TR 2002/21 - Income tax: Pay As You Go (PAYG) Withholding from salary, wages, commissions, bonuses or allowances paid to office holders

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Taxation Ruling
Income tax: Pay As You Go (PAYG) Withholding from salary, wages, commissions, bonuses or allowances paid to office holders

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Preamble

This document does not rule on the application of a 'tax law' (as defined) and is, therefore, not a 'public ruling' for the purposes of Part IVAAA of the Taxation Administration Act 1953. The document is, however, administratively binding on the Commissioner of Taxation. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.

What this Ruling is about

1. This Ruling deals with the operation of section 12-45 in Schedule 1 to the *Taxation Administration Act 1953* (TAA). In particular, it provides guidance in determining whether a person holds an appointment, office or position under the Constitution or an Australian law or whether a person is otherwise in the service of the Commonwealth, a State or a Territory.

2. Section 12-45 in Schedule 1 to the TAA imposes an obligation on the paying entity to withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as:

(a) a member of an Australian legislature;

(b) a person who holds, or performs the duties of, an appointment, office or position under the Constitution or an Australian law;

(c) a member of the Defence Force, or of a police force of the Commonwealth, a State or a Territory;

(d) a person who is otherwise in the service of the Commonwealth, a State or a Territory; or

(e) a member of a local governing body to which subsection 12-45(3) in Schedule 1 to the TAA applies.

3. It is relatively clear to whom paragraphs 12-45(1)(a) and (e) in Schedule 1 to the TAA apply. These paragraphs are further explained at paragraphs 30 to 35. The main object of this Ruling is to provide guidance on the application of paragraphs 12-45(1)(b), (c) and (d).

Background

4. Part 2-5 in Schedule 1 to the TAA sets out the Pay As You Go (PAYG) withholding provisions. These provisions have effect in relation to payments made on or after 1 July 2000. The PAYG withholding system incorporates the main elements of the former Pay As You Earn (PAYE) system which was applicable to payments made before 1 July 2000. In particular, Division 12 of Part 2-5 in Schedule 1 to the TAA preserves the essential scope of the former PAYE system which required withholding from salary or wages paid to an individual as an 'eligible person'.

5. The PAYE concept of 'eligible person' is defined in subsection 221A(1) of the *Income Tax Assessment Act 1936* ('ITAA 1936') to mean:

(a) a person who is an employee within the ordinary meaning of that expression;

(b) a person who holds or performs the duties of an appointment, office or position under the Constitution or under a law of the Commonwealth, a State or a Territory;

(c) a person who is otherwise in the service of the Commonwealth, a State or a Territory (including service as a member of the Defence Force or as a member of a police force);

(d) a member of an Australian Parliament; or

(e) a member of an eligible local governing body.

6. Broadly, the 'eligible person' concept was intended to capture common law employees and persons 'employed' in public service. While some persons in the latter category may be common law employees, others are not employees. The purpose of the 'eligible person' concept was to avoid any doubt that salary or wages paid to persons in public service (whether or not those persons were employees) were subject to withholding under PAYE.

7. Under the PAYG system, the essence of paragraph 221A(1)(a) of the above definition is now incorporated in section 12-35 in Schedule 1 to the TAA; the essence of paragraphs (b) – (e) is now incorporated in section 12-45; and paragraph (c) has been separated into two separate paragraphs in subsection 12-45(1) (i.e., paragraphs 12-45(1)(c) and (d)) in Schedule 1 to the TAA. The PAYG framework is not intended to reduce or expand the apparent scope of 'eligible person' that formerly applied under the PAYE system. Section 12-45 (in conjunction with section 12-35 in Schedule 1 to the TAA) is intended to avoid doubt that salary, wages, commissions,

bonuses or allowances paid to persons in public service continue to be subject to withholding under PAYG.

Date of effect

8. This Ruling applies to relevant payments made on or after the commencement of the PAYG withholding system on 1 July 2000. This Ruling does 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Ruling

Payments to office holders - section 12-45

Member of an Australian legislature (paragraph 12-45(1)(a))

9. An entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as a Federal Member of Parliament, State Member of Parliament, or member of the Legislative Assembly for the Australian Capital Territory or the Northern Territory.

Member of a local governing body (paragraph 12-45(1)(e))

10. An entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as a member of a local governing body that has unanimously resolved that it be treated as an eligible local governing body for the purposes of Division 2 of Part VI of the ITAA 1936, or of Division 12 in Schedule 1 to the TAA and the body has not unanimously resolved to cancel the resolution.

Member of the Defence Force (paragraph 12-45(1)(c))

11. An entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an officer, soldier, sailor or airman of the Defence Force.

Member of a Police Force (paragraph 12-45(1)(c))

12. An entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as a member of the police force of the Commonwealth, a State or

Territory, as defined in the relevant Commonwealth, State or Territory legislation.

Appointment, office or position under the Constitution or an Australian law (paragraph 12-45(1)(b))

13. An entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as a person who holds, or performs the duties of an appointment, office or position under the Constitution or a statutory instrument of the Commonwealth, a State or a Territory.

14. An individual is considered to be appointed or engaged under an Act where you can identify either:

- the particular office, position or appointment; or
- the constitution of the relevant body (such as a panel, board committee or tribunal) to which the individual has been appointed,

in the relevant legislation or statutory instrument.

