# *TR 2022/D3 - Income tax: pay as you go withholding - who is an employee?*



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Status: **draft only – for comment**

# Draft Taxation Ruling

# Income tax: pay as you go withholding – who is an employee?

**Relying on this draft Ruling**

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

Subject to the qualification below, if this draft Ruling applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

To the extent that this draft Ruling aids in understanding the ordinary meaning of an 'employee' for the purposes of subsection 12(1) of the *Superannuation Guarantee (Administration) Act 1992*, it is not binding on the Commissioner. However, if the Commissioner later takes the view that the subsection 12(1) applies less favourably to you than this draft Ruling indicates, the fact that you acted in accordance with this draft Ruling would be a relevant factor in your favour in the Commissioner's exercise of any discretion in regard to the imposition of superannuation guarantee penalties.

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## What this draft Ruling is about

1. This draft Ruling[1] explains when an individual is an 'employee' of an entity for the purposes of section 12-35 of Schedule 1 of to the *Taxation Administration Act 1953* (TAA). That section imposes an obligation on a paying entity to withhold an amount from salary, wages, commission, bonuses or allowances it pays to an employee, whether or not the paying entity is the employer.

2. All legislative references in this Ruling are to Schedule 1 to the TAA, unless otherwise indicated.

3. The expressions 'employee' and 'employer' in the *Superannuation Guarantee (Administration) Act 1992* (SGAA) have both their ordinary meaning and an extended meaning. This Ruling aids in understanding the ordinary meaning of an 'employee' for the purposes of subsection 12(1) of the SGAA but it is not binding on the Commissioner.

4. This Ruling does not deal with payments for work and services which are subject to withholding under other provisions, such as payments to directors[2] or office holders[3], labour-hire payments[4] and alienated personal services income.[5]

## Previous Ruling

5. This Ruling replaces Taxation Ruling TR 2005/16 *Income tax: Pay As You Go – withholding from payments to employees*. TR 2005/16 is withdrawn with effect from the date of issue of this Ruling. This Ruling takes into account developments in case law[6] since TR 2005/16 was last updated.

[1] All references to 'this Ruling' refer to the Ruling as it will read when finalised. This Ruling will not take effect until finalised.
[2] Section 12-40.
[3] Section 12-45.
[4] Section 12-60.
[5] Division 13.
[6] Specifically, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contacting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (*ZG Operations*).

Status: **draft only – for comment**

# Ruling

6. The term 'employee' is not defined in the TAA. For the purposes of section 12-35, the term 'employee' has its ordinary meaning.

7. Whether a person (that is, a worker) is an employee of an entity (referred to in this Ruling as the 'engaging entity') under the term's ordinary meaning is a question of fact to be determined by reference to an objective assessment of the totality of the relationship between the parties, having regard only to the legal rights and obligations which constitute that relationship.[7]

8. To ascertain the relevant legal rights and obligations between the worker and the engaging entity, the contract of employment must be construed in accordance with the established principles of contractual interpretation.[8] The task is to construe and characterise the contract at the time of entry into it.[9] For the purposes of that exercise of construction, recourse may be had to events, circumstances and things external to the contract which are objective, known to the parties at the time of contracting and assist in identifying the purpose or object of the contract.[10]

9. Where the worker and the engaging entity have comprehensively committed the terms of their relationship to a written contract and the validity of that contract has not been challenged as a sham nor have the terms of the contract otherwise been varied, waived, discharged or the subject of an estoppel or any equitable, legal or statutory right or remedy, it is the legal rights and obligations in the contract alone that are relevant in determining whether the worker is an employee of an engaging entity.[11] Evidence of how the contract was performed, including subsequent conduct and work practices, cannot be considered for the purpose of determining the nature of the legal relationship between the parties.[12]

10. However, evidence of how a contract was actually performed may be considered for other purposes consistent with general contract law principles, including to:

- establish formation of the contract
- identify the contractual terms that were agreed to; for example, where the contract is wholly or partially oral
- demonstrate that a subsequent agreement has been made varying, waiving, or discharging one or more of the terms of the original contract
- show the contract was a sham, or
- establish evidence of an estoppel, rectification or other legal, equitable or statutory rights or remedies.[13]

