1. **Statement**

The purpose of this procedure is to explain the correct superannuation obligations for contractors in line with current tax legislation.

2. **Scope**

Compliance with this standard is mandatory.

This standard applies to all employees, contractors and consultants within the Department of Health divisions and commercialised business units as well as Hospital and Health Services.

3. **Content**

**Introduction**

Employers are obliged to provide a minimum level of superannuation support to employees, subject to some exceptions. This obligation arises from the Superannuation Guarantee (Administration) Act 1992, which will be discussed in greater detail.

There are instances when the scope of the obligation is extended to cover natural persons who are not common law employees of the employer. However, this does not extend to persons who are already employees of another employer, such as an employment agency, since that employer assumes the obligations and responsibilities of the employee.

It is with the persons who are engaged as staff members, but not as common law employees, that difficulties are encountered. These employees are the focus of this Business Procedure. For the purpose of this procedure it is assumed, that there is no issue with the nature of the engagement. That the person is NOT a common law employee, and is therefore an independent contractor.

**Legislation**

The extension of superannuation obligations arise out of s.12 of the SGAA which states:

> 12 Interpretation: employee, employer

> (1) Subject to this section, in this Act, employee and employer have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):

> a. expand the meaning of those terms; and

> b. make particular provision to avoid doubt as to the status of certain persons.

> ..

> (2) 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.
Note that subsection (1) says “expands”, and “for the purposes of this Act”. Importantly, subsection (3) does not magically turn a contractor into a common law employee. Nor does it grant to the contractor the same rights and privileges that the employer’s common law employees might have. It simply imposes upon the employer a duty to provide superannuation support to a wider class.

Note also that not all contractors are brought into scope. It is only those whose contracts are “wholly or principally for the labour of the person”, where the relationship is direct. A contractor’s relationship is not “direct” if he or she is paid by an agency (such as a labour hire firm) and Queensland Health pays the agency a fee for the supply of the person’s services.

Where a contractor also provides plant and/or equipment and the provision of labour is only ancillary to the hire of the plant, this type of contract is not captured by s.12.

**Contractor or employee?**

Whether a staff member is an employee of an entity at common law depends on whether the nature and circumstances of the contractual arrangement between the parties gives rise to an employment relationship. To determine if a staff member is either a contractor or an employee, refer to the [Employee/Contractors Evaluation Guideline](#).

**“Wholly or principally”**

There should not be any issue with “wholly” for the person’s labour. The contract in this situation requires the labour of the person, nothing more, nothing less. On the other hand the word “principally” introduces something of a broader spectrum; it necessitates interpretation, and produces an element of vagueness.

In SGR 2005/1, the ATO says

> “where the terms of the contract in light of the subsequent conduct of the parties, indicate that where:
>  
> • 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 [s.12(3)].”

In order to make a determination of the contract as being wholly or principally for the labour of the individual, it is the supply of whatever is needed to achieve the result that must be judged. Whatever is needed may be labour alone; or labour and/or materials and/or plant and/or additional workers. (See [George Stewart v All-Fect Distributors](#) for example, citing Vabu.)

When the person’s own labour is only an auxiliary element of the contract, although a necessary component, the worker would not be deemed under s.12(3) to be an employee.

In SGR 2005/1 paragraph 66, the ATO states its interpretation thus: “in the context of subsection 12(3), the word ‘principally’ assumes its commonly understood meaning, that is, ‘chiefly’ or
‘mainly”. Of particular importance is the nature of the contract. Is it a contract for a “result”, or for the services of the worker?

Examples of what is caught (employee deemed):

- A surgeon drives to a Queensland Health hospital, enters the operating theatre, and proceeds to carry out a procedure, using equipment and consumables supplied by the hospital.
- A computer programmer is engaged to work within a Queensland Health facility to produce imaging software, but brings a laptop with him to take off-site a backup of his work each day.
- A painter is engaged on a daily rate of pay to carry out various renovations, and is paid at the end of each week.
- A contractor is engaged for a fixed period of time to do piecework, but is paid on an hourly rate. (The piecework has been argued unsuccessfully as remuneration for a series of “results”).

Examples of what is not caught (employee not deemed):

- A backhoe operator is engaged for three months to move soil fill so that the site can be levelled and built on afterwards.
- A contractor, an individual working for himself, is brought in to carry out a survey, and will be paid on completion of the survey, for the survey alone.
- A painter is engaged to paint the lift foyers in Block 7.
- A surgeon is contracted to carry out procedures at a Queensland Health hospital, using equipment and consumables supplied by the hospital, but the contract gives the surgeon the right to delegate the work to another surgeon.

