



Superannuation Guarantee and Contractors

Are you paying super for your sole trader contractors?

This blog focuses on the outcome of *MWWD v FCT 2020*

<https://www.ato.gov.au/law/view/document?docid=JUD/2020ATC10-553/00001>

It is worthy of a blog because it drives home two very important points that are regularly ignored because 'everyone else is doing it'. So here it is in black and white:

Point 1 – A payer can still have a superannuation guarantee liability for a contractor even though they are not employees for other purposes.

Point 2 – There are unscrupulous contractors who will take your money, and then go to the ATO to recover their superannuation, **sometimes years down the track**. Better to pay a lower rate and pay their superannuation yourself, just to be sure.

In *MWWD v FCT 2020*, the contractor, a service technician for MWWD, operated out of their Melbourne depot, but travelled to various locations to undertake repairs. They had a contract saying the technician was an independent contractor. Nevertheless, the contractor, **after 4 years**, went to the ATO claiming he had been deprived of superannuation contributions. The ATO agreed, and pursued MWWD to recover the contributions along with penalties *and the loss of the ability to claim a tax deduction for the late super contributions*.

Another important point, the penalties for getting wrong the definition of employee for superannuation guarantee purposes are far higher than any other misunderstanding of the law. This is despite the fact that our courts and the ATO struggle to be sure of the right definition.

MWWD then faced the expense of having to fight the ATO at the Administrative Appeals Tribunal (AAT). MWWD won. Yes, MWWD were lucky enough, or smart enough, to have interpreted the law correctly, not the ATO, But what now if the ATO **with its unlimited taxpayer funds** just continues to appeal until they get a decision they like?

Our recommendations?

- Best just to pay the superannuation in the first place, and reduce the hourly rate in the contract.
- Alternatively, consider requiring all your contractors either operate as a company, trust or partnership so that the contract is not considered for their personal services.

s 12(3) provides:

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.

The AAT decided the relevant considerations were whether the:

- Payer exercised control over where, when and how the worker provides the services;
- Worker was paid primarily for personal labour and skills;
- Worker had a right to delegate; and
- Worker provided their own tools and equipment.

The key to MWWD's success seems to be that the contract allowed for the work to be delegated and that in most cases the amount paid related to the result produced not necessarily the hours worked.

Nevertheless, in the case of the superannuation guarantee, the best way to BAN TACS is to avoid the huge potential penalties by paying the superannuation on time, or not contracting with individuals, even though they may have an ABN.

If you are interested in knowing more about sub contracting arrangements here is a link to our blog <https://bantacs.com.au/Jblog/psi-contractors-splitting-income/#more-330>