15. To be covered by paragraph 12-45(1)(b) in Schedule 1 to the TAA, the appointment, office or position must also exhibit the following characteristics of an office holder:

- Independent existence: The office must exist regardless of the individual who occupies the office from time to time – that is, if the individual currently occupying the office vacates that office, the office must continue to exist to be filled by another individual;
- Duties, functions, responsibilities or powers: The office must have identifiable duties, functions, responsibilities or powers other than a mere advisory function. These features of the office (or of the panel, board, committee or tribunal to which the individual has been appointed) would usually be specified in the relevant legislation or statutory instrument; and
- The relevant duties, functions, responsibilities or powers must attach to the office itself, rather than the individual who occupies the office.

16. It should be noted that the duties of an office holder are independent duties deriving from a source other than the orders of the payer or a contract with the payer (see paragraph 87 of this Ruling). Therefore, where the document that sets out the office holder's duties and responsibilities is a contract with the payer, it is more likely that the individual would be an employee or independent contractor (rather than an office holder).

Persons who are otherwise in the service of the Commonwealth, a State or a Territory (paragraph 12-45(1)(d))

17. The common law has identified two types of individuals in the service of the Crown:

- office holders; and,
- common law employees of the Crown.

18. Payments to common law employees[1] of the Crown are subject to PAYG withholding under section 12-35 in Schedule 1 to the TAA. Payments to office holders whose office is under the Constitution or an Australian law are covered by paragraph 12-45(1)(b) in Schedule 1 to the TAA. Payments to individuals in other offices, such as police officers, military officers and members of Parliaments or local governing bodies are specifically subject to PAYG withholding under paragraphs 12-45(1)(a), (c) and (e) in Schedule 1 to the TAA. Therefore the only office holders who are not already covered by the previously mentioned withholding events are common law office holders.

19. A common law office holder would come within paragraph 12-45(1)(d) in Schedule 1 to the TAA where the office has the characteristics mentioned in paragraph 15 of this Ruling and is not an office under the Constitution or an Australian law. That is, there needs to be an existence independent of the office, and the duties or functions should be attached to the office rather than to the individual. The relationship created with the office holder should be with the Crown itself and not with the person who brought the office into existence by the exercise of a general law or a statutory power.

20. An entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as a common law office holder in the service of the Commonwealth, a State or a Territory.

General exceptions to withholding

21. PAYG withholding under section 12-45 in Schedule 1 to the TAA is subject to three general exceptions listed in section 12-1 in Schedule 1 to the TAA:

- an entity need not withhold an amount from a payment made under section 12-45 where the whole of the

[1] Taxation Ruling TR 2000/14, *Pay As You Go – withholding from payments to employees*, provides guidance as to whether an individual is an employee for the purposes of section 12-35.

payment is exempt income of the entity receiving the payment;

- in working out how much to withhold, the payer may disregard so much of the payment as is a living away from home allowance benefit as defined by section 136 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA); and
- in working out how much to withhold, the payer may disregard so much of the payment as is an expense payment benefit as defined by section 136 of the FBTAA and is not an exempt benefit by virtue of the operation of section 22 of that Act which relates to cents per kilometre payments for motor vehicles.

Interaction with other withholding events

22. There is little real difference between the withholding obligations under sections 12-35 (payment of salary, etc., to an employee), 12-40 (remuneration paid to a company director), and 12-45 (payment of salary etc to an office holder) in Schedule 1 to the TAA. Where the individual is engaged as a common law employee, withholding under section 12-35 takes priority over any other withholding events that might otherwise apply. In the case of payments to members of a board of management of a government body that has the status of a company, withholding under section 12-40 should be applied in priority to section 12-45.

23. Where a payment to an individual does not fall within the scope of section 12-45 in Schedule 1 to the TAA, the payment may be subject to withholding under one of the other withholding events contained in Part 2-5 in Schedule 1 to the TAA.

Advisory committee members

24. Members of ad hoc advisory committees are not regarded as office holders by virtue of their membership of such committees. Payments made to these members are not considered to fall within the scope of section 12-45 in Schedule 1 to the TAA. Payments to an advisory committee member may be subject to withholding under one of the other withholding events contained in Part 2-5 in Schedule 1 to the TAA. To determine the applicable withholding event the payer would need to consider the terms of engagement of the payee – that is,

whether the payee has been engaged under a contract *of service* or a contract *for service*.[2]

Explanations and Examples

Payments to office holders - section 12-45

25. Section 12-45 in Schedule 1 to the TAA provides that:

> 1. An entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as:
>
> (a) a member of an Australian legislature;
>
> (b) a person who holds, or performs the duties of, an appointment, office or position under the Constitution or an Australian law;
>
> (c) a member of the Defence Force, or of a police force of the Commonwealth, a State or a Territory;
>
> (d) a person who is otherwise in the service of the Commonwealth, a State or a Territory; or
>
> (e) a member of a local governing body to which subsection (3) applies.
>
> For exceptions, see subsection (2) and section 12-1.
>
> 2. This section does not require an amount to be withheld from a payment to an individual as a member of a local governing body established by or under a State law or Territory law unless subsection (3) applies to the body.
>
> 3. This subsection applies to a local governing body established by or under a State law or a Territory law if:
>
> (a) the body has unanimously resolved that it be treated as an eligible local governing body for the purposes of Division 2 of Part VI of the ITAA 1936, or of this Division; and
>
> (b) that body has not unanimously resolved to cancel the resolution.
>
> For rules about such resolutions, see section 221B of the ITAA 1936.