Power to delegate

If the contract makes the provision for the contractor to delegate his responsibilities to another person then the effect of s.12(3) is negated. This is because the contract is no longer for the labour of the one individual.

Both the “Neale v Atlas” and the “World Book” cases makes it clear that a person who has a right to delegate does not work under a contract wholly or principally for the labour of that person: SGR 2005/1 paragraph 72.

“In the argument addressed to this Court, there may have been a suggestion that if in the case of any independent contractor it appeared that the parties contemplated that the contractual work would be substantially performed by the independent contractor himself, although the terms or conditions of the contract, whether express or implied, did not actually require it, the particular extension of the defined term would be sufficient justification for characterizing his remuneration as salary or wages for the purposes of s.221C. This suggestion, however, is without validity, for if the contract leaves the contractor free to do the work himself or to employ other persons to carry it out the contractual remuneration when paid is not a payment made wholly or at all for the labour of the person to whom the
payments are made. **It is a payment made under a contract whereby the contractor has undertaken to produce a given result and it becomes payable when, and only when, the contractual conditions have been fulfilled.** Moreover, **the nature of the payment is not affected by the circumstance that the contractor has himself performed the bulk of the work under the contract or that it was the expectation of the parties that he would do so if, in truth, the contract did not create the relationship of master and servant.**” [emphasis added]

In other words, the fact that the contract leaves a person completely free, if they choose, to engage others to perform the work on their behalf means that the payments are not payments under a contract for labour. This is so even if the contractor actually does perform the work personally and had no intention of doing otherwise.

The ATO has acknowledged - somewhat reluctantly (it would seem from the phrase “despite the restriction that has been placed on the meaning of the phrase ‘wholly or principally for the labour of the person’”) that these two cases have authority with respect to s.12(3).

The power to delegate under a contract differs markedly from a similar power under a contract of employment. When an employee delegates, the employer continues to pay both. When a contractor delegates a job to another, the contractor may be responsible for paying the subcontractor, and the contractor is also responsible for ensuring that the result is obtained.

**Australian Business Number**

The existence of an Australian Business Number (“ABN”) does not obviate at all the need to examine the relationship. The ABN may have relevance only to activities outside of the instant contract. The mere existence of an ABN cannot be used to avoid SGAA s.12.

However, the ATO issues an ABN to an ‘entity’ because that entity is supposedly carrying on a business. It may therefore add weight, as just another factor to be considered, to the proposition that the contractual relationship is between Queensland Health and another business entity, the contractor.

**Salary sacrificing by the Contractor**

In SGD 2006/2, the ATO has considered the possibility of a contractor salary sacrificing part or all of a payment into a superannuation contribution.

Requests for such an arrangement must be refused because contractors are outside the scope of the Queensland Government’s salary sacrifice arrangements. These arrangements exist for employees alone.

**Effect of being an employee for income tax**

If a contractor is found to be an employee for income tax purposes, the payments made to that contractor are considered to be salary and wages income. Therefore, the payments must be paid through the payroll system, and must be subjected to PAYG withholding. In addition, the obligations under the SGAA then become absolute.

---

1 Neal v Atlas Products (Vic) Pty Ltd [1955] HCA 18; (1955) 94 CLR 419; (1955) 10 ATD 460
2 SGR 2005/1, paragraphs 73 and 74
Maximum contributions base

Please note: the mere mention of the maximum contributions base in this document does not mean or imply that the base is being, or is about to be, applied to members of staff who are paid in accordance with award and industrial agreements.

SGAA s.6 places a general ceiling on the earnings per quarter on which the employer contributions are based.

This ceiling, called the “maximum contributions base”, is indexed annually with the Average Weekly Ordinary Time Earnings index. It was initially set at $20,000, and for 2017-18 it is $52,760 per qtr..

This should be factored in to negotiated amounts where the rate is to be “all-inclusive”.

Although a contractor can be deemed to be an employee for the purposes of the SGAA, this does not entitle the contractor to the award conditions to which the common law employees are, or may be, entitled. The reward paid to the contractor is set within the conditions of the contract.

