SGR 2005/2 - Superannuation guarantee: work arranged by intermediaries

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Superannuation Guarantee Ruling

Superannuation guarantee: work arranged by intermediaries

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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 the Commissioner's view of how the definitions of 'employer' and 'employee' in the *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992) apply to contractual and working arrangements involving three (or more) parties. These tripartite employment arrangements take different forms and are often labelled in different ways. They involve various relationships (whether contractual or otherwise) between the entity requiring the services or work of an individual (end-user), an intermediary firm, and the individual performing the work or services.

2. Apart from providing a definition of employer and employee, the SGAA 1992 does not make any particular provision about employment and contractual arrangements effected through intermediary firms. This Ruling provides the Commissioner's view as to how to analyse these situations in light of the principles of contract law and the relevant court decisions on these arrangements.

3. This Ruling does not consider in detail the circumstances in which a person is an employee as defined in the SGAA 1992. This subject is comprehensively covered in Superannuation Guarantee Ruling SGR 2005/1 Superannuation guarantee: who is an employee? The current Ruling does however give a summary of the principles that are relevant to that question.

4. Unless otherwise stated, all legislative references in this Ruling are to the SGAA 1992.

Date of effect

5. This Ruling applies from 30 November 2005, the date of its issue.

Previous Rulings

6. The issues dealt with in this Ruling were previously addressed in Superannuation Guarantee Ruling SGR 93/2 which was withdrawn on 1 June 2005.

Background

7. A characteristic of the labour market in Australia is that firms (the end-users of labour) often acquire the services or labour of individuals through an intermediary rather than engaging them directly. Many of these intermediaries specialise in the supply of the services or labour of workers to client firms. Such intermediaries are commonly, although not always, referred to as 'service firms', 'labour hire firms' and 'employment or recruitment agencies'.

8. In contrast to the conventional working relationship between an entity and worker in which a single contract is formed, a number of contracts are often present in these tripartite working arrangements. Accordingly, it can sometimes be difficult to tell whether the worker is an employee of the intermediary or end-user, or neither, when they are engaged through an intermediary.

9. Under some of these arrangements, a contract exists between the intermediary and the end-user (under which the intermediary agrees to supply the services of the worker) and another contract between the intermediary and the worker (under which the worker agrees to perform work for the end-user). A contract does not exist between the worker and the end-user. 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 may enter into a contract with each other. In this case, neither an employer/employee nor principal/independent contract exists between the intermediary and the worker.

Ruling

10. The following principles apply in determining whether there is an employment relationship for the purposes of subsections 12(1) and (3) of the SGAA 1992.

11. Whatever the circumstances of a particular tripartite working arrangement, it is first necessary to determine whether a contract for the performance of work exists and with whom it exists. Only after this is established can the precise nature of the relationship (whether employee or otherwise) be determined.

12. If there is no contract between the worker and end-user in a tripartite working arrangement, the worker cannot be an employee of the end-user. Similarly, if there is no contract between the worker and the intermediary, the worker cannot be an employee of the intermediary.

13. The manner in which the relationship between the parties to a tripartite working arrangement is labelled or described is not conclusive in determining the nature of the relationship involving the parties to the arrangement. Expressions such as 'employment agency' and 'labour hire firm' that are often used to describe the use of various forms of labour market intermediary have no precise legal meaning.

14. In tripartite working arrangements, it is the ultimate or legal control over the worker that is most relevant; not the day-to-day direction and control.

15. A contract between the intermediary and worker can still be a common law contract of employment even though the work is done for the immediate benefit of the end-user.

16. In certain arrangements involving an intermediary firm, worker and end-user, the intermediary may perform an agency role to bring about a contractual relationship between the worker and end-user. If an agency relationship does exist between the intermediary and either the end-user or worker, and the intermediary merely brings about a contractual relationship between the end-user and worker, the worker is not an employee of the intermediary firm.

17. If a worker is not contracted personally to perform work or services but via an interposed entity such as a company or trust, neither the end-user nor the intermediary is the employer of the worker, because any contract they have is with the interposed entity and not with the worker. The worker may be the employee of the interposed entity.