11. The central question is whether the worker is working in the business of the engaging entity, based on the construction of the terms of the contract, having regard to the indicia of employment identified in case law.[14] This evaluative exercise should not be

[7] *Personnel Contracting* at [61] and [172–173].
[8] *Personnel Contracting* at [60], [124] and [173].
[9] *Personnel Contracting* at [174].
[10] *Personnel Contracting* at [175].
[11] *Personnel Contracting* at [43], [59] and [173]; *WorkPac Pty Ltd v Rossato* [2021] HCA 23 at [56–57] and [63].
[12] *Personnel Contracting* at [55], [59], [173] and [185–189].
[13] *Personnel Contracting* at [42] and [177].
[14] *Personnel Contracting* at [36–39], [61–62], [121], [173] and [183]. The relationship may be affected by statutory provisions and by awards made under statutes (*Personnel Contracting* at [41]).

approached on the basis that there is some checklist against which ticks and crosses may be placed to produce the answer.[15]

12. The fact that a worker may be conducting their own business, including having an Australian Business Number, is not determinative. A person conducting their own business may separately be an employee in the business of another.[16]

13. The 'label' which parties choose to describe their relationship, whether within a written contract or otherwise, is not determinative of, or even relevant to, that characterisation. It is the legal rights and obligations which constitute their relationship which are relevant, and 'labels' used to describe the relationship which are inconsistent with those rights and duties have no meaning.[17]

14. 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 employment relationship for the purposes of the TAA.

# Explanation

15. Section 12-35 provides that '[a]n entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee (whether of that or another entity)'.

16. For section 12-35 to apply, there must be a payment of salary, wages, commission, bonuses or allowances made by an entity (the entity does not need to be the employer) to an employee:

- as a consequence of their employment, and
- as an individual[18] in their capacity as an employee.

17. The term 'employee' is not defined in the TAA; therefore, it has its ordinary meaning. In most cases, it will be self-evident whether an employer and employee, or principal and independent contractor, relationship exists. However, it is sometimes difficult to discern the true character of the relationship as the contract or contracts between the parties may be unclear or ambiguous, or because the terms 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.

## Who is an employee within the ordinary meaning of that expression?

18. The relationship between a worker and an engaging entity will generally be either:

- a relationship of employment, often referred to as a contract of service, or
- a principal and independent contractor relationship, referred to as a contract for services.

[15] *Personnel Contracting* at [34].
[16] *Personnel Contracting* at [181].
[17] *Personnel Contracting* at [63] and [66].
[18] Section 12-35 does not apply to payments made to other entities provided that the arrangement is not a sham or a mere redirection of an employee's salary or wages.

19. The Courts have considered these relationships in a variety of legislative contexts, including income tax, industrial relations, payroll tax, vicarious liability, workers compensation and superannuation guarantee. The leading decision is *Personnel Contracting*. In that case, the majority of the High Court confirmed that in determining whether a relationship between a worker and engaging entity is one of employment, an examination of the totality of the relationship must be undertaken by reference solely to the legal rights and obligations which constitute that relationship.[19] This examination is undertaken through the focussing question of whether the worker is working in the business of the engaging entity.[20]

20. The various indicia of employment that have been identified in case law remain relevant but are to be considered only in respect of the legal rights and obligations between the parties.[21] The indicia point to whether the worker is working in the business of the engaging entity or not.[22]

21. While no factor will be determinative, the more control the engaging entity can exercise over how, when and where the worker performs their work under the contract, the more likely the worker is to be an employee of the engaging entity. This is because the ability to exercise control demonstrates the subservient and dependent nature of the work of the worker to the business of the engaging entity.[23]

## Identifying the 'totality of the relationship' between a worker and engaging entity

22. The totality of the relationship between a worker and an engaging entity comprises the legal rights and obligations they have in respect of each other.[24] To determine the nature of the contractual relationship between a worker and an engaging entity , it is the terms of the contract between the parties alone, whether express or implied, which are to be taken into account.[25]

23. Employment contracts may be wholly in writing, wholly oral or a combination of written, oral or terms implied from conduct. Given the possible forms that an employment contract can take, all circumstances relevant to the formation, variation and waiver of terms must still be considered, even when a written contract purports to be comprehensive. This is to ensure all of the legal rights and obligations that the parties have in respect of each other are known and can be taken into account.

