SGR 2005/1 - Superannuation guarantee: who is an employee?

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This Ruling is being reviewed in light of the decisions of the High Court in Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 and ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2.

Superannuation Guarantee Ruling

Superannuation guarantee: who is an employee?

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Preamble

Superannuation Guarantee Rulings (SGRs) 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.

What this Ruling is about

1. This Ruling explains when an individual is considered to be an 'employee' under section 12 of the *Superannuation Guarantee (Administration) Act 1992* (SGAA). The expressions 'employee' and 'employer' in the SGAA have both their ordinary meaning and an extended meaning.

2. The Ruling discusses the various indicators the courts have considered in establishing whether a person engaged by another individual or entity is an employee within the common law meaning of the term.

3. The Ruling clarifies which persons are employees under the extended definition and also considers the circumstances in which an individual who may otherwise be an employee is specifically exempted from the scope of the SGAA.[1]

4. It also provides the Australian Taxation Office (ATO) view on the implications of the alienation of personal services income (PSI) measures contained in Part 2-42 of the *Income Tax Assessment Act 1997* (ITAA 1997) for deciding whether an individual is an employee within the meaning of the SGAA. The Ruling further considers whether an individual who holds an Australian Business Number (ABN) can be an employee for the purposes of the SGAA. The Ruling also discusses arrangements or relationships that do not give rise to an employer/employee relationship.

5. Unless otherwise stated, all legislative references in this Ruling are to the SGAA.

[1] This explanation does not extend to a discussion of the application of sections 27, 28 and 29 of the SGAA. These sections exclude salary or wages paid to certain employees in certain circumstances for the purposes of calculating the superannuation guarantee charge.

Date of effect

6. This Ruling applies from 23 February 2005, the date of its issue.

Previous Rulings

7. The issues dealt with in this Ruling were previously addressed in Superannuation Guarantee Ruling SGR 93/1 which was withdrawn on 25 August 2004.

Ruling

8. Under subsection 12(1) of the SGAA, if a person is an employee at common law, that person is an employee under the SGAA.[2]

9. Whether a person is an employee of another is a question of fact to be determined by examining the terms and circumstances of the contract having regard to the key indicators expressed in the relevant case law. Defining the contractual relationship is often a process of examining a number of factors and evaluating those factors within the context of the relationship between the parties. No one indicator of itself is determinative of that relationship. The totality of the relationship between the parties must be considered.

10. 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. While the definition includes persons who at common law would be regarded as employees, it also extends to:

- a person who is entitled to payment for the performance of duties as a member of the executive body of a body corporate (subsection 12(2));
- a person who works under a contract that is wholly or principally for the labour of the person (subsection 12(3)) (see paragraph 11);
- members of the Commonwealth and State Parliament, members of the ACT Legislative Assembly and members of the NT Legislative Assembly (subsections 12(4) to (7));
- a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills (paragraph 12(8)(a));

[2] This principle is subject to the minor exceptions in subsections 12(9A) and (11) of the SGAA.

- a person who is paid to provide services in connection with any activity referred to in paragraph 12(8)(a);
- a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast (paragraph 12(8)(c));
- a person who holds, or performs the duties of, an appointment, office or position under the Constitution or under the law of the Commonwealth, State or Territory (paragraph 12(9)(a));
- a person who is otherwise in the service of the Commonwealth, of a State or of a Territory, including service as a member of the Defence Force or as a member of the police force (paragraph 12(9)(b)); and
- a person who is a member of an eligible local governing body (subsection 12(10)).

11. For the purposes of subsection 12(3), where the terms of the contract in light of the subsequent conduct of the parties indicate that:

- the individual is remunerated (either wholly or principally) for their personal labour and skills;
- the individual must perform the contractual work personally (there is no right of delegation); and
- the individual is not paid to achieve a result,

the contract is considered to be wholly or principally for the labour of the individual engaged and he or she will be an employee under that subsection.

12. Subsection 12(11) of the SGAA provides that a person who is paid to do work wholly or principally of a domestic or private nature for not more than 30 hours per week is not an employee in relation to that work. A person who is paid to do work of this nature for more than 30 hours per week may or may not be an employee depending on whether they fall within the other provisions of section 12.

13. Where an individual performs work for another party through an entity such as a company or trust, there is no employer-employee relationship between the individual and the other party for the purposes of the SGAA, either at common law or under the extended definition of employee. This is because the company or trust (not the individual) has entered into an agreement rather than the individual. However, the individual may be the employee of the intermediary company or trust, depending on the terms of the arrangement.

14. If a partnership has contracted to provide services, then the person who actually does the work is not the employee of the other party to the contract. This is so even if the worker is a partner and even if the contract requires the partner to do the work. However, if partners contract outside the partnership in their own personal capacity to provide their labour to fulfil a contractual obligation, they can be employees of the other party to the contract.

15. A partner in a partnership is not an employee of the partnership.

16. A person who holds an ABN may still be an employee for the purposes of the SGAA.

17. The question of whether or not a person is an employee for SGAA purposes is not determined by reference to whether the person is a full-time, part time or casual worker.

18. The operation of the PSI measures in Part 2-42 of the ITAA 1997 is not determinative of whether an individual is an employee within the meaning of section 12 of the SGAA.

19. An arrangement between parties that is structured in a way that does not give rise to a payment for services rendered but rather a payment for something entirely different, such as a lease or a bailment, does not give rise to an employer/employee relationship for the purposes of the SGAA.

Explanation

20. Under the SGAA, employers are required to make superannuation contributions into a complying superannuation fund or Retirement Savings Account for the benefit of their eligible employees in accordance with minimum prescribed levels. If an employer does not make the required superannuation contributions, they will be subject to the superannuation guarantee charge (SGC). If an individual is not an employee as defined in the SGAA or is an employee but is otherwise exempted from the application of the SGAA by a specific provision, no liability for the SGC will arise.

21. The SGAA defines ‘employee’ in section 12. The definition is both a clarifying and extending provision. Subsection 12(1) defines the term ‘employee’ as having its ordinary meaning – that is, its meaning under common law. If a worker is held to be an employee at common law, then they will be an employee under the SGAA (unless one of the limited exceptions in subsections 12(9A) and (11) applies).

