will not affect this conclusion. Further, HighTech is liable to pay Jill even if HighTech is not paid by Big Audio. HighTech is also responsible and may incur financial penalties under its agreement with Big Audio if Jill fails to attend work or does not work to an acceptable standard.*

91. *Accordingly, HighTech is the employer of Jill and has the responsibility under the SGAA to make superannuation contributions in respect of Jill.*

Example 4 – control of worker by intermediary

92. *BuilderCo is a firm that carries on a business of providing various tradespeople to builders in the building industry. It has a pool of people on its books covering various categories ranging from project managers to labourers. Before a tradesperson's name is listed on its books, the person is required to enter into a contract with BuilderCo. The contract states that the relationship between BuilderCo and the tradespeople it engages is one of principal and independent contractor. Importantly, the person is paid by the hour and there is no scope under the contract for the tradesperson to delegate his or her work.*

93. *When a builder requires a tradesperson, they will contact BuilderCo and place an order. An employee of BuilderCo completes an order sheet recording the builder's name, the type of trade required, the supervisor to whom the tradesperson should report to at the building site and the duration of work. The employee of BuilderCo then contacts an appropriate tradesperson and advises them of the builder's requirements. If the proposal is acceptable to the tradesperson, that person then attends the building site and performs the necessary work at the direction of the builder. Subsequently, the tradesperson telephones BuilderCo to advise details of hours worked during the previous week. BuilderCo raises an invoice to the builder charging the hours worked by the tradesperson at the agreed hourly rate. BuilderCo then pays the tradesperson, whether or not BuilderCo is paid by the builder.*

94. *In this situation, a tradesperson who performs work for the builder is not an employee of the builder (the end-user) as there is no contract between the parties. A contract will not be inferred between the tradesperson and builder merely because they*

perform the work for the builder at the building site and under the builder's day-to-day direction and control.

95. *Given there is a contract between BuilderCo and the tradesperson, and in light of the legal rights and obligations in that contract, the tradesperson is an employee of BuilderCo for the purposes of the SGAA, under both subsection 12(1) (as a common law employee) and under subsection 12(3) (contract wholly or principally for labour).*

96. *The fact that the tradesperson is labelled an independent contractor in their contract with BuilderCo is not determinative of the nature of the relationship between the parties.*

97. *BuilderCo is the employer of the tradespeople and has the responsibility under the SGAA to make superannuation contributions in respect of the tradespeople.*

Example 5 – intermediary is a mere conduit

98. *Hire Services Ltd is a recruitment agency specialising in the temporary and permanent recruitment and placement of staff in the banking and finance industry. Employers with staffing vacancies contact Hire Services Ltd to fill those vacancies as Hire Services Ltd maintains a database of persons with relevant skills and experience who are seeking employment in this industry.*

99. *Bank Co contracts with Hire Services Ltd to refer prospective employees to fill a vacant position in its finance division. Hire Services Ltd conducts a selection and screening process and puts forward Troy as the most suitably qualified applicant. Bank Co accepts this recommendation and employs Troy under a contract of service (that is, as a common law employee). Bank Co pays a placement fee of $3,000 to Hire Services Ltd for the service provided.*

100. *Troy is the employee of Bank Co for the purposes of the SGAA. There is no contractual relationship between Hire Services Ltd and Troy. Hire Services Ltd merely facilitates the formation of a common law contract of employment between Bank Co and Troy. Accordingly, Bank Co is the employer of Troy and has the responsibility under the SGAA to make superannuation contributions in respect of Troy.*

Commissioner of Taxation
17 June 2026

Appendix 1 – Explanation of updates

101. When finalised, this draft Ruling will replace SGR 2005/2. It retains the existing views in that Ruling.

102. Like SGR 2005/2, this draft Ruling provides the Commissioner's views on how the definitions of 'employer' and 'employee' in the SGAA apply to tripartite working arrangements involving an end-user, an intermediary and a worker. The law in this area has been the subject of significant judicial clarification in recent years.

103. Accordingly, this draft Ruling retains the approaches and views expressed in SGR 2005/2, where appropriate, but aligns the content with TR 2023/4 and relevant High Court and Full Federal Court authority on the meaning of 'employee' and 'employer'. In particular, the draft Ruling clarifies that the employer in tripartite working arrangements is identified by first determining whether a contract for the performance of work exists and between which parties, and then assessing whether an employment relationship arises under the common law or the extended definitions in section 12 of the SGAA.

Appendix 2 – Your comments

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

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

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

Due date: 31 July 2026

Contact officer details have been removed as the comments period has ended.

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References

Previous draft:
SGR 2005/D1

Related rulings and determinations:
SGR 2005/1; SGR 2005/2

Previous rulings and determinations:
SGR 93/2

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- SGAA 1992 12(9A)
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- Occupational Health and Safety Act 1983 (NSW) (repealed)
- Accident Compensation Act 1985 (Vic)
- Workers Rehabilitation and Compensation Act 1986 (SA) (repealed)

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Attorney-General for NSW v Perpetual Trustee Co (Ltd) [1952] HCA 2; 85 CLR 237
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