24. For example, in *Hollis v Vabu Pty Ltd*[26] (*Hollis*) the High Court found that the contractual relationship between Vabu and its bicycle couriers was partly oral and partly in writing.[27] The High Court found that despite the existence of a written agreement, the totality of the legal rights and obligations between the parties could not be found merely from the written contractual terms. They found that some important aspects such as the rate of remuneration for deliveries were not recorded in the written agreement and other aspects, such as annual and sick leave, were provided for but were not available to couriers.[28] Accordingly, it was necessary to look at the work practices imposed, the written

[19] *Personnel Contracting* at [44], [61] and [172].
[20] *Personnel Contracting* at [36–39], [61–62], [121] and [183].
[21] *Personnel Contracting* at [174].
[22] *Personnel Contracting* at [61] and [183].
[23] *Personnel Contracting* at [62], [73] and [193].
[24] *Personnel Contracting* at [44].
[25] The relationship may also be affected by statutory provisions and by awards made under statutes (*Personnel Contracting* at [41]).
[26] [2001] HCA 44.
[27] *Hollis* at [24].
[28] *Hollis* at [24].

agreement and the system operated thereunder to establish the totality of the legal rights and obligations.

25. In determining the nature of the relationship between the parties, it is only the legal rights and obligations as expressed in the written terms of the contract that are relevant if:

- the worker and the engaging entity have comprehensively committed the terms of their relationship to a written contract
- the validity of that contract has not been challenged as being a sham, and
- the terms of the contract have not been otherwise varied, waived, discharged or the subject of an estoppel or any equitable, legal or statutory right or remedy.[29]

In such circumstances, evidence of how the contract was actually performed, including subsequent conduct and work practices, cannot be taken into account for the purpose of determining the nature of the legal relationship.[30]

26. However, as outlined in paragraph 10 of this Ruling, evidence of how a contract was actually performed may be taken into account for certain other purposes.

### *Formation of the contract*

27. Regardless of the form a contract takes, it is to be construed and characterised at the time it was entered into.[31] To assist in identifying the purpose or object of a contract and to determine whether a contract was in fact formed and when it was formed, recourse may be had to events, circumstances and things external to the contract which:

- are objective, and
- are known to the parties at the time of contracting.

28. In *ZG Operations*, Kiefel CJ, Keane and Edelman JJ found that the contract could not be one of employment, having regard to circumstances surrounding the making of the relevant contract (referred to as the '1986 contract'), specifically the nature of the contracting parties at the time the contract was entered into[32]:

> … The 1986 contract between the partnerships and the company came to be made because of the company's insistence that the only ongoing relationship between the respondents and the company would be that established by the 1986 contract and that the partnerships would own and operate the trucks which would transport the company's deliveries. Given that the genesis of the contract was the company's refusal to continue to employ the respondents as drivers, and the respondents' evident acceptance of that refusal, it is difficult to see how there could be any doubt that the respondents were thereafter no longer employees of the company.

[29] *Personnel Contracting* at [43], [46], [59], [173] and [177].
[30] *Personnel Contracting* at [55], [59], [173] and [185–189].
[31] *Personnel Contracting* at [174].
[32] *ZG Operations* at [61].

### *Variation, discharge or waiver*

29. The parties to a contract may expressly agree, whether in writing or orally, to vary, discharge or waive the terms of their contract after it has been formed.[33] A variation of the terms of a contract may also occur by implication as a result of the conduct of the parties.[34]

30. Where a worker and engaging entity have conducted themselves in a manner that is inconsistent with the terms of the contract, such conduct may be considered to have in fact varied the rights and obligations that form their relationship.

### *Sham*

31. A contract will be a sham if it is not a legitimate record of the intended legal relationship between 2 parties, but instead is 'a mere piece of machinery' serving some other purpose (often to act as a façade and deliberately obscure the true legal relationship for third parties).[35]

32. This requires all parties to an agreement to have no intention to create the purported legal relationship. It will only apply in situations where an engaging entity and worker *both* intended their relationship to differ from their written contract. It will not apply where one party alone sought to obscure their actual relationship.