22. Apart from stating that ‘employee’ has its ordinary meaning, the SGAA does not list the indicators that may be considered in determining whether a worker is an employee at common law. In most cases, it will be self-evident whether an employer/employee or a principal/independent contractor relationship exists. However, it is sometimes difficult to discern the true character of the relationship from the facts of the case as the intentions of the parties may be unclear or ambiguous, such as where the terms of the contract are

disputed by the parties or are otherwise in apparent conflict. Because of these difficulties, the ordinary meaning of employee has been the subject of a significant amount of judicial consideration. These cases have discussed a number of indicators that may be applied in determining whether an individual is a common law employee.

23. If it is considered that the relationship at common law is one of principal and independent contractor or the determination of the status of the worker is unclear, the extended definition of 'employee' in the SGAA must be considered. The SGAA also has two provisions which exclude certain workers from being employees for SGAA purposes, even if they otherwise would be employees.

Who is an employee within the ordinary meaning of that term?

Background

24. The relationship between an employer and employee is a contractual one. It is often referred to as a *contract of service*. Such a relationship is typically contrasted with the principal/independent contractor relationship that is referred to as a *contract for services*. An independent contractor typically contracts to achieve a result whereas an employee contracts to provide their labour (typically to enable the employer to achieve a result).

25. The Courts have considered the common law contractual relationship between parties in a variety of legislative contexts, including income tax, industrial relations, payroll tax, vicarious liability, workers compensation and superannuation guarantee. As a result, a substantial and well-established body of case law has developed on the issue. There are often many relevant facts and circumstances, some pointing to a contract of service, others pointing to a contract for services.[3] Whatever the facts of each particular case may be, there is no single feature which is determinative of the contractual relationship; the totality of the relationship between the parties must be considered to determine whether, on balance, the worker is an employee or independent contractor.[4]

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[3] *Commissioner of Payroll Tax (Vic) v. Mary Kay Cosmetics Pty Ltd* 82 ATC 4444; 13 ATR 360, per Gray J.

[4] *Stevens v. Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16; (1986) 63 ALR 513 (*Stevens v. Brodribb*) at CLR 29; ALR 521, per Mason J. The principle that the 'totality of the relationship between the parties' be considered to determine the nature of the contract at common law was adopted with approval by the majority of the High Court in *Hollis v. Vabu* (2001) 207 CLR 21; 2001 ATC 4508; (2001) 47 ATR 559 (*Hollis v. Vabu*).

26. Consideration should be given to the various indicators identified in judicial decisions which have considered the employee/independent contractor distinction bearing in mind that no list of factors is to be regarded as exhaustive and the weight to be given to particular facts will vary according to the circumstances.[5] Where a consideration of the indicia points one way so as to yield a clear result, the determination should be in accordance with that result.[6]

Terms and the circumstances of the formation of the contract

27. The fundamental task is to determine the nature of the contract between the parties. The terms and conditions of the contract, whether express or implied, in light of the circumstances surrounding the making of the contract, will always be of considerable importance to the proper characterisation of the relationship between the parties.[7]

28. Contractual arrangements often contain a clause that purports to characterise the relationship between the parties as that of principal and independent contractor and not that of employer and employee. Such a clause cannot receive effect according to its terms if it contradicts the effect of the agreement as a whole[8] – that is, the parties cannot deem the relationship between themselves to be something that is not.[9] The parties to an agreement cannot alter the true substance of the relationship by simply giving it a different label.[10] If the underlying reality of a relationship is one of employment, the parties cannot alter that fact by merely having the contract state (or have the worker acknowledge) that the worker's status is that of an independent contractor.[11]

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[5] *Abdalla v. Viewdaze Pty Ltd t/as Malta Travel* (2003) 53 ATR 30 (*Abdalla v. Viewdaze*). The Full Bench of the Industrial Relations Commission provided a summary of the state of the law governing the determination of whether an individual is an employee or independent contractor following *Hollis v. Vabu*.
[6] Ibid.
[7] See *Stevens v. Brodribb* (1986) 160 CLR 16 at 37, per Wilson and Dawson JJ.
[8] *Australian Mutual Provident Society v. Chaplin and Anor* (1978) 18 ALR 385 at 389.
[9] *Hollis v. Vabu* (2001) 207 CLR 21 at 45.
[10] *Massey v. Crown Life Insurance Co* [1978] 1 WLR 676; [1978] 2 All ER 576.
[11] In *Commissioner of State Taxation v. The Roy Morgan Research Centre Pty Ltd* [2004] SASC 288, the Full Court of the Supreme Court of South Australia considered whether interviewers engaged by Roy Morgan were employees or independent contractors in the context of pay-roll tax. A clause in the contract between the parties stipulated that the interviewers were independent contractors. In arriving at the decision that the interviewers were employees, the Court held that such a clause should not be regarded as confirmation of the status of the interviewers as independent contractors.

29. As Gray J stated in *Re Porter: re Transport Workers Union of Australia*:[12]

> Although the parties are free, as a matter of law, to choose the nature of the contract which they will make between themselves, their own characterisation of that contract will not be conclusive. A court will always look at all of the terms of the contract, to determine its true essence, and will not be bound by the express choice of the parties as to the label to be attached to it. As Mr Black put it in the present case, the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck.

However, such a clause may be used to overcome any ambiguity as to the true nature of the relationship.[13]

30. For example, an employer may seek to change the status of an employee to that of independent contractor by both parties signing a contract of engagement that includes a clause to the effect that the worker is an independent contractor rather than an employee. That clause is ineffective if it is inconsistent with the apparent true nature of the relationship inferred from the contract as a whole. If the terms of the subsisting relationship are not changed, it is likely that the worker's status would remain that of an employee.

31. The circumstances surrounding the formation of the contract may assist in determining the true character of the contract.[14] Thus, if a contract comes into existence because the contractor advertises their services to the public in the ordinary course of carrying on a business or as a result of a successful tender application, the existence of a principal/independent contractor relationship is more likely. Conversely, if the contract is formed in response to a job vacancy advertisement or through the services of a placement agency, the existence of an employer/employee relationship is more likely.[15]

Key indicators of whether an individual is an employee or independent contractor

32. The features discussed below have been regarded by the Courts as key indicators of whether an individual is an employee or independent contractor at common law.

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[12] (1989) 34 IR 179 at 184.

[13] *Australian Mutual Provident Society v. Chaplin and Anor* (1978) 18 ALR 385 at 389-390.

[14] For example, *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 997 per Lord Wilberforce; and *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales* (1982) 149 CLR 337 at 347-352; (1982) 41 ALR 367 at 371-375; (1982) 56 ALJR 459 at 461-463 per Mason J.

