SGD 2005/2 - Superannuation guarantee: is a contribution to a complying superannuation fund or a retirement savings account for the benefit of an employee made when the employer makes the contribution to a clearing house (other than an approved clearing house)?

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Generated on: 20 November 2026, 03:32:40 AM

Superannuation Guarantee Determination

Superannuation guarantee: is a contribution to a complying superannuation fund or a retirement savings account for the benefit of an employee made when the employer makes the contribution to a clearing house (other than an approved clearing house)?

Preamble

Superannuation Guarantee Determinations do not have the force of law. Each decision made by the Australian Taxation Office is made on the merits of the individual case having regard to any relevant Rulings and Determinations.

*[**Note:** This is a consolidated version of this document. Refer to the ATO Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]*

1. No. A contribution for the benefit of an employee to a superannuation fund or retirement savings account (RSA) that is made through the use of a clearing house, other than an approved clearing house,[1] is made when the contribution is received by the trustee of the complying superannuation fund or the RSA. A failure by the clearing house to forward the contributions to the fund[2] by the required date for the quarter under the *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992) will result in a failure by the employer to make that contribution by the required date.

1A. This Determination does **not** apply to contributions made to an 'approved clearing house'. Section 23B of the SGAA 1992 applies to such contributions made on or after 1 July 2010. A different outcome to that described in this Determination arises if the requirements of section 23B of the SGAA 1992 are met. References to 'clearing house' in this Determination do not therefore include 'an approved clearing house'.

1B. An 'approved clearing house' is a body specified under regulation 7AE of the *Superannuation Guarantee (Administration) Regulations 1993* for the purposes of subsection 79A(3) of the SGAA 1992. Regulation 7AE includes the Australian Taxation Office as an approved clearing house for the purposes of subsection 79A(3) of the SGAA 1992.

[1] See paragraphs 1A and 1B of this Determination.
[2] Any reference to fund in this Determination is a reference to a complying superannuation fund or RSA.

2. Subsection 23(6) of the SGAA 1992 allows contributions made within the period of 28 days after the end of a quarter to reduce an employer's liability to the superannuation guarantee charge. However that subsection requires the contributions to be made to a fund for the benefit of an employee. A payment by an employer to a clearing house is not a contribution made to a fund for the benefit of an employee.

3. It makes no difference if the clearing house is operated by a superannuation fund. The contribution is still made to the fund when the trustee of the fund receives the contribution. A regulated superannuation fund is only able to accept contributions in accordance with Part 7 of the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations 1994). Under Part 7 of the SIS Regulations 1994, a superannuation fund is only able to accept contributions that are made in respect of a member of the fund.

4. A clearing house is a service provided by an organisation, (which may be offered by a superannuation fund) that accepts payments from an employer and distributes contributions to the particular funds chosen by the employees on behalf of the employer. The employer makes payments to the clearing house (in some cases through a direct debit authority) and the clearing house then distributes the contributions to the employees' chosen funds on the employer's behalf. The employer generally pays the clearing house a fee to use the service. Where a clearing house deducts the administration fee from the payment and sends the reduced balance to the fund, only the remaining balance sent to the fund will reduce the employer's liability to the superannuation guarantee charge.

5. A clearing house may also include a direct debit facility with a financial institution. In this situation the financial institution, using their direct credit facility, moves the money from an employer's account to a financial institution account and then onto the employee's chosen fund.

6. It is unlikely that trustees of superannuation funds will operate a clearing house. The *Superannuation Industry (Supervision) Act 1993* (SISA 1993) and general trust law require that the fund monies be used for the benefit of fund members and not for the benefit of employer sponsors or other persons who are not members of the fund. Under the SISA 1993, a trustee must ensure that the fund meets the sole purpose test (outlined in section 62 of the SISA 1993) and follow the covenants outlined in subsection 52(2) of the SISA 1993.

7. The service provided by the clearing house for employers is documented under a contract between the clearing house and employer. In some cases there is an agency relationship between the employer and the clearing house. For commercial law purposes, an agent is a person who is authorised, either expressly or impliedly, by a principal to act for that principal so as to create or effect legal relations between the principal and third parties (*International Harvester Company of Australia Proprietary Limited v. Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644). Where an employer (the principal) has authorised a clearing house (the agent) to act on the employer's behalf, and the clearing house is acting within the authority conferred on it by the employer, any act done on behalf of the employer by the clearing house is an act of the employer. In some cases the relationship between the employer and clearing house is purely contractual, rather than of agency. However, even in such cases the employer has made a contribution for the benefit of an employee when the contribution is received by the trustee of the fund.

8. Typically, the contract between an employer and a clearing house will set out the terms and conditions of the agreement between the clearing house and the employer. Included within these terms may be service standards including details on the maximum amount of time it takes for a clearing house to process payments it receives from employers and forward contributions to employees' chosen funds. Often these time periods are dependent on the form of the payment made by an employer. For example, it may take a clearing house more time to clear payments made by cheque than direct debit or direct credit authority. An employer should ensure they allow sufficient time for a clearing house to process their payments to meet the quarterly superannuation guarantee due date. Note however if the clearing house does not forward the contributions by the superannuation guarantee due date the employer will be liable to the superannuation guarantee charge. This will be the case even when the clearing house receives payment from the employers within sufficient time to process the payments and transfer the contributions to the employee's chosen fund by the quarterly superannuation guarantee due date.