33. If the contractual arrangements constitute a sham, the characterisation of the relationship will be determined by reference not to the purported contract but by reference to the actual legal rights and obligations which the parties created.

### *Equitable remedies*

34. The majority of the High Court in *Personnel Contracting* confirmed that the parties' conduct could reveal probative evidence of facts relevant to rectification, estoppel or any other legal, equitable or statutory rights or remedies.[36] Where one of the contracting entities is entitled to equitable relief from a Tribunal or the Courts in respect of the contract, this is likely to impact on the characterisation of the employment relationship.

## The test to be applied in determining if a relationship is one of employment

### *Serving in the engaging entity's business*

35. At its core, the distinction between an employee and an independent contractor is that:

- an employee serves *in* the business of an employer, performing their work as a representative of that business
- an independent contractor provides services *to* a principal's business, but the contractor does so in furthering their own business enterprise; they carry

[33] *Personnel Contracting* at [42], [177] and [188].
[34] *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* [1952] HCA 10 at [6]; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37 at [149].
[35] *Raftland Pty Ltd as trustee of the Raftland Trust v Commissioner of Taxation* [2008] HCA 21 at [34–35]; *Personnel Contracting* at [177].
[36] *Personnel Contracting* at [177].

> out the work as principal of their own business, not a representative of another.[37]

36. In reference to the terms of the contract between an engaging entity and worker, the focussing question through which any determination of the existence of an employment relationship will always be is the worker working in the business or enterprise of the engaging entity?[38] The various employment indicia developed by the authorities (outlined in paragraphs 41 to 69 of this Ruling) aid in answering this question.[39]

### *Characterising an engaging entity's business*

37. The correct characterisation of the business being carried on by the engaging entity is an essential part of determining whether the worker is working in the business of the engaging entity.[40]

38. In *Personnel Contracting*, the High Court examined the nature of the engaging entity's (Construct's) business in characterising its relationship with the worker (Mr McCourt). Kiefel CJ, Keane and Edelman JJ considered that the core of Construct's business was their promise to supply compliant labour to their customer (Hanssen)[41]:

> The right to control the provision of Mr McCourt's labour was an essential asset of that business. Mr McCourt's performance of work for, and at the direction of, Hanssen was a direct result of the deployment by Construct of this asset in the course of its ongoing relationship with its customer.

### *Whether or not the worker conducts their own business is not determinative*

39. While an independent contractor typically performs work representing their own business and not that of the principal, focusing solely on whether the worker works in their own business may detract from considering the totality of the relationship between the worker and engaging entity.[42] This is because a worker may realistically have a business of their own and also perform work in an engaging entity's business (and not through their own business). Also, a worker's services may appear to benefit both their own business and the engaging entity's business, making the finding that they have their own business unhelpful.[43]

40. While the own business/employer's business dichotomy may not be universally applicable, it can help focus attention upon those aspects of the contractual relationship which bear more directly upon whether the worker's work was so subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise.[44]

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[37] *Marshall v Whittaker's Building Supply Co* [1963] HCA 26 at [5], per Windeyer*; Colonial Mutual Life Assurance Society Limited v Producers and Citizens Co-operative Assurance Company of Australia Limited* [1931] HCA 53; (1931) 46 CLR 41 at [48].
[38] *Personnel Contracting* at [36–39] and [183].
[39] *Personnel Contracting* at [34].
[40] *Personnel Contracting* at [70–71], [89] and [200].
[41] *Personnel Contracting* at [89].
[42] *Personnel Contracting* at [180–181].
[43] *Personnel Contracting* at [181–183], *Tattsbet Limited v Morrow* [2015] FCAFC 62 at [61].
[44] *Personnel Contracting* at [39] (referring to *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at [515]; *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at [184–185]).