Explanation

Legislative context

18. Under the SGAA 1992, 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 superannuation guarantee charge (the SGC). The superannuation contributions necessary to avoid the SGC can also be made by persons other than the employer. The SGAA 1992 permits contributions to be made on behalf of the employer.[1]

19. The SGAA 1992 defines 'employer' and 'employee' in section 12. Subsection 12(1) defines the terms as having their ordinary meaning – that is, their meaning under common law. For the purposes of the SGAA 1992, subsections 12(2) to (11) expand[2] the ordinary meaning of employer and employee and make particular provision 'to avoid doubt as to the status of certain persons'.

[1] See subsection 6(2).
[2] Except for subsections 12(9A) and (11) which restrict the meaning of those terms.

20. The classification of a person as an employee for the purposes of the SGAA 1992 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.

21. 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 normal sense but who is in fact not very distinguishable from an employee.[3]

22. Where workers are employed through intermediaries, the employer (if any) for SGAA 1992 purposes must be established as it is the employer who is required to satisfy the requirements of the SGAA 1992 in respect of these workers.

Common law employee – general principles

23. The relationship between an employer and an employee is contractual.[4] It is often referred to as a contract *of* service. Such a relationship is usually contrasted with the principal/independent contractor relationship that is a contract *for* services.

24. Whether a person is an employee of another is a question of fact. The courts have, over time, devised a number of indicators for identifying the nature of the relationship. Defining the contractual relationship is often a process of examining a number of indicators and evaluating those indicators within the context of the relationship between the parties. No one indicator of itself is determinative of the relationship. The totality of the relationship between the parties must be considered.

25. In *Stevens v. Brodribb Sawmilling Company Pty Ltd*,[5] the High Court stated that the extent to which one party was subject to the direction and control of the other party in the manner in which they did their work under the contract was a significant factor in determining the parties' relationship. However, there are a number of other relevant indicators that need to be considered in determining whether a particular relationship is one of employment. Some of these indicators are:[6]

- whether the contract is one to achieve a result;
- whether the work can be delegated or subcontracted;

[3] The Second Report of the Senate Select Committee on Superannuation, Superannuation Guarantee Bills (at page 146).
[4] *Byrne & Anor v. Australian Airlines Limited* (1995) 185 CLR 410 at 436, per McHugh and Gummow JJ.
[5] (1986) 160 CLR 16; 60 ALJR 194; 63 ALR 513.
[6] For a comprehensive discussion of these indicators, see SGR 2005/1.

- who bears the commercial risk arising out of injury or defect in the carrying out of the work;
- whether the worker provides and maintains significant tools or equipment; and
- whether the principal has the right to suspend or dismiss the worker engaged.

26. In determining the nature of the contract, the terms of the contract between the parties, 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.

27. In *Hollis v. Vabu*,[7] the High Court endorsed the proposition expressed in *Marshall v. Whittaker's Building Supply Co*[8] that 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'.[9] The majority of the High Court were of the view that 'as a practical matter', the workers in question 'were not running their own business or enterprise' with 'independence in the conduct of their operations'.[10]

Subsection 12(3)

28. Under subsection 12(3) of the SGAA 1992, a person who works under a contract that is wholly or principally for the person's labour is an employee of the other party to the contract. Subsection 12(3) must be considered where there is no common law employment relationship or where there is some doubt as to the common law status of the person.

29. It is clear from the decisions in *Neale v. Atlas Products (Vic) Pty Ltd*[11] and *World Book (Australia) Pty Ltd v. FCT*[12] 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'.

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[7] (2001) 207 CLR 21.
[8] (1963) 109 CLR 210.
[9] *Hollis v. Vabu* (2001) 207 CLR 21 at 39.
[10] *Hollis v. Vabu* (2001) 207 CLR 21 at 41.
[11] (1955) 94 CLR 419; 10 ATD 460.
[12] 92 ATC 4327; (1992) 23 ATR 412. We consider these decisions to be relevant to subsection 12(3) of the SGAA 1992 for the reasons given in paragraphs 68-73 of SGR 2005/1.

30. Where an individual who has been engaged under a contract is not a common law employee or there is some doubt as to the status of the individual at common law, that individual will be an employee under subsection 12(3) if:

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

Superannuation Guarantee Ruling SGR 2005/1

31. The above discussion of the law as to who is an employee is a brief summary of the underlying principles to be considered. This Ruling should be read in the context of Superannuation Guarantee Ruling SGR 2005/1 Superannuation guarantee: who is an employee?