9. Some clearing houses will indemnify employers for any loss incurred where they are in breach of their service standards and the employer is not at fault. For example, some clearing houses reimburse employers for any costs (such as an employer's liability to the superannuation guarantee charge) where the employer has made a payment within the required time period (allowing for the clearing house processing time) and provided all the information necessary for the clearing house to distribute the contributions to the employee's chosen fund.

10. In most cases if an employer provides all the relevant information necessary for the clearing house to distribute contributions to the employees' chosen funds and makes a payment to the clearing house at least 28 days before the superannuation guarantee due date, the clearing house will have sufficient time to distribute the contributions to the chosen funds. However employers should confirm the agreed turnaround times with their clearing house.

11. If a clearing house forwards the contribution on to a superannuation fund by way of a cheque, Taxation Ruling TR 2010/1 provides information on when the contribution is taken to have been made.

12. This Determination does not address a situation of an agency relationship between a clearing house and a superannuation fund as the Commissioner does not believe such a relationship is likely to occur in practice.

Example 1

13. *Peter pays clearing house PBS Pty Ltd $9,800 by direct debit on 27 April to cover contributions for the 1 January to 31 March quarter for his employees. PBS Pty Ltd forwards the contributions on behalf of Peter to each of the employee's respective superannuation funds on 29 April. As the contributions have not been received by the trustees of the superannuation funds by 28 April, Peter is liable for the superannuation guarantee charge. Peter's superannuation guarantee charge consists of each of the employee's individual superannuation guarantee shortfall amounts, a nominal interest component and an administration component.*

Example 2

14. *Mitchell Accounts pays a clearing house operated by Handy Superannuation Fund $5,000 by cheque on 26 October to cover the July to September quarter. Contributions of $3,000, made by Mitchell Accounts are in respect of employees who are members of Handy Superannuation Fund. Contributions of $2,000 need to be paid to different superannuation funds (the employees' chosen superannuation funds).On 31 October the clearing house forwards all of the contributions to the trustee of the relevant superannuation fund, including the trustee of Handy Superannuation Fund. Mitchell Accounts has not met the 28 October deadline and has a superannuation guarantee shortfall of $5,000 as the contribution was not made until 31 October. Mitchell Accounts' superannuation guarantee liability would consist of the shortfall amount of $5,000, nominal interest on that shortfall amount and Mitchell Accounts' administration component.*

Example 3

15. *Mathew pays clearing house Haine Pty Ltd $59,800 by direct debit authority on 24 April to cover contributions for the January to March quarter for his 10 employees. Haine Pty Ltd charges an administration fee of $5.50 per quarter plus a fee of $1.10 for each employee whose contributions are transferred to a superannuation fund. Haine Pty Ltd subtracts $16.50 from Mathew's payment and then forwards the balance on behalf of Mathew to each employee's respective superannuation fund as contributions. It is only the remaining balance of $59,783.50 that is sent to the employees' superannuation funds that will reduce Mathew's liability to pay the superannuation guarantee charge. Mathew needs to ensure that he pays Haine Pty Ltd the minimum required superannuation contributions for his employees as well as the full amount of the clearing house's administration fees to avoid liability to the superannuation guarantee charge. The minimum amount of superannuation support Mathew was required to provide for his 10 employees for the quarter starting 1 January was $59,800. Mathew has a superannuation guarantee shortfall which is calculated with reference to the total salary and wages paid by him to his employees. Assuming this amount is the same as his earnings base, Mathew's superannuation guarantee liability would consist of the shortfall amount of $16.50, nominal interest on that shortfall amount and Mathew's administration component.*

Example 4

16. *Narain Enterprises engages DW clearing house to distribute contributions to its employees' chosen fund. The agreement between Narain Enterprise and DW clearing house provides that if the clearing house receives all the required information as well as payment by direct credit or direct debit authority they will distribute contributions to the employees' chosen funds within 10 business days of receipt of the payment from the employer. If payment is made by cheque, the distributions will occur within 15 business days of receipt of the cheque from the employer. Narain Enterprises makes payments to DW clearing house by cheque. In order to meet their superannuation guarantee obligations, Narain Enterprises must ensure that the cheque and information needed by DW clearing house to distribute contributions is received by DW clearing house at least 15 business days* ***before*** *the superannuation guarantee due date. However if DW clearing house does not forward the contributions to the employees' chosen fund by the superannuation guarantee due date, Narain Enterprises will have a superannuation guarantee charge liability.*

Date of Effect

17. This Determination applies both before and after its date of issue. However, the Determination does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Determination.

Commissioner of Taxation
16 November 2005

Previous draft:

SGD 2005/D1

Related Rulings/Determinations:

TR 2010/1

Subject references:

- approved clearing house
- clearing house
- contribution
- superannuation guarantee
- timing of payments

Legislative references:

- SGAA 1992 23(6)
- SGAA 1992 23B
- SGAA 1992 79A(3)
- SISA 1993 52(2)
- SISA 1993 62
- SGA Regulations 1993 7AE
- SIS Regulations 1994 Pt 7

Case references:

- International Harvester Company of Australia Proprietary Limited v. Carrigan's Hazeldene Pastoral Company (1958) 100 CLR 644

ATO references

NO:	2005/10288
ISSN:	1038-745
ATOlaw topic:	Superannuation Guarantee Charge