### *Presenting as an emanation of the business*

41. Whether a worker is presented to the public as part of the engaging entity's business is a key consideration in determining whose business they are serving in. In *Hollis*, bicycle couriers were presented as emanations of the employer's business to the public and to those using the employer's couriers by wearing uniforms bearing the employer's logo as contractually required. This was an important factor supporting the majority's decision that the bicycle couriers were employees.[45]

42. However, it is important to distinguish between a worker being contractually obliged to present as part of the engaging entity's business and them merely choosing to do so to abide by a business' expectations. In *ZG Operations*, the delivery drivers ordinarily wore company-branded clothing and installed tarpaulins bearing the company's logo on the trucks, but they were not contractually required to. As a result, the High Court held that this did not change the contractual rights which comprised the relationship between the parties.[46]

## *Control*

43. An employer generally has a right to control how, where and when its employee performs their work.[47] The importance of control in this context lies not in its actual exercise, but rather in the contractual right of the employer to exercise such control.[48]

44. The importance of a right to control was emphasised by Kiefel CJ, Keane and Edelman JJ in *Personnel Contracting* where they stated[49]:

> … the existence of a right of control by the putative employer over the activities of the putative employee serves to sensitise one to the subservient and dependent nature of the work of the employee, so as to assist in an assessment of whether a relationship is properly to be regarded as a contract of service rather than a contract for services.

45. Where the main operating activity of the business is the supply of labour or a service of some kind, often a critical element of the business is the need to retain control over that labour or the workers providing the service. This control will be strongly indicative of an employment relationship. In *Personnel Contracting*, the High Court found Construct retained a right of control over Mr McCourt that was a core part of its business as a labour hire agency. This right to control the work of Mr McCourt was seen as a key asset of Construct's business. The High Court found that Mr McCourt had no right to exercise any control over what work he was to do and how that work was to be carried out.[50]

46. An employer may not always retain a right to control how, when and where work is performed; different kinds of control may be contractually available depending on the nature of the arrangement. For example, the nature of a casual employment arrangement means that it is likely that the employee retains control over when or for how long they work for an employer.[51]

47. A term in a contract that purports to confer a right to control must be interpreted in the context of the broader contract and the services being provided. In *ZG Operations*, the High Court found that a clause requiring carriage of goods 'as reasonably directed' did not

[45] *Hollis* at [50–52].
[46] *ZG Operations* at [32–33] and [52–53].
[47] *Zuijs v Wirth Bros Pty Ltd* [1955] HCA 73; 93 CLR 561 (*Zuijs)* at [571–573]; *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; 160 CLR 16 (*Stevens)* at [9] and [15–20], per Mason J.
[48] *Zuijs* at [571]; *Stevens* at [10], per Wilson and Dawson JJ.
[49] *Personnel Contracting* at [73].
[50] *Personnel Contracting* at [71–77].
[51] *Personnel Contracting* at [84] and [109].

confer the necessary control when viewed in context. The context indicated that *ZG Operations*, the engaging entity, had a power to give directions to make deliveries, but it did not have the power to direct how they should be done.[52]

### *Other rights that confer a capacity to control*

48. In some cases, a broad, unfettered right to terminate a worker's contract may confer a capacity to control that worker, as the engaging entity can use the prospect of termination as a tool to control performance.[53]

49. Similarly, a requirement that a worker indemnify an engaging entity for damages from failing to adhere to the engaging entity's instructions or directions may give the engaging entity control.[54]

## ***Other indicia***

### *The ability to delegate work*

50. A critical feature of an employment relationship is the personal service of the employee; the worker themselves should be serving in the engaging entity's business. If a worker has an unlimited power to delegate the work to others, this is an indication that the worker is being engaged as an independent contractor.[55]

51. However, the mere existence of a right to delegate in a contract does not indicate that the worker is being engaged as an independent contractor. A contract which has an unlimited right to delegate may be indicative of an independent contractor relationship. If a right to delegate is not 'unlimited' or is subject to the consent of the engaging entity, it must be considered alongside the other indicia and cannot decisively show that a relationship is not one of employment. The contract must be construed as a whole in order to determine the extent of a right to delegate.

52. The concept of delegation in this context should not be confused with other arrangements in which a different person might perform work in the worker's place. An employee may frequently delegate tasks to other employees, particularly where the employee is performing a supervisory or managerial role. However, this delegation exercised is fundamentally different to true delegation exercised by a contractor outlined in this Ruling.