[15] *Roy Morgan Research Centre Pty Ltd v. Commissioner of State Revenue (Vic)* 96 ATC 4767 at 4772-4773; (1996) 33 ATR 361 at 366-367 per Byrne J. This decision was affirmed by the Court of Appeal (97 ATC 5070; (1997) 37 ATR 528) and an application for special leave to the High Court was refused.

Control

33. The classic 'test' for determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter.[16] A common law employee is told not only what work is to be done, but how and where it is to be done. With the increasing usage of skilled labour and consequential reduction in supervisory functions, the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it.[17] As stated by Dixon J in *Humberstone v. Northern Timber Mills*:[18]

> 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 over the man in the performance of his work resided in the employer so that he was subject to the latter's orders and directions.

34. Likewise, the High Court in *Zuijs v. Wirth Brothers Proprietary Ltd* (Zuijs)[19] described the significance of control in the following way in the context of skilled employment where the nature of the work performed left little scope for detailed control:

> What matters is lawful authority to command as far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters.

35. The mere fact that a contract may specify in detail how the contracted services are to be performed does not necessarily imply an employment relationship. In fact, a high degree of direction and control is not uncommon in contracts for services.[20] The payer has a right to specify how the contracted services are to be performed, but such control must be expressed in the terms of the contract; otherwise the contractor is free to exercise their discretion (subject to any terms implied by law). This is because the contractor is working for themselves.

36. While control is important, it is not the sole indicator of whether or not a relationship is one of employment.[21] The approach of the Courts has been to regard it as one of a number of indicia which must be considered in determination of that question.

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[16] *Stevens v. Brodribb* (1986) 160 CLR 16 at 24, per Mason J and CLR 35, per Wilson and Dawson JJ.

[17] *Stevens v. Brodribb* (1986) 160 CLR 16 at 24, per Mason J and CLR 36, per Wilson and Dawson JJ. In *Stevens v. Brodribb*, the High Court was adjusting the notion of 'control' to modern industrial conditions and, in doing so, continued the developments in *Zuijs* (1955) 93 CLR 561 and *Humberstone v. Northern Timber Mills* (1949) 79 CLR 389. The control test as articulated in *Stevens v. Brodribb* was cited and adopted with approval by the majority of the High Court in *Hollis v. Vabu*.

[18] (1949) 79 CLR 389 at 404.

[19] (1955) 93 CLR 561 at 571.

[20] See *Queensland Stations Pty Ltd v. FC of T* (1945) 70 CLR 539; (1945) 19 ALJ 253; (1945) 8 ATD 30; [1945] ALR 273 (*Queensland Stations*).

[21] For example, *Stevens v. Brodribb* (1986) 160 CLR 16 at 24, per Mason J.

37. However, even though the modern approach to defining the contractual relationship is to have regard to the totality of the relationship between the parties, control is still the most important factor to be considered. This was recognised by Wilson and Dawson JJ in *Stevens v. Brodribb* ((1986) 160 CLR 16 at 36), where they state:

> In many, if not most cases, it is still appropriate to apply the control test in the first instance because it remains the surest guide to whether a person is contracting independently or serving as an employee.

38. In *Hollis v. Vabu*, the fact that the couriers engaged by Vabu had little control over the manner of performing their work (the corollary being that Vabu had considerable scope for the actual exercise of control over the performance of the couriers activities) was an important factor leading to the conclusion that the bicycle courier in question was a common law employee of Vabu. Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ observed that:

> Vabu's whole business consisted of the delivery of documents and parcels by means of couriers. Vabu retained control of the allocation and direction of the various deliveries…Their work was allocated by Vabu's fleet controller. They were to deliver goods in the manner in which Vabu directed. In this way, Vabu's business involved the marshalling and direction of the labour of the couriers, whose efforts comprised the very essence of the public manifestation of Vabu's business.[22]

Does the worker operate on his or her own account or in the business of the payer?

39. In *Hollis v. Vabu*, the majority of the High Court quoted the following statement by Windeyer J in *Marshall v. Whittaker's Building Supply Co*:[23]

> … the distinction between an employee and independent contractor is 'rooted fundamentally in the difference between a person who serves his employer in his, the employer's business, and a person who carries on a trade or business of his own.'[24]

This distinction is also referred to as the integration or organisation test.[25]

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[22] *Hollis v. Vabu* (2001) 207 CLR 21 at 44-45.
[23] (1963) 109 CLR 210.
[24] *Hollis v. Vabu* (2001) 207 CLR 21 at 39, per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.
[25] The notion of an 'integration' test arose in *Montreal v. Montreal Locomotive Works* 20 [1947] 1 DLR 161 at 169 and was affirmed by Lord Denning in *Stevenson Jordan and Harrison Ltd v. MacDonald and Evans* [1952] 1 TLR 101 at 111 and reaffirmed in *Bank Voor Handel En Scheepvaart NV v. Slatford* [1953] 1 QB 248 at 295.

40. In *Hollis v. Vabu*, the High Court considered this distinction when determining whether a bicycle courier was a common law employee of Vabu. The majority found that the bicycle courier was an employee and stated:

> Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations.[26]

41. While the majority did, in reaching its decision, consider lawful authority to command (that is control) and other relevant aspects of the relationship between the parties, it at the same time was concerned with the fundamental question of whether the worker was operating their own business or was operating within Vabu's business. Therefore, whenever applying the indicators of employment listed in this ruling it is also necessary to keep in mind the distinction between a worker operating on his or her own account and a worker operating in the business of the payer.

'Results' contracts

42. Where the substance of a contract is to achieve a specified result, there is a strong (but not conclusive) indication that the contract is one for services. In *World Book (Australia) Pty Ltd v. FC of T*[27] Sheller JA said:

> Undertaking the production of a given result has been considered to be a mark, if not the mark, of an independent contractor...[28]

43. The phrase 'the production of a given result' means the performance of a service by one party for another where the first-mentioned party is free to employ their own means (such as third party labour, plant and equipment) to achieve the contractually specified outcome. Satisfactory completion of the specified services is the 'result' for which the parties have bargained. The consideration is often a fixed sum on completion of the particular job as opposed to an amount paid by reference to hours worked. If remuneration is payable when, and only when, the contractual conditions have been fulfilled, the remuneration is usually made for producing a given result.[29]

44. In contracts to produce a result, payment is often made for a negotiated contract price, as opposed to an hourly rate. For example, in *Stevens v. Brodribb*, payment was determined by reference to the volume of timber delivered, and in *Queensland Stations* where it was a fixed sum per head of cattle delivered.