The SGAA 1992 and arrangements involving intermediaries

32. In employment arrangements involving an intermediary firm, a worker and an end-user, more than one contract is often 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 the issue of whether the relationship is one of employment or of some other kind.[13] The question of whether the worker is an employee of the intermediary or of the end-user depends on the particular circumstances as disclosed by the facts found.[14] The totality of the relationship between the parties must be considered.

33. 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 firms' are often used to describe the use of various forms of labour market intermediary. These terms have no precise legal meaning. In these tripartite working arrangements, it is necessary to look beyond the form of the contractual relationships and the labels attached to the relationships by the parties to establish the true nature of the relationships of the parties involved.[15]

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[13] This statement of legal principle has been expressed in such cases as *Attorney-General for New South Wales v. The Perpetual Trustee Company (Limited)* (1952) 85 CLR 237; *Dalgety Farmers Ltd t/as Grazcos v. Bruce* (1995) 12 NSWCCR 36 and *Swift Placements Pty Ltd v. Workcover Authority of New South Wales* [2000] NSWIRComm 9.

[14] *Swift Placements Pty Limited v. WorkCover Authority of New South Wales* [2000] NSWIRComm 9.

[15] *Damevski v. Giudice* [2003] FCAFC 252 at 144, per Merkel J.

Contract necessary for employment

34. The relationship between an employer and an employee is contractual. An employment relationship cannot exist in the absence of a contract.[16] The indicators listed by the courts in determining whether a contract is one of employment can only be applied once it is determined that a contract exists. They cannot be applied to determine whether a contract exists in the first place. 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.

35. Therefore, to establish whether a worker is an employee of the intermediary firm or end-user under the SGAA 1992, it is first necessary to determine whether:

- a contract (whether written, oral or implied) exists between the worker and the intermediary;
- a contract (whether written, oral or implied) exists between the worker and end-user; and
- a contract exists between the intermediary and end-user.

36. 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.[17] 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).[18]

37. Another way to ask the question is:

- 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?

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[16] There are some limited categories of 'employment' within the extended definition of that concept in section 12 of the SGAA 1992 that do not depend on the existence of a contract. For example, Members of Parliament: subsection 12(4). 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.

[17] Khoury, D, Yamouni, YS 2003, *Understanding Contract Law*, 6th edn, Butterworths, Australia.

[18] Khoury, D, Yamouni, YS 2003, *Understanding Contract Law*, 6th edn, Butterworths, Australia p. 12.

38. 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.[19]

39. 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 1992. Similarly, if there is no contract between the worker and intermediary, the worker cannot be an employee of the intermediary under the SGAA 1992.

Case law

40. The courts and various State Industrial Relations Commissions which have considered the nature of tripartite working arrangements in an industrial relations, workers compensation and pay-roll tax context 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. These cases also illustrate the importance of applying the principles of contract law to determine whether a contract exists.

41. In the frequently quoted decision of the Full Federal Court in *Building Workers' Industrial Union of Australia and Others v. Odco Pty Ltd*[20] (*Odco*), Wilcox, Burchett and Ryan JJ in their joint judgment held that an employment relationship did not exist between the end-user (builder) and worker provided by the intermediary (Odco) because a contract did not exist between the worker and end-user. The Court found that there was a contract between the worker and the intermediary (but that this contract was not a contract of employment).

42. 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 builder and the workers. The Court stated that:

> 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 against Troubleshooters. The worker's only entitlement was against Troubleshooters, and in accordance with a different measure. [21]

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[19] Graw, S 2005, *An Introduction to the Law of Contract*, 5th edn, Lawbook Co, p. 28.
[20] (1991) 29 FCR 104.
[21] *Building Workers' Industrial Union of Australia and Others v. Odco Pty Ltd* (1991) 29 FCR 104 at 114.

43. 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:[22]

> The essential enquiry…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.[23]

44. The Full Federal Court also rejected the submission by counsel for the appellants in *Odco* that when a man sent by the intermediary reports to and is allocated work by the builder end-users, he contracts with the builder to perform that work:

> 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.[24]

45. In *Drake Personnel Ltd & Ors v. Commissioner of State Revenue*[25] (*Drake*), the Victorian Supreme Court of Appeal examined the question of whether the intermediary firm (Drake), or its client (the end-user) was the employer for payroll tax purposes, of the workers (temporaries) provided by Drake.