53. Similarly, a worker may have the right (or even the obligation) to find a 'substitute' to perform work in their place; for example, when they are unwell and unable to work.[56] When a worker asks a colleague to take an additional shift or responsibility, and the worker is not responsible for paying that replacement worker, the worker has merely organised a substitution or shared the workload. This is not delegation that is exercised by a contractor.

### *'Results' contracts*

54. 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.[57] The reference to a

[52] *ZG Operations* at [69] and [105].
[53] *Personnel Contracting* at [196].
[54] *Personnel Contracting* at [196].
[55] *Australian Mutual Provident Society v Chaplin and Anor* (1978) 18 ALR 385 at [391].
[56] *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 (*On Call*) at [105] and [253].
[57] *World Book (Australia) Pty Ltd v Commissioner of Taxation* (1992) 92 ATC 4327 at [4334], per Shelley JA.

'result' in this context is 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.

55. The way in which a worker is remunerated for their services, and the process through which the parties determine this remuneration, can help to identify whether a worker is being engaged to serve in an engaging entity's business or has merely contracted with that business to produce a specified result.

56. Consideration for a specified result is often a fixed sum paid on completion of the particular job[58] as opposed to an amount paid by reference to hours worked, activities performed or a commission.

57. In contracts to produce a result, payment is often a negotiated price for the specified outcome. For example, in *Stevens*, payment was determined by reference to the volume of timber delivered[59] and in *Queensland Stations Pty Ltd v Federal Commissioner of Taxation*[60], it was a fixed sum per head of cattle delivered. A payment is more likely to be for a result if it bears little to no reference to the time spent working to produce the outcome.[61]

58. However, 'piece-rate' or 'output-based' payment models are often consistent with an employment relationship if they are simply a natural means to remunerate the particular kind of task the worker is performing.[62] Often in these cases, the employee is paid per discrete task because of one or more of the following factors:

- the sole duty of the employee is to complete the task
- it is easier to calculate remuneration based on task completion
- the amount per task is calculated by reference to the period worked or by reference to time variables (for example, effort, speed and waiting times), or
- paying per task is used as a means to increase productivity.[63]

59. Key examples of non-hourly remuneration models that have been found to be consistent with employment include:

- 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[64]
- bicycle couriers paid a flag fall rate per delivery, rather than per time period engaged[65]
- fruit pickers paid daily per bin of fruit picked[66]
- interviewers who were only paid a fixed rate on the completion of each assignment that was determined by reference to the time expected to complete the assignment.[67]

[58] *Neale v Atlas Products (Vic) Pty Ltd* [1955] HCA 18; 94 CLR 419 at [424–425].
[59] *Stevens* at [10].
[60] [1945] HCA 13; (1945) 70 CLR 539 at [542].
[61] *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2010] FCAFC 52 (*Roy Morgan*) at [42].
[62] *Hollis* at [54].
[63] *Hollis* at [54]; *On Call* at [277]; *Roy Morgan* at [42].
[64] *Commissioner of Taxation (Cth) v Barrett* [1973] HCA 49 at [17].
[65] *Hollis* at [54].
[66] *JA & BM Bowden & Sons Pty Ltd v Chief Commissioner of State Revenue* (NSW) 2001 ATC 4220 at [95].
[67] *Roy Morgan* at [42].

### *Provision of tools and equipment*

60. The provision of assets, equipment and tools by a worker, and the incurring of expenses and other overheads, may be an indicator that the worker is an independent contractor.[68] However, a worker bringing their own tools is not automatically inconsistent with an employment relationship. The nature, scale and cost of the tools and equipment must be considered.

61. As highlighted in *Hollis*, the provision and maintenance of tools and equipment and payment of business expenses should be significant for the worker to be considered an independent contractor. The majority of the High Court stated[69]:

> 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.

62. In *ZG Operations*, Gageler and Gleeson JJ considered the question of scale with respect to the cost of tools and equipment to be important, finding[70]:

> Where work contracted for, actually performed by an individual, and paid for, involves use of a substantial item of mechanical equipment for which the provider of the work is wholly responsible, the personal is overshadowed by the mechanical. That was recognised by this Court in *Humberstone v Northern Timber Mills* and again in *Wright v Attorney-General for the State of Tasmania*. Those cases were cited as authorities for that proposition in *Neale v Atlas Products (Vic) Pty Ltd*; they support what has become the "conventional view" that "owners of expensive equipment, such as [a truck], are independent contractors".