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[26] *Hollis v. Vabu* (2001) 207 CLR 21 at 41.
[27] 92 ATC 4327; (1992) 23 ATR 412.
[28] *World Book (Australia) Pty Ltd v. FC of T* 92 ATC 4327 at 4334. Sheller JA referred to the High Court decision in *Queensland Stations* as authority for that proposition. He also used the facts of that case as an example of a contract to produce a result. Note that, given the emphasis that the courts have placed on the control test (discussed above), the production of a given result is probably not *the* mark of an independent contractor but merely *a* mark.
[29] *Neale (Deputy Commissioner of Taxation) v. Atlas Products (Vic) Proprietary Limited* (1955) 94 CLR 419 at 424-425.

45. Having regard to the true essence of the contract, the manner in which payment is structured will not of itself exclude genuine result based contracts. For example, there are results based contracts where the contract price is based on an estimate of the time and labour cost that is necessary to complete the task, or may even be calculated on that basis, subject to reasonable completion times.

46. While the notion of 'payment for a result' is expected in a contract for services, it is not necessarily inconsistent with a contract of service. The High Court in *FC of T v. Barrett & Ors*[30] found that land salesmen, who were engaged by a firm of land agents to find purchasers for land entrusted to the firm for sale and who were remunerated by commission only were employees and not independent contractors. Likewise, the High Court in *Hollis v. Vabu*[31] considered that payment to the bicycle couriers per delivery, rather than per time period engaged, was a natural means to remunerate employees whose sole purpose is to perform deliveries. Further, the Full Court of the Supreme Court of South Australia in *Commissioner of State Taxation v. The Roy Morgan Research Centre Pty Ltd*[32] found that interviewers who were only paid on the completion of each assignment, not on an hourly basis, were employees and not independent contractors.

47. Accordingly, the contractual relationship as a whole must still be considered to determine the true character of the relationship between the parties.

Whether the work can be delegated or subcontracted

48. The power to delegate or subcontract (in the sense of the capacity to engage others to do the work) is a significant factor in deciding whether a worker is an employee or independent contractor.[33] If a person is contractually required to personally perform the work, this is an indication that the person is an employee.

[30] 73 ATC 4147 at 4153.
[31] (2001) 207 CLR at 44.
[32] [2004] SASC 288.
[33] *Stevens v. Brodribb* at (1986) 160 CLR 16 at 26, per Mason J.

49. If an individual has unlimited power to delegate the work to others (with or without the approval or consent of the principal), this is a strong indication that the person is being engaged as an independent contractor.[34] Under a contract for services, the emphasis is on the performance of the agreed services (achievement of the 'result'). Unless the contract expressly requires the service provider to personally perform the contracted services, the contractor is free to arrange for his or her employees to perform all or some of the work or may subcontract all or some of the work to another service provider. In these circumstances, the contractor is the party responsible for remunerating the replacement worker.[35]

50. A common law employee may frequently 'delegate' tasks to other employees, particularly where the employee is performing a supervisory or managerial role. However, this 'delegation' exercised by an employee is fundamentally different to the delegation exercised by a contractor outlined above. When an employee asks a colleague to take an additional shift or responsibility, the employee is not responsible for paying that replacement worker, rather the workers have merely organised a substitution or shared the work load. This is not delegation consistent with that exercised by a contractor.

Risk

51. Where the worker bears little or no risk of the costs arising out of injury or defect in carrying out their work, they are more likely to be an employee.[36] On the other hand, an independent contractor bears the commercial risk and responsibility for any poor workmanship or injury sustained in the performance of work. An independent contractor often carries their own insurance and indemnity policies.

Provision of tools and equipment and payment of business expenses

52. It has been held that the provision of assets, equipment and tools by an individual and the incurring of expenses and other overheads is an indicator that the individual is an independent contractor.[37]

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[34] *Australian Mutual Provident Society v. Chaplin and Anor* (1978) 18 ALR 385 at 391. In cases such as *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 1 All ER 433, *Bowerman v. Sinclair Halvorsen Pty Ltd* [1999] NSWIRComm 21 and *Express & Echo Publications Ltd v. Tanton* [1999] ICR 693, it was held that a power of delegation is inconsistent with a contract of service even if the principal has the right to approve or qualify any replacement worker.

[35] In *McFarlane v. Glasgow City Council* [2001] IRLR 7, it was held that gymnastic instructors engaged by the council were employees of the council, notwithstanding the fact that the instructors were obliged to find replacements when they were unable to take a class. One of the factors leading to this conclusion was that the replacements were paid directly by the council rather than by the instructors.

[36] In *Hollis v. Vabu*, Vabu undertook the provision of insurance for the couriers and deducted the amounts from their payments to the couriers.

[37] See, for example, *Stevens v. Brodribb* and *Vabu Pty Ltd* v. *FC of T* 96 ATC 4898; (1996) 33 ATR 537 (*Vabu Pty Ltd v. FC of T*).

53. In *Stevens v. Brodribb*, the High Court observed that working on one's own account (as an independent contractor) often involves:

> the provision by him of his own place of work or of his equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion…[38]

54. Similarly, in *Queensland Stations* the droving contractor was required to find and pay for all the men, plant, horses and rations necessary and sufficient for the task. Their own means were employed to accomplish a result.[39]

55. However, the provision of necessary tools and equipment is not necessarily inconsistent with an employment relationship. As highlighted in *Hollis v. Vabu*, the provision and maintenance of tools and equipment and payment of business expenses should be significant for the individual to be considered an independent contractor. The majority of the High Court stated that:

> In classifying the bicycle contractors as independent contractors, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories…A different conclusion might, for example, be appropriate where the investment in capital was more significant, and greater skill and training were required to operate it.[40]

56. There are situations where, having regard to the custom and practice of the work, or the practical circumstances and nature of the work, very little or no tools of trade or plant and equipment are necessary to perform the work. This fact by itself will not lead to the conclusion that the individual engaged is an employee. The weight or emphasis given to this indicator (as with all the other indicators) depends on the particular circumstances and the context and nature of the contractual work. All the other facts must be considered to determine the nature of the contractual relationship.

57. Further, an employee, unlike an independent contractor, is often reimbursed (or receives an allowance) for expenses incurred in the course of employment, including for the use of their own assets such as a car.

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[38] (1986) 160 CLR 16 at 37, per Wilson and Dawson JJ.
[39] Per Rich J at CLR 548.
[40] (2001) 207 CLR 21 at 41 to 42. The High Court was referring to the NSW Court of Appeal taxation decision in *Vabu v. FC of T* where it was held that the couriers engaged by Vabu (including those who provided motor vehicles and motor cycles) were independent contractors. The majority decision in *Hollis v. Vabu* overturned that decision insofar as bicycle couriers were concerned.