46. The Court held that the temporaries were common law employees of Drake. In holding that Drake 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 clients of Drake and the temporaries.

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[22] *Building Workers' Industrial Union of Australia and Others v. Odco Pty Ltd* (1991) 29 FCR 104 at 119.

[23] The decision in *Odco* was followed by the Supreme Court of New South Wales in *Forstaff and Others v. 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-user clients. 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] *Building Workers' Industrial Union of Australia and Others v. Odco Pty Ltd* (1991) 29 FCR 104 at 116.

[25] [2000] VSCA 122.

47. In the course of his reasoning, Phillips JA stated that the contract between Drake and the workers arose only as and when work was accepted by the worker.[26] 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.

48. 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*[27] (*Swift Placements*), considered the nature of the relationship established between the intermediary firm (Swift Placements) and a worker supplied by Swift Placements to perform work for a client of the intermediary. 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* at the time he sustained injuries at the premises of the end-user client. It was held that the worker was employed by Swift Placements under a common law contract of employment.

49. 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 client or between the worker and Swift Placements. By doing so, the Full Bench followed the process referred to in cases such as *Dalgety Farmers Ltd t/as Grazcos v. Bruce*[28] which is:

> In determining whether a contract of service has been entered into, 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.[29]

50. It was submitted by counsel for Swift Placements that a contract existed between the worker and end-user client 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:

> 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.[30]

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[26] *Drake Personnel Ltd & Ors v. Commissioner of State Revenue* [2000] VSCA 122 at 34.
[27] [2000] NSWIRComm 9.
[28] (1995) 12 NSWCCR 36.
[29] *Swift Placements Pty Limited v. WorkCover Authority of New South Wales* [2000] NSWIRComm 9 at 33.
[30] *Swift Placements Pty Limited v. WorkCover Authority of New South Wales* [2000] NSWIRComm 9 at 37.

51. The Full Bench went on to state that:

> …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.[31]

Damevski v. Guidice

52. The Full Federal Court decision in *Damevski v. Guidice*[32] *(Damevski)* provides a particularly pertinent example of the application of the principles of contract law to a tripartite working arrangement.[33] The matter concerned an employer's (Endoxos) endeavour to terminate the employment of the applicant (Damevski) and to simultaneously contract with an independent agency (MLC) for the provision by Damevski, supposedly acting as an independent contractor, of the same services he had previously provided in his capacity as an employee.[34] The issue for consideration by the Court was whether, after the purported termination of his employment, Damevski provided his service to his former employer Endoxos as an employee or independent contractor.

53. In three separate judgments, Wilcox, Marshall and Merkel JJ found that there was:

- a contract of employment between Damevski and Endoxos;
- no contract (either oral or written) between MLC and Damevski; and
- no evidence Damevski was an independent contractor.

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[31] *Swift Placements Pty Limited v. WorkCover Authority of New South Wales* [2000] NSWIRComm 9 at 38.
[32] [2003] FCAFC 252.
[33] 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 allow the employer to avoid its legal obligations as an employer.
[34] This arrangement involved all the other employees of Endoxos.

54. In considering whether there was a contract between MLC and Damevski, Wilcox J stated that:

> 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.

55. Relevantly, in his judgement, Marshall J found the Full Bench of the Industrial Relations Commission in an earlier decision on this 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 Damevski and Endoxos.[35] Marshall J stated:

> 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.[36]

56. His Honour then applied the principles of contract law to the arrangement in question and concluded, after considering the reality of the situation and the totality of the relationship between the parties, that there was a contract of employment between Endoxos and Damevski.[37]

Control

57. The Courts have held that 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.

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[35] 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.
[36] *Damevski v. Giudice* [2003] FCAFC 252 at 81.
[37] The only role performed by MLC in the arrangement was that of an administrative one of paying Damevski's wages on behalf of Endoxos.