63. Equipment that is not specialised or inherently used only for the completion of the worker's contracted services is also less likely to be considered significant.[71] This may include personal electronic devices such as a mobile phone or laptop, or modes of transport that are also used for personal and/or recreational purposes (for example, bicycles).

64. 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 worker is engaged as 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 legal rights and responsibilities must be considered to determine the nature of the contractual relationship.

65. Further, an employee, unlike an independent contractor, can be 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.

### *Risk*

66. 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.[72] On the other hand, an

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[68] *Stevens* at [12].
[69] *Hollis* at [47].
[70] *ZG Operations* at [88].
[71] *Hollis* at [56].
[72] In *Hollis*, Vabu undertook the provision of insurance for the couriers and deducted the amounts from their payments to the couriers.

independent contractor bears the commercial risk and responsibility for any poor workmanship or injury sustained in the performance of work.

67. A clause in a contract that requires a worker to take out public liability or indemnity insurance may not hold much weight if an analysis of the totality of the legal rights and obligations demonstrates that the engaging entity bears the risk or where other factors support a conclusion that the worker is an employee.

### *Generation of goodwill*

68. If an independent contractor performs services in the course of their own business, it would be common for the contractor to be able to generate goodwill for that business. Where a contract between a worker and engaging entity prevents any goodwill from accruing for a worker's possible business, this may indicate that the worker is instead serving in the engaging entity's business.

69. However, not all businesses will necessarily generate goodwill. In *ZG Operations* Kiefel CJ, Keane and Edelman JJ found[73]:

> … many businesses – such as manufacturers of products for a single customer – do not generate goodwill. That is a feature of the niche in the market occupied by those businesses; it is not a circumstance which denies the independence of such businesses from their customers.

## ***Other relevant considerations***

### *Labels given to parties in the contract and other descriptors of their relationship*

70. The 'labels' which the parties may have chosen to describe their relationship are not determinative or even likely relevant to, the characterisation of their relationship.[74] In *Personnel Contracting*, Kiefel CJ and Keane and Edelman JJ[75] stated[76]:

> As a matter of principle, however, it is difficult to see how the expression by the parties of their opinion as to the character of their relationship can assist the court, whose task it is to characterise their relationship by reference to their rights and duties. Generally speaking, the opinion of the parties on a matter of law is irrelevant. Even if it be accepted that there may be cases where descriptive language chosen by the parties can shed light on the objective understanding of the operative provisions of their contract, the cases where the parties' description of their status or relationship will be helpful to the court in ascertaining their rights and duties will be rare.

71. Furthermore, clauses that outline how parties see their relationship will be similarly limited in their impact on the actual character, for the same reasons. This may include the requirement to provide an Australian business number, the provision or lack of provision of leave entitlements or requirement to obtain insurance.

### *Where a business engages with a non-individual entity*

72. Where a worker does not contract directly with a business, but instead engages to perform work for the business as a partner of a partnership or through an entity such as a company or trust, this may indicate an intention by all parties to not create an employment

[73] At [58].
[74] *Personnel Contracting* at [58], [63], [127] and [184].
[75] Gageler and Gleeson JJ in agreement with the majority on this point.
[76] At [66].

relationship.[77] This is because there may be no contractual rights and obligations existing between the business and the worker (in their individual capacity).

73. However, a different conclusion may be reached if a worker uses an interposed entity but is also directly a party to the contract with the engaging entity. For example, an engaging entity may enter into a contract with both the interposed entity and the worker.[78]

### *Neither employee nor independent contractor – lease or bailment*

74. 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.

75. 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 *Commissioner of Taxation of the Commonwealth of Australia v De Luxe Red & Yellow Cabs Co-operative (Trading) Society Ltd & Ors*[79], the Full Federal Court held that a taxi licence owner and taxi drivers were not in a relationship of employer and employee. The relationship was rather one of bailment, even though the licence owner had a degree of control over the drivers' work.