Other indicators

58. In addition to the above, other indicators of the nature of the contractual relationship have been variously stated and have been added to from time to time.[41] Those suggesting an employer-employee relationship include the right to suspend or dismiss the person engaged,[42] the right to the exclusive services of the person engaged[43] provision of benefits such as annual, sick and long service leave[44] and the provision of other benefits prescribed under an award for employees.

59. The requirement that a worker wear a company uniform is an indicator of an employment relationship existing between the contracting parties. In *Hollis v. Vabu*, the fact that the couriers were presented to the public and to those using the courier service as emanations of Vabu (the couriers were wearing uniforms bearing Vabu's logo) was an important factor supporting the majority's decision that the bicycle couriers were employees.[45]

60. If it is determined that an individual is an employee within the ordinary or common law meaning of the term, they will be an employee for the purposes of the SGAA (unless one of the exceptions in subsections 12(9A) and (11) applies).

The statutorily expanded definition of employee under subsections 12(2) to (11) of the SGAA

61. Although the term 'employee' has its ordinary meaning in the SGAA, subsections 12(2) to 12(11) list a number of further persons who are also treated as employees. These subsections deem persons who come within these subsections to be employees for the purposes of the SGAA, even if they are not common law employees and are clearly distinguishable from common law employees.

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[41] *Stevens v. Brodribb* (1986) 160 CLR 16 at 36, per Wilson and Dawson JJ.
[42] Ibid.
[43] Ibid.
[44] *Stevens v. Brodribb* (1986) 160 CLR 16 at 24, per Mason J. However, the fact that a contract does not contain provisions for annual and sick leave etc will not, in itself, be an indicator of a principal/independent contractor relationship. This is because in contracts that are structured to suggest a contract for services, leave entitlements are not provided. In *Commissioner of State Taxation v. The Roy Morgan Research Centre* [2004] SASC 288, the interviewers did not receive any paid sick leave or annual leave, or amounts in lieu of those entitlements because it was expressly agreed in writing between Roy Morgan and the interviewers that they were, in relation to the company, independent contractors.
[45] *Hollis v. Vabu* (2001) 207 CLR 21 at 42, per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.

Members of executive bodies of bodies corporate

62. Under subsection 12(2) of the SGAA, a person who is entitled to payment for the performance of duties as a member of the executive body (whether described as the board of directors or otherwise) of a body corporate[46] is, in relation to those duties, an employee of the body corporate.

63. In the majority of circumstances, such a person will be called a 'director'. The SGAA will apply even if the person is not referred to as a director but falls within the terms of subsection 12(2).

Contracts for the labour of the person

64. Subsection 12(3) of the SGAA provides that 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 of the contract. Whenever a contract is formed with an individual to perform work, the first test is always to determine if a contract of service exists and only if the answer to that question is negative, is the 'wholly or principally' for labour issue considered.

65. The words 'wholly or principally' are used to limit or restrict the types of contracts that will be covered by subsection 12(3). To the extent that a contract is partly for labour and partly for something else (for example, the supply of goods, materials or hire of plant or machinery), it will qualify only if it is 'principally' for labour.

66. In the context of subsection 12(3), the word 'principally' assumes its commonly understood meaning, that is, 'chiefly' or 'mainly'.

67. 'Labour' includes mental and artistic effort as well as physical toil.[47]

68. Subsection 12(3) was intended to extend the scope of the SGAA beyond traditional employment relationships to take into account some independent contractors who principally provide their own labour to meet obligations under a contract. The Second Report of the Senate Select Committee on Superannuation, *Superannuation Guarantee Bills*, noted (at page 146) that subsection 12(3) was 'designed to include a person who may not be an employee in the normal sense but who is in fact not very distinguishable from an employee.' However, the operation of subsection 12(3) has, in our view, been restricted by the interpretation which the courts placed on the equivalent expression in paragraph (a) of the definition of 'salary or wages' in subsection 221A(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) ('paragraph (a)').[48]

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[46] 'Body corporate' is a general term to describe an artificial entity having a separate legal existence.
[47] *Deputy Commissioner of Taxation v. Bolwell* (1967) 1 ATR 862 at 873.
[48] *Neale (Deputy Commissioner of Taxation) v. Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419; (1955) 10 ATD 460 (*Neale*); *Case V158* 88 ATC 1030; *World Book (Australia) Pty Ltd v. FC of T* 92 ATC 4327; (1992) 23 ATR 412 (*World Book*) and *Filsell v. Top Notch Fashions Pty Ltd* 94 ATC 4656; (1994) 29 ATR 224.

69. Both subsection 12(3) of the SGAA and paragraph (a) contain the identical phrase '…under a contract that is wholly or principally for the labour of the person…'.

70. In the High Court decision in *Neale*, it was decided that, for a payment to fall within paragraph (a) of the 'salary or wages' definition, it was necessary that the contract require the person to whom the payment was made to perform the work personally and that if the contract left it open for the person to engage someone else to perform it, it was not a payment to which paragraph (a) applied. Rather, it was a contract to produce a given result.

71. An amendment inserting paragraph 221A(2)(b) into the ITAA 1936 was made in 1983 to correct the perceived deficiency in paragraph (a) identified in *Neale*.[49] However, in *World Book*, the NSW Court of Appeal found that paragraph 221A(2)(b) did not entirely succeed in altering the law. *World Book* is not directly relevant to section 12 of the SGAA in any event because section 12 has no equivalent of paragraph 221A(2)(b). However, in discussing the interpretation of the crucial expression 'wholly or principally for the labour of the person', Sheller JA said:

> In my opinion by retaining the description of contract wholly or principally for the labour of a person the legislature has maintained a distinction between a contract for labour and a contract, to use the expression of the High Court in *Neale* at ATD 461; CLR 425 'whereby the contractor has undertaken to produce a given result and [the amount to be paid] becomes payable when, and only when, the contractual conditions have been fulfilled'.
>
> …But a contract which is undertaken by the contractor to produce a given result is not, in my opinion, a contract wholly or principally for the labour of the person for reason that the labour is undertaken not for the principal but for the contracting party himself to produce the result he has contracted to produce.[50]

72. It is clear from *Neale* and *World Book* that a person who has 'a right to delegate work' (whether or not that right is exercised) does not work under a contract wholly or principally for his or her labour and that a contract for labour must be distinguished from 'a contract to produce a given result.'