[2] Taxation Ruling TR 2000/14, *Pay As You Go – withholding from payments to employees*, contains a detailed discussion on the distinction between a contract of service and a contract for service.

26. The various elements of section 12-45 in Schedule 1 to the TAA are explained in the following paragraphs.

Salary, wages, commission, bonuses or allowances

27. The terms 'salary', 'wages', 'commission', 'bonuses' and 'allowances' carry their ordinary meaning as interpreted by the courts in cases such as *Mutual Acceptance v. FC of T* [3] and *W A Flick and Co. Pty Ltd v. FC of T.*[4] It is the connotation of 'employment' in those terms that is significant and the fact that the expression '*salary, wages, commissions, bonuses and allowances'* is only used in sections 12-35 (payment to employee) and section 12-45 in Schedule 1 to the TAA. Other sections, such as section 12-40 (payment to company director), section 12-55 (voluntary agreement to withhold) and section 12-60 (payment under labour hire arrangement, or specified by regulations) in Schedule 1 to the TAA use the neutral generic term *payment* to identify what is subject to withholding.

28. The notion of *office* holder's remuneration being a 'salary' is affirmed in Halsbury's Law, Volume 16 at paragraph 7:

> **Office-holders.** The categorisation of an individual as an office-holder tends to be of more significance in the law relating to income taxation than in employment law. While it is true that in the case of certain major offices the individual's status as an office-holder may mean that he is not an employee, in most cases this will not be so and there will be nothing to prevent the ordinary definition of 'employee' from being satisfied. Even if the office-holder does not qualify as an employee, there may still be aspects of employment law applicable to him, particularly in relation to the payment of wages, since the remuneration of a modern office-holder is likely to be construed as an ordinary salary for performing the duties of the office, not as the archaic form of an honorarium for filling an office…

29. A true honorarium paid to an office holder would not be salary, wages, commission, bonuses or allowances that would be subject to withholding under section 12-45 in Schedule 1 to the TAA. However, as indicated in the above paragraph, it is likely that the remuneration paid to a modern office holder would be ordinary salary for performing the duties of the office rather than an honorarium for filling an office.

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[3] *Mutual Acceptance v. FC of T* (1944) 69 CLR 389.
[4] *W A Flick and Co.* Pty *Ltd v. FC of T* (1959) 103 CLR 334.

A member of an Australian legislature (paragraph 12-45(1)(a))

30. Paragraph 12-45(1)(a) in Schedule 1 to the TAA provides that an entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as a member of an Australian legislature.

31. For the purposes of section 12-45 in Schedule 1 to the TAA, 'Australian legislature' has the meaning set out in the *Income Tax Assessment Act 1997* (ITAA 1997).[5] Section 995-1 of the ITAA 1997 defines 'Australian legislature' to mean:

(a) the Parliament of the Commonwealth of Australia;

(b) the Parliament of a State;

(c) the Legislative Assembly for the Australian Capital Territory; or

(d) the Legislative Assembly of the Northern Territory of Australia.

32. Where an individual receives a payment of salary, wages, commission, bonuses or allowances as a Federal Member of Parliament, State Member of Parliament, or member of the Legislative Assembly for the Australian Capital Territory or of the Northern Territory, that payment will be subject to PAYG withholding under paragraph 12-45(1)(a) in Schedule 1 to the TAA.

A member of a local governing body (paragraph 12-45(1)(e))

33. Payments of salary, wages, commission, bonuses or allowances made to an individual as a member of a local governing body (established by or under a State Law or Territory Law) will not be subject to withholding under section 12-45 in Schedule 1 to the TAA unless subsection 12-45(3) applies to that body.

34. Subsection 12-45(3) in Schedule 1 to the TAA, applies to a local governing body established by or under a State law or a Territory law if:

(a) the body has unanimously resolved that it be treated as an eligible local governing body for the purposes of Division 2 of Part VI of the ITAA 1936, or of this Division; and

(b) that body has not unanimously resolved to cancel the resolution.

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[5] Subsection 3AA(2) of the TAA provides that an expression has the same meaning in Schedule 1 of the TAA as in the ITAA 1997.

35. For example, an individual is a local councillor with a city council. The city council has made a resolution under section 221B of the ITAA 1936 that the body be treated as an eligible local governing body. That resolution is still in force as the city council has not unanimously resolved to cancel that resolution. The individual is paid a salary by the city council for her work as a local councillor. The city council is required to withhold an amount under paragraph 12-45(1)(e) in Schedule 1 to the TAA from the payment of the salary.

A member of the Defence Force, or of a police force of the Commonwealth, a State or a Territory (paragraph 12-45(1)(c))

36. Paragraph 12-45(1)(c) in Schedule 1 to the TAA provides that an entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as a member of the Defence Force, or of a police force of the Commonwealth, a State or a Territory.

37. The TAA does not provide guidance on the meaning of 'Defence Force' or 'police force'. Therefore, these terms take on their ordinary meaning. Various statutes provide relevant definitions that can be used as a guide. However, where the statutes specifically define membership, the more specific sections will apply. For example, where the statutes define membership to include common law employees (such as civilians in the Defence Department or police service), section 12-35 (payments to employees) in Schedule 1 to the TAA applies in relation to payments made to those individuals as it is the more specific section relevant to the contract of engagement between the parties.