58. 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*[38] (*Mason & Cox*). The issue in *Mason & Cox* was whether there was a contract of employment between the worker and end-user (Mason & Cox) under the *Workers Rehabilitation and Compensation Act 1986* (SA).[39] Mason & Cox argued that there was an implied contract of employment between the worker and Mason & Cox on the basis that the worker performed work for Mason & Cox at their premises and under their direction and control.[40]

59. The Full Court unanimously held that there was no contract of employment between Mason & Cox 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 Mason & Cox and under their direction and control. As to the issue of control, his Honour stated:

> 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.[41]

60. Doyle CJ considered that the fact that the worker complied with the directions given by Mason & Cox as to the manner in which he was to carry out his work does not of itself indicate any legal right by Mason & Cox to direct him. If the worker had failed to follow their directions, his Honour considered Mason & Cox 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.

61. Doyle CJ went on to state that what is important is '…the legal right to control, rather than the practical fact of control'.[42]

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[38] (1999) 74 SASR 438. *Mason & Cox* provides additional judicial authority for the principle that in the absence of a contract between two parties, an employment contract cannot exist. See the judgment of Perry J.

[39] If there was a contract of employment between the parties, the worker had no right of action against Mason & Cox at common law.

[40] It was not argued that there was an express contract of service between Mason & Cox and the worker.

[41] *Mason & Cox Pty Ltd v. McCann* (1999) 74 SASR 438 at 26.

[42] *Mason & Cox Pty Ltd v. McCann* (1999) 74 SASR 438 at 29. As authority for this proposition, Doyle CJ cited the following comments of Dixon J in *Humberstone v. Northern Timber Mills* (1949) 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.

62. This approach to the application of the indicator of control in the context of tripartite working arrangements is consistent with that applied by the Full Bench of the Industrial Relations Commission in *Swift Placements*. The Full Bench held in *Swift Placements* that control over a worker did not merely relate to the on-the-job situation, but rather the ultimate or legal control over the worker. It stated:

> …control by an employer over an employee is not to be viewed merely in the on-the-job situation in directing a person what to do and how to do it, but rather in the sense of the ultimate or legal control over the person to require him to properly and effectively exercise his skill in the performance of the work allocated…[43]

63. In applying the control test to the tripartite working arrangement in question, the Full Bench rejected the submission by counsel for Swift Placements that where day-to-day control of the work resides with the client and not with the intermediary, then the client is the relevant employer and not the intermediary.

64. Further, in *Drake*, the Victorian Court of Appeal rejected the contention made by Drake that there could be no employment relationship between Drake and the temporary worker because the day-to-day control of the work vested in the end-user client of Drake rather than Drake. Phillips JA concluded that:

> 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…[44]

65. Therefore, in applying the control test in these tripartite employment arrangements, it is the ultimate or legal control over the worker which is most relevant rather than day-to-day control of the worker. A contract will not be taken to exist between the end-user and worker merely because the worker performs work under the direction and control of the end-user.

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[43] *Swift Placements Pty Limited v. WorkCover Authority of New South Wales* [2000] NSWIRComm 9 at 44.

[44] *Drake Personnel Ltd & Ors v. Commissioner of State Revenue* [2000] VSCA 122 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.

Work done for benefit of end-user

66. The Courts have also affirmed the principle that a contract of employment between the intermediary and 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 client without altering the nature of the relationship between the intermediary and worker. In *Drake*, Phillips JA, in rejecting the contention that there was no contract of employment between Drake and the temporary because the work was not being performed for Drake stated that:

> …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.[45]

67. In *Swift Placements*, the Full Bench quoted a passage from the judgment of Kitto J in *Attorney-General for New South Wales v. The Perpetual Trustee Company (Limited)*[46] which explained the essential elements of an employer-employee relationship and applied the principle cited in the passage that:

> …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.[47]

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[45] *Drake Personnel Ltd & Ors v. Commissioner of State Revenue* [2000] VSCA 122 at 54.
[46] (1952) CLR 237.
[47] *Swift Placements Pty Limited v. WorkCover Authority of New South Wales* [2000] NSWIRComm 9 at 32.

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

> 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

69. An intermediary may be authorised by another party to do something on that party's behalf. Generally, the intermediary is called an agent. The party who authorises the agent to act in their behalf is called the principal. At general law, agency is the relationship existing between two 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.

70. 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 to bring about the contractual relationship between the principal and the third party.[51]

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[48] (1990) 95 ALR 641 at 652.
[49] *International Harvester Company of Australia Proprietary Limited v. Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644.
[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, p. 215.