73. As subsection 12(3) of the SGAA uses the expression 'wholly or principally for labour', the Tax Office considers that the meaning given to the phrase by the authorities cited in the context of paragraph (a) of the definition of 'salary or wages' in subsection 221A(1) of the ITAA 1936 applies to the application of subsection 12(3).

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[49] Paragraph 221A(2)(b) was intended to apply where the person who was paid actually performed, or could reasonably be expected to perform, the whole or principal part of the labour under the contract. That is, a right of delegation that was not, or was not reasonably expected to be, acted upon other than in minor respects would be insufficient to take the contract outside the scope of the expression.

[50] *World Book* 92 ATC 4327 at 4334.

74. Despite the restriction that has been placed on the meaning of the phrase 'wholly or principally for the labour of the person', the *obiter dicta* in the judgments in *Neale* and *World Book* left open the possibility of the application of paragraph (a) (and by extension subsection 12(3) of the SGAA) to independent contractors.

75. In *Neale*, the High Court made the following comment:

> It may be, however, that in cases where an independent contractor is required by the terms of his contract to perform the contractual work himself the addition to the general definition may have some application, but it is unnecessary, in the circumstances of this case, to express any concluded view concerning contracts of such a special class.[51]

76. In *World Book*, Sheller JA in the NSW Court of Appeal concluded:

> It may be that there are contracts for services which are wholly or principally for the labour of a person and which are not undertaken by the contractor to produce a given result. To the rewards of such contracts the definition may apply.[52]

77. The ATO view is that some contracts for services will be wholly or principally for the labour of the individual contracted even though the individual is not a common law employee. Therefore, subsection 12(3) must be considered where there is no common law employment relationship or where there is doubt as to the common law status of the individual.[53]

78. Where the terms of the contract in light of the subsequent conduct of the parties indicates that:

- the individual is remunerated (either wholly or principally) for their personal labour and skills;
- the individual must perform the contractual work personally (there is no right of delegation)[54]; and
- the individual is not paid to achieve a result (paragraphs 43 to 47 discuss when a contract is one to achieve a result),

the contract is considered to be wholly or principally for the labour of the individual engaged and he or she will be an employee under subsection 12(3).

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[51] (1955) 94 CLR 419 at 425.
[52] 92 ATC 4327 at 4334; (1992) 23 ATR 412 at 419-420.
[53] The AAT decision in *Brinkley v. FC of T* 2002 ATC 2053; (2002) 49 ATR 1178 supports the view that subsection 12(3) has application. The question under consideration in this case was whether a fishing boat skipper was an employee of the boat's owner for the purposes of the SGAA. It was held that the skipper was an employee of the owner at common law. If there was any doubt as to whether an employment relationship existed at common law, the AAT considered that subsection 12(3) put the matter beyond doubt by expressly including contracts for labour (although the AAT did not expressly refer to the principles established by *Neale* and *World Book*).
[54] Since many contractors are engaged on the basis of their personal skills, qualifications and experience (in many circumstances after a process of competitive tendering), the contractor will often not have the capacity to delegate the contractual work.

Arrangements involving labour hire firms

79. Further, certain labour hire arrangements as described below whereby labour hire firms supply or provide the services and labour of workers to client organisations are considered by the Tax Office to come within the scope of subsection 12(3).

80. Where a contract of service does not exist, the contract between the labour hire firm and the worker is characterised as one wholly or principally for labour. It is considered that the contract between the labour hire firm and worker is not properly characterised as a contract for a result. In a labour hire arrangement, the contract in substance requires the worker to provide some services for the benefit of a third party. The worker does not undertake to produce a given result; rather, the worker undertakes to perform some work for a client of the labour hire firm.[55] The worker is thus an employee of the labour hire firm under subsection 12(3) of the SGAA. The nature of labour hire arrangements is discussed in greater detail in SGR 93/2.[56]

Members of Commonwealth and State Parliament, members of ACT Legislative Assembly and members of NT Legislative Assembly

81. Members of the Commonwealth House of Representatives and of the Senate, members of State Legislative Assemblies and Legislative Councils and members of the Northern Territory and Australian Capital Territory Legislative Assemblies are not common law employees because they have no identifiable employer.[57] None of the usual indicators of an employer/employee relationship, such as an express or implied contract of employment or an ability to direct activities or exercise control over the employee, apply to members.

82. However, the members in question are specifically incorporated into the definition of employee in the SGAA by virtue of subsections 12(4) to 12(7).

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[55] The view that the contracts in labour hire arrangements are not 'results' contracts is supported by cases including *Construction Industry Training Board v. Labour Force Ltd* [1970] 3 All ER 220; *Building Workers' Industrial Union of Australia and Others v. Odco Pty Ltd* (1991) 29 FCR 104; (1991) 99 ALR 735 and *Drake Personnel Ltd & Ors v. Commissioner of State Revenue (Vic)* 2000 ATC 4500; (2000) 44 ATR 413. In these cases, the workers supplied by the labour hire firm to the end users of labour were paid an agreed rate per hour for the hours worked and there was no evidence, either express or implied, which suggested that the workers could delegate their contractual work.

[56] Superannuation Guarantee Ruling SGR 93/2 Independent agencies: service firms, labour hire firms and employment agencies.

[57] See, for example, *State Chamber of Commerce and Industry & Ors v. The Commonwealth of Australia* (1987) 163 CLR 329; 87 ATC 4745; (1987) 19 ATR 103. See also Taxation Ruling TR 1999/10 Income tax and fringe benefits tax: Members of Parliament – allowances, reimbursements, donations and gifts, benefits, deductions and recoupments, at paragraph 36.

Artists, musicians, sports persons etc

83. Subsection 12(8) of the SGAA defines 'employee' to include:

> (a) a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills is an employee of the person liable to make the payment.

84. One clear limitation on these words is that the active participation of the artist or sportsperson is required. If not, it could not be said that the person is 'paid to perform or present' the activity. A painter, for instance, does not perform or present a painting exhibition. They merely produce the works used in the exhibition. Therefore, even though the products of their work can form part of, for example, a display, individuals who produce paintings or photographic displays do not usually come within the scope of paragraph 12(8)(a).

85. That the word 'similar' is used also shows clearly that 'activity' is limited to things of a like kind. We consider that the activities covered by paragraph 12(8)(a) are those which derive their artistic or sporting content from the performance or presentation because that is the common thread running through the listed activities.