38. In *Attorney-General for New South Wales v. Perpetual Trustee*,[6] the Privy Council considered the differences between a common law employment relationship and that of a police constable. In their Lordships' view:

> there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original not delegated and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract.

Member of the Defence Force

39. For the purposes of paragraph 12-45(1)(c) in Schedule 1 to the TAA, the Commissioner considers that a member of the Defence

[6] *Attorney-General for New South Wales v. Perpetual Trustee* (1955) 92 CLR 113 at 130.

Force is taken to have the same meaning as that contained in the *Defence Act 1903.*

40. Section 4 of the *Defence Act 1903* provides that a 'member' of the Defence Force includes any officer, sailor, soldier or airman and in turn those terms are defined as follows:

> *Officer* – means:
>
> (a) in relation to the Australian Navy – a person appointed as an officer of the Australian Navy, including a person who holds the rank in the Australian Navy of Acting Sub-Lieutenant or of Midshipman;
>
> (b) in relation to the Australian Army or the Australian Air Force – a person appointed as an officer of the Australian Army or the Australian Air Force.
>
> *Sailor* – means a member of the Navy other than an officer.
>
> *Soldier* – means a member of the Army other than an officer.
>
> *Airman* – means a member of the Air Force other than an officer.

41. Members of the Defence Force are not common law employees. Salary, wages, commission, bonuses or allowances paid to any officer, soldier, sailor or airman of the Defence Force will be subject to PAYG withholding under paragraph 12-45(1)(c) in Schedule 1 to the TAA.

42. Individuals engaged by the Department of Defence in civilian support roles (e.g., public servants) are not 'members of the Defence Force' for the purposes of paragraph 12-45(1)(c) in Schedule 1 to the TAA. Civilian support roles are normally filled by common law employees or, in some cases, independent contractors.

Member of a police force of the Commonwealth, a State or a Territory

43. For an individual to be considered a 'member' of the relevant police force for the purposes of paragraph 12-45(1)(c) in Schedule 1 to the TAA, reference needs to be made to the Act that appoints members of that police force.

44. The *Australian Federal Police Act 1979* deals with the appointment of members of the Australian Federal Police (AFP). A member of the AFP is defined in section 4 of that Act to mean:

> (a) the Commissioner of Police;
>
> (b) a Deputy Commissioner of Police;
>
> (c) an AFP employee in respect of whom a declaration under section 40B is in force. (Section 40 B provides that the Commissioner can declare an AFP employee to be a member of the AFP where certain requirements are met).

45. Each State and Territory has its own legislation dealing with the appointment of members to a police force. For example, in Queensland, subsection 2.2(1) of the *Police Service Administration Act 1990* (Qld) provides that the police service consists of police officers, police recruits, and staff members.

46. 'Police officers' are defined in subsection 2.2(2) of that Act to be:

(a) the commissioner of the police service;

(b) the persons holding appointment as an executive police officer;

(c) the persons holding appointment as a commissioned police officer;

(d) the persons holding appointment as a non-commissioned police officer;

(e) the persons holding appointment as a constable.

47. That Act provides for an office of constable[7] and an office of the Commissioner[8] and requires officers take an oath of office. The police officers have certain statutory powers that are listed in the *Police Service Administration Act 1990* (Qld) and various other Acts, and certain powers afforded to them by common law attached to their office. Police officers of the Queensland police force are considered to be office holders for the purposes of paragraph 12-45(1)(c) in Schedule 1 to the TAA.

48. Although membership of the Queensland police service includes police recruits and staff members, the Act specifically provides that those persons are common law employees[9] and therefore, salary, wages, commission, bonuses or allowances paid to them would be subject to PAYG withholding under section 12-35 in Schedule 1 to the TAA.

49. Similarly, in determining whether a person is a member of a police force of another State or Territory for the purposes of paragraph 12-45(1)(c), it is necessary to have regard to the legislation[10] for that State or Territory which deals with appointments of such members. Where that legislation includes police recruits or

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[7] Part 3 *Police Service Administration Act 1990* (Qld).

[8] Part 4 *Police Service Administration Act 1990* (Qld).

[9] Paragraph 5.11(1)(b) of the *Police Service Administration Act 1990* (Qld) states that the conditions of employment of a police recruit are to be governed by a contract of employment made, or taken to be made, between the Crown and the recruit.

[10] See *Police Service Act 1990* (NSW); *Police Regulation Act 1958* (Vic); *Police Act 1998* (SA); *Police Regulation Act 1898* (Tas); *Police Act 1892* (WA); *Police Administration Act 2001* (NT).

staff members as part of the police service, those persons would not be members of a police force for the purposes of paragraph 12-45(1)(c) if the legislation in that State or Territory provides that they are common law employees.

A person who holds, or performs the duties of, an appointment, office or position under the Constitution or an Australian Law (paragraph 12-45(1)(b))

50. Paragraph 12-45(1)(b) in Schedule 1 to the TAA provides that:

> an entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as a person who holds, or performs the duties of, an appointment, office or position under the Constitution or an Australian law.