71. In some arrangements involving an intermediary firm, worker and end-user, the intermediary may perform an agency role to bring about a contractual relationship between the worker and 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 end-user. Alternatively, the intermediary may be authorised by the end-user to find suitably qualified workers for the end-user.

72. Where an agency relationship does in fact exist between the intermediary and either the end-user or 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 firm. The contract is between the worker and the end-user. The intermediary firm is not a party to the contract.

73. The question of whether the intermediary firm has performed an agency role in tripartite working arrangements has been considered in various cases. In *Odco*, the Full Federal Court rejected the contention made that the intermediary firm was acting as the agent for the end-user builder 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.

74. Earlier in the decision the Court noted that the use of the word 'agency' did not necessarily connote a legal relationship of principal and agent.[54]

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[52] The intermediary is often referred to commercially as an 'employment agency' or 'recruitment' or 'placement' firm.

[53] *Building Workers' Industrial Union of Australia and Others v. Odco Pty Ltd* (1991) 29 FCR 104 at 119.

[54] *Building Workers' Industrial Union of Australia and Others v. Odco Pty Ltd* (1991) 29 FCR 104 at 117.

75. In *Drake*, the question of whether the intermediary firm (Drake) was performing an agency role in the legal sense 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.

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

> 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 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…[57]

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[55] *Drake Personnel Ltd & Ors v. Commissioner of State Revenue* [2000] VSCA 122 at 29.

[56] It was submitted by counsel for Swift Placements that it (being 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 Pty Limited v. WorkCover Authority of New South Wales* [2000] NSWIRComm 9 at 49. The Full Bench also rejected the submission by Swift Placements that it was an 'outsourced resources department' of its client in providing labour. The document setting out the agreement between Swift Placements and the client expressly provided that staff provided were Swift Placement's employees and that where a client itself employs one of Swift Placement's employees or former employees, the client was to immediately notify Swift Placement and 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'.

77. Therefore, the manner in which the relationship between the worker, intermediary and 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. 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.

78. As emphasised in *Odco*, 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 be present.

Companies and trusts

79. Sometimes a worker is not contracted personally to perform work or services or provide their labour but rather via an interposed entity. Typically, this is a family company or trust. The company or trustee enters into a contract instead of the worker, although the worker still performs the work or services or provides their labour.

80. 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. Rather, they have entered into a contract with the company or trustee.

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

Examples

Example 1

82. PBS Ltd is a large security company which carries on a business of supplying security guards, mobile patrols, body guards, 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's premises at night. The mobile security guards are required to patrol the premises between 11pm and 3am every night, wear uniforms bearing the PBS Ltd logo, are remunerated by PBS Ltd and are required to inform PBS if they cannot work a particular shift.

83. 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 and another contract between PBS Ltd and the guards under which the guards agree to perform work for Explosive Ltd. However no contract has been entered into between Explosive Ltd and the guards. On the basis of these facts, the guards cannot be employees of Explosive Ltd as there is no contract between these parties. However, the guards will be employees of PBS Ltd for the purposes of the SGAA 1992 as the indicators of a common law employment relationship exist. Accordingly, PBS Ltd is required to provide superannuation support for its guards under the SGAA 1992.

Example 2

84. 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 an agreement between NurseCo and the nurses under which the nurses agree to provide their services to the hospitals. There is also an agreement between NurseCo and each hospital under which NurseCo agrees to supply the services of nurses to the hospital. There is no agreement between the hospitals and the nurses. The nurses are interviewed by NurseCo and, if assessed as suitable, are placed on NurseCo's books for placement(s) with suitable hospitals. On request from a hospital, NurseCo will assess the particular assignment and send a nurse to attend the hospital. Once a particular assignment with the hospital is finished, NurseCo will place the nurse with another hospital as needed. NurseCo remunerates the nurses and invoices the hospital based on the remuneration paid plus commission.

85. The manner in which the arrangement is labelled gives the appearance that NurseCo is simply acting as an agent for the nurses in procuring them offers of employment with the hospitals. In many instances, the nurses contracted by NurseCo and supplied to the hospitals work restricted hours and are paid less than $450 per month for work at a particular hospital.[58] However, because the nurses may work at more than one hospital in a month, the total wages paid by NurseCo to a particular nurse may exceed $450 for the month.