86. The requirement of paragraph 12(8)(a) that the employees it covers must be active participants will, in some cases, be of little significance because the persons defined to be employees are extended further in paragraphs 12(8)(b) and 12(8)(c). These provide:

> (b) a person who is paid to provide services in connection with an activity referred to in paragraph (a) is an employee of the person liable to make the payment; and
>
> (c) a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast is an employee of the person liable to make the payment.

87. These paragraphs are not limited in the way that subsection 12(3) is limited to contracts wholly or principally for a person's labour. However, it is necessary that the particular person is actually paid to provide services rather than for some other purpose. For example, a person engaged to write a script is performing services but one who sells existing scripts is not – they are merely selling property.

88. Paragraphs 12(8)(b) and 12(8)(c) of the SGAA do not require the person to actively participate in a performance, presentation, broadcast or other activity described within paragraph 12(8)(a) to be defined as an employee; rather the paragraphs specify that the person will be an employee if they provide a service in connection with the activity. For example, a technician engaged to control the sound quality for a concert is not an active participant in any performance. Even though the technician is not within paragraph 12(8)(a), they are still an employee because they are paid for services in connection with a musical performance.

A person who holds, or performs the duties of, an appointment, office or position under the Constitution or under a law of the Commonwealth, of a State or of a Territory

89. A person who holds, or performs the duties of, an appointment, office or position under the Constitution or under a law of the Commonwealth, of a State or of a Territory is an employee by virtue of paragraph 12(9)(a) of the SGAA. Similarly, a person who is otherwise in the service of the Commonwealth, a State or a Territory, including service as a member of the Defence Force or as a member of the police force, is an employee of the Commonwealth, State or the Territory, as the case requires: paragraph 12(9)(b).

90. The wording in subsection 12(9) of the SGAA is very similar to the wording contained in paragraphs 12-45(1)(b), (c), and (d) in Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). Taxation Ruling TR 2002/21[58] provides comprehensive guidance on the interpretation of the wording contained in those paragraphs. A similar interpretation applies for the purposes of interpreting subsection 12(9) of the SGAA.

Members of an eligible local governing body

91. Subject to subsection 12(10) of the SGAA, a person who holds office as a member of a local government council is not an employee of the council.

92. Under subsection 12(10), a person who is a member of an 'eligible local governing body' (as that term is defined in section 221A of the ITAA 1936) is an employee for the purposes of the SGAA. An eligible local governing body is a local governing body that made a resolution which, in effect, brought the remuneration of its members into the old PAYE system. The effect of subsection 12(10) is to also bring those members into the superannuation guarantee system.

[58] Taxation Ruling TR 2002/21 Income tax: Pay As You Go (PAYG) Withholding from salary, wages, commissions, bonuses, or allowances paid to office holders.

Work of a domestic or private nature

93. Subsection 12(11) of the SGAA provides that a person who is paid to do work wholly or principally of a domestic or private nature for not more than 30 hours per week is not an employee in relation to that work. A person who is paid to do work of this nature for more than 30 hours per week may or may not be an employee depending on whether they fall within the other provisions of section 12, as discussed above.

94. The terms 'private' and 'domestic' are not defined in the SGAA so it is necessary to refer to the ordinary meaning of the words.

95. The *Macquarie Dictionary* (third edition) defines 'domestic' to mean 'of or relating to the home, the household or household affairs' and 'private' to mean 'belonging to oneself', 'being one's own', 'individual or personal'.

96. In (1955) 5 CTBR (NS) *Case 50* at 332, the Board of Review defined 'private or domestic' expenditure (under subsection 51(1) of the ITAA 1936) as:

> ... losses or outgoings of a private nature we take to mean here losses or outgoings relating solely to the person incurring them ... e.g., travelling expenses incurred by a person to and from his place of employment.... Losses or outgoings of a domestic nature we take to mean here losses or outgoings which relate solely to the house, home or family organisation, of the person incurring them....

97. Although this case was about losses or outgoings of a private nature we think it also illustrates the similar concept of work of a domestic or private nature. In our view, work of a domestic or private nature ordinarily means work relating personally to the individual making payment for the work or to the person's home, household affairs or family organisation.

98. For example, people employed by someone to clean their home, to mind their children, to effect repairs or maintenance of their home, or to tend their home garden would be engaged in domestic or private work. If they worked for that person for not more than 30 hours a week, they would not be that person's employee under the SGAA.

Partnerships

99. A partner in a partnership cannot be an employee of the partnership. It is impossible for a person to meet the common law definition of employee as discussed above and still have the powers and responsibilities of a partner. In particular, the degree of control over an individual required for the individual to be an employee at common law is incompatible with the degree of independence that a partner has in relation to the conduct of the partnership enterprise. It is also impossible in our view for a partner to enter into a contract with the partnership 'wholly or principally for the partner's labour' within the meaning of subsection 12(3).

100. Agreements that allow a partner to draw a 'salary' against the partnership have not been construed as creating employer/employee relationships, but rather as agreements to vary the sharing of partnership profits between the partners.[59]

101. At common law, a partnership (except an incorporated limited partnership),[60] is not a legal entity separate and distinct from its members.[61] The views in paragraphs 99 and 100 are not affected by subsection 72(1) of the SGAA, which deems a partnership to be a separate legal entity for the purposes of the Act.

102. However, an individual other than a partner engaged by the partnership to perform work for the partnership may be an employee of the partnership, depending on the circumstances of the contractual arrangement.

Personal services income measures

103. Part 2-42 of the ITAA 1997 contains the alienation measures that set out the income tax treatment of the ordinary or statutory income of an individual or personal services entity that is an individual's personal services income. Income will constitute personal services income if the income is mainly a reward for an individual's personal efforts or skills.[62] The alienation measures will not apply where the income is derived in the course of conducting a personal services business.[63]

104. It is recognised that there is some overlap between the tests used to determine whether a personal services business exists, particularly between the 'results test'[64] and the common law tests used to distinguish independent contractors and employees. However, section 84-10 of the ITAA 1997 ensures that the application of the alienation measures to an individual does not make the individual an employee for the purposes of the SGAA.[65] Whether or not an individual is subject to the PSI measures is distinct from and separate to the determination of whether that individual is an employee within the meaning of section 12 of the SGAA.