Holds or performs the duties of…

51. An individual may be regarded as 'holding' an appointment, office or position once he or she has been formally appointed to it and has become entitled to exercise its functions – it is not necessary to show the individual has actually discharged any of those functions.[11]

52. The word 'perform' is appropriately applied to the person who is physically performing the work.[12] For example, an individual's appointment may be subject to successful completion of a probation period. A person may therefore perform the duties of the appointment during the probation period prior to confirmation of the appointment. In that probationary period, the individual would be described as 'performing the duties' of the appointment, office or position. Equally so, where an office is vacant and an individual has been appointed on an acting basis to fill that vacancy, for the purposes of paragraph 12-45(1)(b) in Schedule 1 to the TAA, the individual would be considered to be performing the duties of that office.

53. 'Duty' has been interpreted as being not confined to a legal obligation, but as the equivalent of 'function' which encompasses all that is incidental to the carrying out of those duties or functions.[13] 'Responsibilities' would also be an equivalent term in this context.

54. For the purposes of paragraph 12-45(1)(b) in Schedule 1 to the TAA, an individual will be taken to *hold, or perform the duties of,* an appointment, office or position if that person:

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[11] *Cockerell v. Fry* (1967) 15 LGRA 164 per McInerney J, at 178-179.

[12] *Donaghey v. Boulton & Paul Ltd* [1967] 2 All ER 1014 at 1027, per Lord Hodson.

[13] *Canadian Pacific Tobacco Co. Ltd. v. Stapleton* (1952) 86 CLR 1, at 6; and *Attorney-General v. Cooper and Another* [1974] 2 NZLR 713.

- has been appointed to, and is entitled to exercise the functions of, the appointment, office or position; or
- actually performs the duties or functions of (including matters incidental to) the appointment, office or position – for example, an individual is acting in an office while the office is vacant, or where the individual is performing the duties during a probationary period.

55. Where an individual is an 'authorised officer' for the purposes of exercising certain functions and duties (generally by instrument of authorisation by, for example, the Agency head or a delegate), payments made to the individual would not fall within paragraph 12-45(1)(b) in Schedule 1 to the TAA where the powers or functions can only be exercised or performed by the authorised officer in the name of, and on behalf of someone else. Authorisations relate to the occupant from time to time of a particular position or to employees/officers of a particular classification or within a specified class of positions – they are not personal. However, where an authorised officer is not able to exercise the powers or perform the functions independently, the powers or functions under the authorisation are exercised or performed by the authorised officer in the course of their duties or services provided under their contract of engagement. This will be either as an employee or as an independent contractor rather than as an office holder.

56. In other cases, a person or class of persons may be appointed as an authorised officer or authorised officers and are able to perform or exercise statutory functions or powers independently. For example, under section 20 of the *Export Control Act 1982*, the Secretary can appoint a person to be an authorised officer to exercise the powers and perform the functions of an authorised officer under the Act.

57. Even where an authorised officer performs the statutory duties independently, it is also necessary to consider the other requirements of paragraph 12-45(1)(b) in Schedule 1 to the TAA. For example, in many cases these statutory duties of an authorised officer would not attach to an appointment, office or position and therefore payments of salary, wages etc would not come within section 12-45 in Schedule 1 to the TAA.

58. It should be noted that some powers and functions can be delegated and do not necessarily have to be performed or exercised by the individual who occupies the office to which those powers and functions are attached (for example, the Commissioner of Taxation).[14]

[14] Under subsection 8(1) of the TAA, the Commissioner of Taxation may delegate to a Deputy Commissioner any of the Commissioner's statutory powers or functions, other than the power of delegation.

Other powers and functions are personal and cannot be delegated (for example, the powers and functions of a judge). Delegations should be distinguished from authorisations. If the powers and functions of an office have been delegated to a particular position, the delegate in exercising those powers and functions, would be performing the powers and functions of the office, despite not being the holder of that office. Where an individual who is normally engaged as an employee is occasionally required to exercise powers and functions that have been delegated to him or her by an office holder, the payment to the individual is potentially subject to withholding under section 12-35 and paragraph 12-45(1)(b) in Schedule 1 to the TAA. However, there is no practical difference for the payer as the amount to withhold and reporting obligations relating to section 12-35 and paragraph 12-45(1)(b) are identical. The amount to withhold under section 12-35 and section 12-45 in Schedule 1 to the TAA is worked out in accordance with the PAYG Withholding Tax Tables and other calculation sheets published by the Commissioner.

An appointment, office or position

59. The TAA does not provide any guidance on the interpretation of the terms 'appointment, office or position'. These terms must therefore be interpreted according to their ordinary meaning and legislative context.[15]

60. The Macquarie Dictionary defines:

- 'appointment' as 'an office held by a person appointed';
- 'office' as 'a position of duty, trust, or authority … official employment or position … '; and
- 'position' as 'a post of employment … '.

61. The words 'appointment, office or position' are not precise terms. Rather, these are expressions of broad import connoting 'employment', which encompasses a person's work, occupation or business, as understood in common language. This is consistent with the perceived intention of the provision being to ensure that salary, wages, commission, bonuses or allowances paid to persons 'employed' in public service whether in an official or statutory position (such as Commissioner of Taxation) or simply in a generic position under a public service statute to which certain duties or functions attach (the commonly understood 'public servant') are within the scope of PAYG withholding even if not engaged under the common law concept of a contract of service.