86. Under this arrangement, there is an employment contract between NurseCo and the nurses. There is also a contract between NurseCo and each hospital. There is no contract between the hospitals and nurses. Since there is no contract between the hospitals and nurses, the nurses cannot be employees of the hospital.

[58] Under subsection 27(2) of the SGAA 1992, if an employer pays an employee less than $450 by way of salary or wages in a month, the salary or wages paid are not taken into account by the employer in the calculation of an individual superannuation guarantee shortfall under section 19 of the SGAA 1992.

87. Further, despite the form of the contractual relationships and NurseCo's description of itself as an employment agency, NurseCo's role in the arrangement is not one of agency in any legal sense. NurseCo is contractually liable under its employment contract to pay the nurses even if NurseCo itself does not receive payment from the hospital. In addition, NurseCo 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. The nurses are employees of NurseCo under the SGAA 1992 as the indicators of a common law employment relationship exist. In the situations where a nurse is paid more than $450 in a particular month, NurseCo will be required to make superannuation contributions on behalf of the nurse.

Example 3

88. HighTech Resources Ltd is a firm specialising in the supply of the services of engineers to various firms in the engineering sector in NSW and Victoria. HighTech enters into a contract with Big Audio, an engineering firm, to provide engineers to Big Audio for a 6 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 in the contract and all other assignments within the scope of the contract that may be given to Jill by Big Audio. Under the contract, Jill must perform the services on the days and locations as specified by Big Audio, and 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 as the indicators of a common law relationship are present. Jill cannot be an employee of Big Audio as there is no contract between the parties. 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, High Tech is liable to pay Jill even if High Tech is not paid by Big Audio. High Tech 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. HighTech has the responsibility under the SGAA 1992 to make superannuation contributions on behalf of Jill to a fund.

Example 4

91. 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 terms and conditions of the contract indicate that the relationship between BuilderCo and the tradespeople it engages is one of principal and independent contractor (contract for services). 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.

92. 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 supervisor to whom the tradesperson should report to at the building site, the type of trade required 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, he/she attends the building site and performs the necessary work at the direction of the builder. BuilderCo does not exercise and is not able to exercise any control over what the person does at the site or how he/she does it (however, BuilderCo does have ultimate or legal control over the tradesperson). 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 person at the agreed hourly rate. BuilderCo then pays the person, whether or not BuilderCo is paid by the builder.

93. In this situation, a person who performs work for the builder cannot be 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. However, as there is a contract between BuilderCo and the tradesperson and in light of the circumstances, the person is considered to be an employee of BuilderCo for the purposes of the SGAA 1992, either under subsection 12(1) (as a common law employee) or under subsection 12(3) (contract wholly or principally for labour).

Example 5

94. Finance 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 Finance Services, which maintains a database of persons with relevant skills and experience who are seeking employment in this industry.

95. Bank Co contracts with Financial Services to refer prospective employees to fill a vacant position in its finance division. Financial Services 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 an employee). Bank Co pays a placement fee of $3,000 to Financial Services for the service provided.

96. Troy is the employee of Bank Co for the purposes of the SGAA 1992. There is no contractual relationship between Financial Services and Troy. Financial Services merely facilitates the formation of a common law contract of employment between Bank Co and Troy.

Detailed contents list

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Previous draft:
SGR 2005/D1

Related Rulings/Determinations:
SGR 2005/1

Previous Rulings/Determinations:
SGR 93/2

Subject references:
- agency
- contractors
- contracts for labour
- employees
- employers

Legislative references:
- SGAA 1992 6(2)
- SGAA 1992 12
- SGAA 1992 12(1)
- SGAA 1992 12(2)
- SGAA 1992 12(3)
- SGAA 1992 12(4)
- SGAA 1992 12(9A)
- SGAA 1992 12(11)
- SGAA 1992 19
- SGAA 1992 27(2)
- Occupational Health and Safety Act 1983
- Accident Compensation Act 1985 (Vic)
- Workers Rehabilitation and Compensation Act 1986 (SA)

Case references:
- Accident Compensation Commission v. Odco Pty Ltd (1990) 64 ALJR 606
- Attorney-General for New South Wales v. The Perpetual Trustee Company (Limited) (1952) 85 CLR 237
- Building Workers' Industrial Union of Australia and Others v. Odco Pty Ltd (1991) 29 FCR 104; 99 ALR 735
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