## Date of effect

76. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

**Commissioner of Taxation**
15 December 2022

[77] *Personnel Contracting* at [174]; *ZG Operations* at [99].
[78] See, for example, *Dental Corporation Pty Ltd v Moffet* [2020] FCAFC 118.
[79] [1998] FCA 361.

# Appendix – Your comments

77. You are invited to comment on this draft Ruling, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

78. A compendium of comments is prepared when finalising this Ruling and an edited version (names and identifying information removed) is published to the Legal database on ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

**Due date:** **17 February 2023**

**Contact officer details have been removed following publication of the final ruling.**

Status: **draft only – for comment**

# References

*Related Rulings/Determinations:*

TR 2006/10

*Previous Rulings/Determinations:*

TR 2005/16

*Legislative references:*

- TAA 1953 Sch 1 12-35
- TAA 1953 Sch 1 12-40
- TAA 1953 Sch 1 12-45
- TAA 1953 Sch 1 12-60
- TAA 1953 Sch 1 Div 13
- SGAA 12(1)

*Cases relied on:*

- Australian Mutual Provident Society v Chaplin and Anor (1978) 18 ALR 385
- Colonial Mutual Life Assurance Society Limited v Producers and Citizens Co-operative Assurance Company of Australia Limited [1931] HCA 53; 46 CLR 41
- Commissioner of Taxation (Cth) v Barrett [1973] HCA 49; 129 CLR 395; 73 ATC 4147; 4 ATR 122
- Commissioner of Taxation of the Commonwealth of Australia v De Luxe Red & Yellow Cabs Co-operative (Trading) Society Ltd & Ors [1998] FCA 361; 38 ATR 609; 82 FCR 507; 98 ATC 4466; 87 IR 349
- Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contacting Pty Ltd [2022] HCA 1; 279 FCR 631
- Dental Corporation Pty Ltd v Moffet [2020] FCAFC 118; 278 FCR 502; 297 IR 183
- Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd and Others [2015] FCAFC 37; 228 FCR 346; 321 ALR 404
- Hollis v Vabu Pty Ltd [2001] HCA 44; 207 CLR 21; 2001 ATC 4508; 47 ATR 559
- JA & BM Bowden & Sons Pty Ltd v Chief Commissioner of State Revenue (NSW) [2001] NSWCA 125; 2001 ATC 4220; 47 ATR 94
- Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173; [1969] 2 WLR 1
- Marshall v Whittaker's Building Supply Co [1963] HCA 26; 109 CLR 210; [1963] ALR 859
- Neale v Atlas Products (Vic) Pty Ltd [1955] HCA 18; 94 CLR 419; 10 ATD 460
- On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3) [2011] FCA 366; 214 FCR 82; 279 ALR 341; 83 ATR 137; 2011 ATC 20-258
- Queensland Stations Pty Ltd v Federal Commissioner of Taxation [1945] HCA 13; (1945) 70 CLR 539; [1945] ALR 273
- R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd [1952] HCA 10; 85 CLR 138
- Raftland Pty Ltd as trustee of the Raftland Trust v Commissioner of Taxation [2008] HCA 21; 238 CLR 516; 246 ALR 406; 2008 ATC 20-029; 68 ATR 170
- Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497
- Roy Morgan Research Pty Ltd v Commissioner of Taxation [2010] FCAFC 52; 184 FCR 448; 268 ALR 232; 2010 ATC 20-184; 76 ATR 264
- Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1; 160 CLR 16; 63 ALR 513; 60 ALJR 194; [1986] ACL 36085
- Tattsbet Limited v Morrow [2015] FCAFC 62; 233 FCR 46; 321 ALR 305
- WorkPac Pty Ltd v Rossato [2021] HCA 23; 271 CLR 456; 392 ALR 39
- World Book (Australia) Pty Ltd v Federal Commissioner of Taxation 27 NSWLR 377; 108 ALR 510; 92 ATC 4327; 23 ATR 412
- ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2
- Zuijs v Wirth Bros Pty Ltd [1955] HCA 73; [1956] ALR 123; [1955] WCR (NSW) 77; 29 ALJ 698; 93 CLR 561

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