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[15] *Chaudri v. FC of T* [2001] FCA 554; 2001 ATC 4214; (2001) 47 ATR 126; see also *Sykes v. Cleary* (1992) 176 CLR 77.

An appointment, office or position and common law employment

62. Paragraph 12-45(1)(b) in Schedule 1 to the TAA is essentially a clarifying rather than extending provision. The paragraph is designed to ensure that salary, wages, commission, bonuses or allowances paid to persons in public employment is subject to PAYG withholding. Many such persons will also be common law employees[16] and their salary or wages clearly subject to withholding under section 12-35 in Schedule 1 to the TAA.

63. Section 12-35 and paragraph 12-45(1)(b) in Schedule 1 to the TAA are not mutually exclusive provisions. Where payments of salary or wages are caught by both provisions, only one amount is to be withheld from the payment (in accordance with subsection 12-5(1) in Schedule 1 to the TAA). The provision to apply is the one that is most specific to the circumstances of the payment (subsection 12-5(2) in Schedule 1 to the TAA). In the case of those common law employees who may be said to hold, or perform the duties of, an appointment, office or position, section 12-35 in Schedule 1 to the TAA should be applied to the relevant payments.

64. For example, in relation to the Australian Public Service (APS) the *Public Service Act 1999* (Cth) uses the term 'employee' rather than 'officer' in keeping with the modern approaches to APS employment. Subsection 6(1) provides:

> All persons engaged on behalf of the Commonwealth as employees to perform functions in a Department or Executive Agency must be engaged under this Act, or under the authority of another Act.

The Explanatory Memorandum to the Public Service Bill states clearly at paragraph 1.10 in relation to subsection 6(1):

> This engagement will result in the person being an 'employee' in the common law sense.

Subsection (2) contains exceptions in relation to persons engaged on an honorary basis, and persons engaged by the Australian Secret Intelligence Service.

65. However, it recognises that other legislation may be drafted with references to public servants being office holders rather than employees. Included in the Act is an interpretation provision (section 77) that ensures that where other legislation which has been drafted on the basis of the concept of office refers to APS employees who are in 'offices' or 'positions', that will still apply to APS

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[16] Graham Smith, 'Do Crown Servants in Australia have a contract of employment?', *1 Australian Journal of Labour Law*, 260; *AG(UK) v. Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341; 10 NSWLR 86; *Director-General of Education v. Suttling* (1987) 69 ALR 193.

employees. Similarly, subsection 21(2) of the *Acts Interpretation Act 1901* (Cth) defines 'office' to include '…a position occupied by an APS employee'.

66. In cases where the individual is an office holder in the formal statutory sense and there is some doubt as to whether he or she is also a common law employee, paragraph 12-45(1)(b) in Schedule 1 to the TAA should be applied in relation to their salary or wages. This removes any doubt or confusion about the PAYG withholding obligation of the paying authority.

67. Paragraph 12-45(1)(b) in Schedule 1 to the TAA is intended to require withholding from payments of salary or wages to a person holding, or performing the duties of, an appointment, office or position in circumstances where the person is clearly not a common law employee (for example, members of the judiciary). Persons in this category, while not employees or employee-like, are in positions of public service and are remunerated for their services in an employee-like way through the payment of salary, wages, commission, bonuses or allowances.

Concept of public office

68. Paragraphs (a), (c), (d) and (e) of subsection 12-45(1) in Schedule 1 to the TAA contain a common element of public service. That is, the work or services performed by the individual under those paragraphs is generally for the benefit of the public rather than the benefit of a private enterprise. Whilst paragraph 12-45(1)(b) in Schedule 1 to the TAA could be interpreted quite broadly, in this context, and by the use of the words 'under the Constitution or an Australian law', the appointment, office or position will also need to be of a public nature to be covered by paragraph 12-45(1)(b).

69. In *R v. McCann*,[17] Byrne J referred to a treatise on *The Law of Public Offices and Officers* in which Floyd Mechem, described a public office as:

> the right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer. As here used, the word office is to be distinguished from its application to such positions as are at most quasi public only, as the charge or office of an executor, administrator or guardian, and from the offices of private corporations.

[17] *R v. McCann* [1997] QCA 239 (8 August 1997) at 16.

70. His Honour also referred to a view from the United States of America (63A American *Jurisprudence* 2d, 'Public Officers and Employees'):

> The key considerations in determining whether one is a public officer are the nature of the office, the powers wielded, and the responsibilities which are carried out. In making such a determination, the court must look to the nature of the services performed by the incumbent and the duties imposed upon him. The characteristics of a public office are generally agreed upon, although the distinction between an office and employment may be vague in particular fact situations. The characteristics of a public office include: (1) creation by statute or constitution; (2) exercise of some portion of the sovereign power; (3) a continuing position not occasional or contractual; (4) a fixed term of office; (5) an oath requirement; (6) liability of misfeasance or nonfeasance; and (7) the official has an independence beyond that of employees. A public office may be either appointed or elected; customarily will perform a public or governmental duty; the enforcement of governmental regulations or the control of the general interest of society will be confided in him; usually he will have general duties as part of the regular administration of government; and the right to emoluments.[18]

71. In *R v. Whitaker*,[19] a public officer was described as: '…an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.'

72. However, not everyone who carries out duties specified by the law is the holder of a public office. As noted in *R v. McCann*,[20] people may perform duties of a public character without being members of the public service, for example, directors of statutory corporations.