Depending on the conditions of the contract, so far as superannuation support is concerned, the contributions would be not less than the amount calculated by multiplying

(a) the prevailing superannuation guarantee charge specified rate (9.5% for 2017-18) by

(b) the lesser of the earnings for the financial year quarter and the maximum contributions base per quarter.

Therefore, under those circumstances, it will be necessary to delay the payment of any superannuation contributions for the contract until the end of each financial year quarter so that the actual liability can be calculated correctly.

Who to pay?

The superannuation cannot be paid to the contractor such as by way of an adjustment to the rate of reward, if the payment is intended to ensure compliance with the SGAA. It must be paid to a fund that is classed as a complying fund in the Superannuation Industry (Supervision) Act 1993. If the negotiated rate is stated to be “all inclusive”, then it is important to take the superannuation out first, before payment occurs to the contractor. (Multiply the all-inclusive rate by \[\frac{100}{100 + \text{Rate}}\] to arrive at the pre-superannuation amount. i.e. for 2017-18 this would be \[\frac{100}{109.5}\])

See Weston v FCT, 2008 ATC 10-052, paragraph 8: “While I accept that he understood that he would meet the employee superannuation contribution requirement by paying an additional 10 per cent to the employee, the Act is clear that the obligation is on the employer to make contributions to a complying fund directly. There is no discretion in the Act to ignore the failure of the employer to make such contributions.”

Recruitment Options

HR Policy B45 “Locum Arrangements and Conditions – Medical Officers” provides only two options for the engagement of locum doctors: either as a common law employee or through a third party such as a labour hire agency (to which B45 refers to collectively as “agency”) as an employee of that agency. However, since a person cannot employ themself, the locum cannot also act as the third party.
The rules for each of these are very clear. Prior to 1st July, 2017 superannuation support had to be given through QSuper, however after 1 July, 2017 employees have choice of fund. On the other hand, the third party agency carries the superannuation duties and obligations.

Choice of Fund

From July 2017, Queensland public sector employees are able to choose the fund to which they can have their superannuation contributions paid, which is known as choice of fund.

At the same time, QSuper became an open fund which means that anyone can become a member of QSuper.

QSuper will remain the Queensland Government’s default fund for employees, which means that superannuation contributions will be made to QSuper if the employee does not nominate another fund.

Eligible employees can choose the super fund they want their contributions paid into, including a self-managed superannuation fund, by completing a Superannuation Standard Choice Form and providing this form to their employer. The choice of fund forms will be available on QHEPS under Payroll and rostering A-Z forms (S – Super Choice of Fund).

The fund nominated must be a complying fund. A complying fund is an Australian super fund that meets specific requirements and obligations outlined in the Commonwealth’s Superannuation Industry (Supervision) Act 1993.

It is the responsibility of the employee to check whether the fund they are nominating is a complying super fund. Compliance status can checked at http://superfundlookup.gov.au.

4. Related legislation and documents

- Superannuation Guarantee (Administration) Act 1992
- Superannuation (State Public Sector) Act 1990
- Superannuation (State Public Sector) Deed 1990
- Superannuation (State Public Sector) Notice 2000
- Superannuation Industry (Supervision) Regulations 1994
- Superannuation Industry (Supervision) Act 1993
- SGR 2005/1 - Superannuation Guarantee Ruling: Who is an employee?
- SGD 2006/2 – contractor salary sacrificing (full title omitted due to its length)
5. Definitions

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>ATO</td>
<td>Australian Taxation Office</td>
</tr>
<tr>
<td>QSA</td>
<td>Superannuation (State Public Sector) Act 1990</td>
</tr>
<tr>
<td>QSUPER Deed</td>
<td>Superannuation (State Public Sector) Deed 1990</td>
</tr>
<tr>
<td>SGAA</td>
<td>Superannuation Guarantee (Administration) Act 1992 (Cwlth)</td>
</tr>
<tr>
<td>SGR</td>
<td>Superannuation Guarantee Ruling, issued by the ATO</td>
</tr>
<tr>
<td>TR</td>
<td>Taxation Ruling, issued by the ATO</td>
</tr>
</tbody>
</table>

Version Control

<table>
<thead>
<tr>
<th>Version</th>
<th>Date</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>23/01/2014</td>
<td>Vanessa Hafemeister</td>
</tr>
<tr>
<td>2</td>
<td>01/07/2015</td>
<td>Policy Rationalisation Project</td>
</tr>
<tr>
<td>3</td>
<td>19/07/2017</td>
<td>Richard Baker</td>
</tr>
</tbody>
</table>