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[59] *Ellis v. Joseph Ellis & Co* [1905] 1 KB 324.
[60] Incorporated limited partnerships are bodies corporate with a separate legal personality from the partners, for example, see section 84 of the *Partnerships Act 1958* (Vic).
[61] *Rose v. Federal Commissioner of Taxation* (1951) 84 CLR 118.
[62] Section 84-5 of the ITAA 1997.
[63] Division 87 of the ITAA 1997.
[64] Which is set out in section 87-18 of the ITAA 1997.
[65] Section 84-10 of the ITAA 1997 states that the application of Part 2-42 to an individual does not imply, for the purposes of any Australian law or any instrument made under an Australian law, that the individual is an employee.

Neither employee nor independent contractor – lease or bailment

105. There are circumstances in which the relationship between a person who engages another to perform work and the person engaged does not give rise to a payment for services rendered or provision of labour but rather a payment for something entirely different, such as a lease or 'bailment'. In these circumstances, a person enters into a lease or bailment for the use of property owned by another person, and the payments are made from the lessee or bailee to the lessor or bailor. Consequently, the lessee or bailee, rather than being a provider of services to the owner of the asset, acquires a right to exploit that asset for their own benefit in return for a 'rental' payment to the owner.

106. A common form of bailment relationship is that of owner and taxi driver. In the taxi industry, some taxi drivers who operate under a bailment arrangement make a payment to the owner allowing them to use the taxi to drive. These payments may take the form of lease payments or a percentage of shift takings. In *FC of T v. De Luxe Red and Yellow Cabs Co-operative (Trading) Society Ltd & Ors*,[66] the Full Federal Court held that a taxi licence owner and taxi drivers were not in a relationship of employer and employee within the meaning of those terms in section 12 of the SGAA. The relationship was rather one of 'bailment', even though the licence owner had a degree of control over the drivers' work.

The interaction of ABN with the SGAA

107. Section 8 of the *Australian Business Number Act 1999* (ABNA) provides in part that an entity is entitled to an ABN if they carry on an enterprise in Australia. Section 38 of the ABNA provides in part that an enterprise includes activities done in the form of a business but does not include activities done by a person as an employee.[67]

108. The fact that an individual has an ABN does not prevent that individual from also being engaged as an employee in another role or position. Someone who carries on a business or trade in their own right other than as an employee might also at certain times perform work for another as an employee.[68]

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[66] 98 ATC 4466; (1998) 82 FCR 507; (1998) 38 ATR 609.

[67] This is subject to certain exceptions stated in paragraph 38(2)(a) of the ABNA.

[68] As noted by the Industrial Relations Commission in Application for Registration by an Association of Employees, ACT Visiting Medical Officers Association D2001/9 7 May 2004:

> A party to an employment relationship may well, contemporaneously, carry on a trade or business in her or his own right for purposes other than in respect of the employment relationship…A tradesperson such as a carpenter or cabinetmaker may be carrying on a business as such in her or his own right and in her or his own name. As an independent contractor, such a person may provide her or his services to a variety of others as and when required. The same person, in the pursuit of her or his trade, might also for varying periods of time perform work for another as an employee. The fact that such a person carries on some work as

109. An IT consultant may have an ABN because the activities he undertakes as a mechanic in sole practice amount to an enterprise. He may also be an employee because he is employed on weekends by the local hotel as a barman. In the common law context, each contract entered into by an individual must be examined to determine whether, on balance, the individual is engaged as an employee or independent contractor.

110. Moreover, an individual with an ABN may undertake a contractual engagement which is a contract for services and still be an employee for SGAA purposes. This is because, as discussed, the scope of the SGAA is extended beyond common law employees.[69] For example, an individual who has an ABN may be an employee under subsection 12(3) of the SGAA if they have been contracted wholly or principally for their labour.

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an independent contractor does not alter the character of the work that the same person carries on as an employee.

[69] Employee is not otherwise defined in the ABNA so it takes its common law meaning.

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Commissioner of Taxation
23 February 2005

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Previous Rulings/Determinations:

SGR 93/1

Subject references:

- ABN
- alienation of personal services income
- bailment
- contractors
- employer v. independent contractor
- partnerships
- PAYG
- remuneration to councillors of an eligible local governing body

Legislative references:

- SGAA 1992 12
- SGAA 1992 12(1)
- SGAA 1992 12(2)
- SGAA 1992 12(3)
- SGAA 1992 12(4)
- SGAA 1992 12(5)
- SGAA 1992 12(6)
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- SGAA 1992 72(1)
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- ABNA 1999 38
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Case references:

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- Building Workers' Industrial Union of Australia and Others v. Odco Pty Ltd (1991) 29 FCR 104; (1991) 99 ALR 735
- Case V158 88 ATC 1030
- Case 50 (1955) 5 CTBR (NS)
- Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales (1982) 149 CLR 337 at 347-352; (1982) 41 ALR 367 at 371-375; (1982) 56 ALJR 459
- Commissioner of State Taxation v. The Roy Morgan Research Centre Pty Ltd [2004] SASC 288
- Commissioner of Payroll Tax (Vic) v. Mary Kay Cosmetics Pty Ltd 82 ATC 4444; (1982) 13 ATR 360
- Construction Industry Training Board v. Labour Force Ltd [1970] 3 All ER 220
- Deputy Commissioner of Taxation v. Bolwell (1967) 1 ATR 862
- Drake Personnel Ltd & Others v. Commissioner of State Revenue (Vic) 2000 ATC 4500; (2000) 44 ATR 413
- Ellis v. Joseph Ellis & Co. [1905] 1 KB 324
- Express & Echo Publications Ltd v. Tanton [1999] ICR 693
- Federal Commissioner of Taxation v. Barrett and Ors 73 ATC 4147; (1973) 4 ATR 122
- FC of T v. De Luxe Red and Yellow Cabs Co-Operative (Trading) Society Ltd and Ors 98 ATC 4466; (1998) 38 ATR 609; (1998) 82 FCR 507
- Filsell v. Top Notch Fashions Pty Ltd 94 ATC 4656; (1994) 29 ATR 224
- Hollis v. Vabu (2001) 207 CLR 21; 2001 ATC 4508; (2001) 47 ATR 559
- Humberstone v. Northern Timber Mills (1949) 79 CLR 389; [1949] ALR 985
- Marshall v. Whittaker's Building Supply Co (1963) 109 CLR 210
- Massey v. Crown Life Insurance Co [1978] 1 WLR 676; [1978] 2 All ER 576
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- Re Porter: re Transport Workers Union of Australia (1989) 34 IR 179
- Reardon Smith Line Ltd v. Yngvar Hansen-Tangen [1976] 1 WLR 989; [1976] 3 All ER 570
- Ready Mixed Concrete (South East) Ltd v. Minister of Pensions

and National Insurance [1968] 1 All ER 433
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