73. In *McMillan v. Guest*,[21] a director of a company incorporated under the *Companies Act* was considered to hold a public office. In relation to paragraph 12-45(1)(b) in Schedule 1 to the TAA, whilst a company director could be said to hold a position under an Australian law, (namely the *Corporations Act 2001* (Cth)), for the reasons given above, paragraph 12-45(1)(b) is only applicable where the office is in the nature of a public office. Company directors perform work or services primarily for the benefit of the shareholders of the company rather than for the benefit of the public.

74. In the situation of statutory corporations, it is arguable that the directors of those types of corporations are providing their work or services for the benefit of the public and that they hold an

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[18] *R v. McCann* [1997] QCA 239 (8 August 1997) at 26.
[19] *R v. Whitaker* [1914] 3 KB 1283 at 1296
[20] *R v. McCann* [1997] QCA 239 (8 August 1997)
[21] *McMillan v. Guest* [1942] AC 561

appointment, office or position under an Australian law. These directors are potentially subject to withholding under paragraph 12-45(1)(b) and section 12-40 (about payments to company directors) in Schedule 1 to the TAA. Through the priority rules in section 12-5 in Schedule 1 to the TAA, a director of a company would be subject to withholding under section 12-40 rather than section 12-45 in Schedule 1 to the TAA. Section 12-40 is the provision more specific to the circumstances of the payment.

75. It should also be noted that the term 'office' is used in section 26AD of the ITAA 1936 ('Amounts received on retirement or termination of any office or employment in lieu of long service leave'). The holder of an 'office' in the context of section 26AD of the ITAA 1936 (and the former paragraph 26(d) of the ITAA 1936) has been interpreted quite widely to include:

- a managing partner in a grazing partnership;[22]
- an inspector of schools;[23]
- a church minister;[24] and
- a permanent officer in the Commonwealth Public Service.[25]

However, the term 'office' as used in paragraph 12-45(1)(b) in Schedule 1 to the TAA is limited by the words in that paragraph, 'under the Constitution or an Australian law' to public statutory office holders, rather than extending to those office holders found to exist in relation to section 26AD of the ITAA 1936.

76. The following paragraphs will now explore the main features which the courts have found to characterise an office, namely:

- independent existence;
- duties, functions or powers attach to the office rather than the individual who occupies the office.

Each of the features listed above should be considered in the context of our view that the concept of 'office' under paragraph 12-45(1)(b) in Schedule 1 to the TAA is limited to a public office.

Independent existence

77. The first main characteristic of an office holder is that the office must have an existence independent of the person who may occupy it from time to time.

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[22] *Federal Commissioner of Taxation v. Sealy* 87 ATC 5076; (1987) 19 ATR 582.
[23] *AAT Case 8603; Case 9/93* 93 ATC 148; (1993) 25 ATR 1082.
[24] *Case W31* 89 ATC 307; (1989) 20 ATR 3509.
[25] (1958) 9 TBRD *Case J45*.

78. Rowlett J in *Great Western Railway Co. v Bater*[26] interpreted an 'office' to mean 'an office or employment which has a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders.'

79. A more modern view is that a *degree* of permanence and continuity is essential.

80. In *Edwards (Inspector of Taxes) v. Clinch*,[27] Lord Wilberforce stated that a:

> rigid requirement of permanence is no longer appropriate and continuity need not be regarded as an absolute qualification the word must involve a degree of continuance (not necessarily continuity) and of independent existence: it must connote a post to which a person can be appointed, which he can vacate and to which a successor can be appointed.

81. For example, subsection 10(1) of the *Health Insurance Commission Act 1973* states:

> The Commission shall consist of the following Commissioners…

Section 11 of that Act states:

> A part time Commissioner shall be appointed for such period, not exceeding 5 years, as the Governor-General specifies in the instrument of appointment and is eligible for re-appointment.

These sections demonstrate some of the relevant indicia of an 'office'. The position has existence independent of its holder from time to time, and the position is not limited to the tenure of one person. The legislative instrument in the case of a Health Insurance Commissioner, is the *Health Insurance Commission Act 1973*. An individual appointed as a Health Insurance Commissioner would be considered an office holder under paragraph 12-45(1)(b) in Schedule 1 to the TAA.

82. Generally an office will still exist even where the individual dies, retires or completes the assignment.[28] In *Edwards (Inspector of Taxes) v. Clinch*, Lord Lowry stated:[29]

> The characteristics of permanence need only amount to the independent existence of an office, as opposed to its incidental creation and automatic demise with the beginning and the end of the appointment of an individual to perform a task. And the continuity required need have no magic beyond the existence of the post (subject always to its abolition) after the holder has left it, with the possibility of a successor being appointed.

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[26] *Great Western Railway Co. v Bater* [1980] 3 All ER 278.
[27] *Edwards (Inspector of Taxes) v. Clinch* [1982] AC 845 at 861.
[28] *Edwards (Inspector of Taxes) v. Clinch* [1982] AC 845, per Lord Lowry at 870.
[29] *Edwards (Inspector of Taxes) v. Clinch* [1982] AC 845 at 876.

