



DEPARTMENT OF
FINANCE AND
ADMINISTRATION

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Mr Alistair Sands
Committee Secretary
Standing Committee on Finance and Public Administration
Parliament House
CANBERRA ACT 2600

Dear Mr Sands

Response to Questions on Notice - November 2002 Hearings

I am writing concerning question **F43** from Senator the Hon Nick Sherry taken on notice during the November Senate Finance and Public Administration Legislation Committee Estimates Hearing.

The Department advised in it's answer tabled on 20 November 2002 that a copy of a bulletin on superannuation for contractors and consultants would be provided to the Committee once it has been issued.

Please find attached a copy of the bulletin, which is also available on the Finance website, http://www.finance.gov.au/super/docs/PB_Bulletin_42.1.pdf

Should you have any queries, please do not hesitate to contact either myself on 6215 3533 or Mr Sean Giddings on 6215 3590.

Yours sincerely

Ian McAuley
Branch Manager
Parliamentary and Corporate Support
25 February 2003

Contractors, Consultants and the *Superannuation (Productivity Benefit) Act 1988*

This bulletin explains that superannuation may be provided under the *Superannuation (Productivity Benefit) Act 1988* (PB Act) for certain contractors and consultants.

For a detailed explanation of other aspects of the PB Act see Superannuation Circular 42 which is available on the Finance website.

(http://www.finance.gov.au/super/productivity_benefits_circular.html)

PB Act coverage

In general, the PB Act applies to employees with no other employer-sponsored superannuation cover in respect of their Commonwealth or ACT sector employment.

Persons covered by the PB Act are referred to in that Act as qualified employees and include certain casual and temporary employees, statutory appointees and members of boards and commissions. The Superannuation (Productivity Benefit) (Qualified Employees) Declaration No 3, made in July 1993, expanded the definition, by reference to subsection 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (the SG Act), to include certain contractors and consultants engaged by the Commonwealth, the ACT and those Commonwealth and ACT agencies covered by the PB Act. Subsection 12(3) of the SG Act 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 to the contract.”

Responsibility for the administration of the *Superannuation Guarantee (Administration) Act 1992* lies with the Australian Taxation Office (ATO). The following information, which is provided to assist employers determine whether they have an employer/employee relationship with persons working under contract, is based on ATO Superannuation Guarantee rulings. Each case needs to be decided on a case by case basis but ultimately, if employers are unable to decide whether such a relationship exists, they should seek advice from the ATO on 13 10 20 or <http://www.ato.gov.au/super/>.

To establish whether an employer/employee relationship exists with their contractors and consultants, departments and agencies should consider the following questions:

- (a) Is the contractor a common law employee within the ordinary meaning of the term?

The main test of a common law employment relationship is the *right* to control how, when, where and who is to perform labour. The degree of control necessary varies according to the type of job.

A further test that can be used when the control test is inconclusive is the integration test - whether a person providing services does so as an individual carrying on his or her own business (contract for services) or individually as an integral part of another's business organisation (a contract of service).

(For more information on who is a common law employee refer to Superannuation Guarantee (SG) Ruling 93/1. For advice on people engaged through service firms, labour hire firms and employment agencies refer to SG Ruling 93/2.)

or

- (b) Is the nature of the contract one where:

- (i) it is with a natural person, rather than with a company, trust or partnership?
- (ii) the labour content is more than 50% of the value of the contract?

(For advice on what constitutes labour and how to determine the value of the labour content refer to SG Ruling 93/1.)

- (iii) under the contract, is the labour to be provided by a particular person who is the party to the contract?

(If the labour could be performed by another person(s) it would not be a contract for the labour of a particular person - see SG Ruling 93/1 for further details.)

If the answer to Question (a) or all points in Question (b) is “yes”, the PB Act will apply, provided the person is not a member of the CSS or the PSS in respect of that contractual arrangement.

To which fund should contributions be made for contractors and consultants covered by the PB Act?

Persons entitled to have contributions paid to a superannuation fund by their employer under the PB Act can choose from a number of schemes approved under that Act. Attachment 4 of Superannuation Circular 42 provides a full list of approved funds.

Alternatively, if an employee is already a member of another superannuation fund, payment may be made to that fund provided satisfactory evidence is supplied that it is a “complying superannuation fund”. A certificate of verification from the fund’s trustees or confirmation from the Australian Prudential Regulation Authority (APRA) that the fund is a “complying fund” would be satisfactory evidence. Information can also be found on the Register of Complying Super Funds (ROCS), which is maintained by the Australian Taxation Office. Where the employee or contractor is a member of more than one fund, *one fund only* must be selected for the payment of PB Act contributions.

The Australian Government Employees Superannuation Trust (AGEST) is the fund nominated by the Minister for Finance and Administration to be the default fund for the receipt of PB Act contributions. Employers will be expected to make contributions to that fund unless an employee or contractor has elected to join one of the other funds approved for that purpose under the PB Act.

It is the responsibility of the employer to obtain relevant information about approved funds and provide such information to employees and contractors before an election to join a fund is made.

Further information

For further information on the PB Act please refer to the Superannuation Circular No. 42 - available on the Finance website.

http://www.finance.gov.au/super/productivity_benefits_circular.html).

Superannuation Guarantee Rulings SG 93/1, 93/2, 94/1 and 94/5 which relate to this topic are available at the Australian Taxation Office website.

<http://law.at0.gov.au/atolaw/browse.htm?toc=03:RUL:Superannuation%20Guarantee>).

The Register of Complying Super Funds (ROCS) is available at the Australian Taxation Office website. (<http://www.at0.gov.au/scripts/super/rocsmain.asp>)