83. There may be circumstances where the relevant statute, under which the position is established, also provides for the position to terminate at a specified time such as on the completion of a particular inquiry. Providing the position is not limited to the tenure of one person and continues to exist for the period required in the legislation, it would have the necessary degree of permanence and continuity to satisfy the modern concept of 'independent existence' arising from *Edwards (Inspector of Taxes) v. Clinch.*

84. The characteristic of an independent existence of the office is a requirement for the second main characteristic of an office holder, so that the duties, functions, or powers can attach to the office itself, rather than the individual who occupies the office.

Duties, functions or powers attach to the office rather than the individual who occupies the office

85. An office is generally considered to be a position of authority or responsibility. To have that status the duties, functions and powers associated with that office holder attach to the office itself rather than the individual occupying that office.[30]

86. When Parliament creates a statutory power it will vest that power in the holder of a public office or body who is able to exercise it. For example, the power can be vested in an already existing office, such as the Governor-General, a Minister or the Secretary of a Department, or an office or body created to exercise particular statutory powers.

87. An office is a separate and independent position, to which duties are attached. An office does not owe its existence to the incumbent or the discretion of an organisation. Office holders' duties are independent duties deriving from a source other than the orders of the payer or a contract with the payer.[31] For example, the duties, functions or powers will arise from statutory instruments, or the common law.

88. An office holder is generally able to exercise the authority to make decisions without reference to or the control of a superior. However, those decisions are limited to the extent of the duties, functions or powers attached to that office.

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[30] *R v. McCann*; *Fredericks v. Board of Health of West Hoboken* 82 A 528, 529 (NJ 1912).

[31] Macken, James J, McCarry, Greg, Sappideen, Carolyn, (3rd edition) (1990), *The Law of Employment*, The Law Book Company Limited, Sydney at p.54.

89. In *Oceanic Crest Shipping Co v. Pilbara Harbour Services Pty Ltd*,[32] Brennan J stated:

> When the Crown or a public authority is the employer of a public officer who is charged by statute with the exercise of an 'independent responsibility cast on him by law' what is done in discharge of that responsibility is not done on behalf of the employer. The Crown or public authority, having no authority either to discharge that responsibility or to control its discharge, is not acting through the officer and what is done by the officer in discharge of the independent responsibility by the employee is not regarded as done in the course of his employment as a servant of the crown or public authority.

90. In *Herscu v. The Queen*,[33] the High Court found that the phrase 'duties of office' (in relation to section 87 *Criminal Code 1899* (Qld)) did not require a specific statutory duty that can be identified, but the functions which fall on the office to be performed because of the position held.

91. In some cases the functions and duties are exercisable by a body of individuals rather than one holder of an office. For example, legislation may specify that a particular government board can exercise certain duties and functions. However, the individual members of that board do not have any powers that they can exercise as individuals in their own right. Paragraph 96 of this Ruling discusses the application of paragraph 12-45(1)(b) in Schedule 1 to the TAA to these types of office holders.

Under the Constitution or an Australian law

92. Paragraph 12-45(1)(b) in Schedule 1 to the TAA requires that the appointment, office or position must be one 'under the Constitution or an Australian law'. In this context, 'under' is taken to mean *in accordance with the provisions* of the Constitution or an Australian law.

93. The Constitution is the Constitution of the Commonwealth contained in *The Commonwealth of Australia Constitution Act*. Section 995-1 of the ITAA 1997 defines 'Australian law' to mean a Commonwealth law, a State law or a Territory law.

94. For an individual to be an office holder under paragraph 12-45(1)(b) in Schedule 1 to the TAA, the position must be provided for (established or created) under the Constitution or an Australian law. The mode of appointment should not be regarded as a matter that by itself determines whether a person is the holder of a

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[32] *Oceanic Crest Shipping Co v. Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626.

[33] *Herscu v. The Queen* (1991) 173 CLR 276 at 282

public office.[34] The focus should be on the functions being performed as well as the creation of a position to which those functions are attached. In this context, the relevant question is whether these features are contained in the particular Act.

95. To determine whether an individual is an office holder under paragraph 12-45(1)(b) in Schedule 1 to the TAA reference needs to be made to the relevant law – that is, the Constitution, Act or other statutory instrument.

96. As alluded to in paragraphs 86 and 91 there are two general types of office holder for the purposes of paragraph 12-45(1)(b) in Schedule 1 to the TAA:

(i) an individual occupying an office where the functions and duties of that office are only exercisable by the holder of the office, or able to be delegated by that one individual (for example, the Commissioner of Taxation);[35] and

(ii) an individual occupying an office or position as a member of a larger body, where the functions and duties are only exercisable by the body as a whole, rather than each individual member of the body being able to exercise those duties or functions (for example, members of a Government Board or Tribunal).

97. To identify whether a payment of salary, wages, commission, bonuses or allowances paid to an individual will be subject to withholding under paragraph 12-45(1)(b) in Schedule 1 to the TAA the relevant statutory instrument must be examined. That instrument should:

- either identify or make reference to the office or the constitution of the relevant body of which the individual is a member; and
- identify duties, functions, responsibilities or powers of the office or body to which the individual has been appointed, which are akin to the duties, functions, responsibilities or powers of a public office holder.[36]

It should be noted that in some cases the duties, functions, responsibilities or powers will not be statute-based, but will fall on the

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[34] *Enever v. The King* (1906) 3 CLR 969 at 978, per Griffith CJ.

[35] Under subsection 8(1) of the TAA, the Commissioner of Taxation may delegate to a Deputy Commissioner any of the Commissioner's statutory powers or functions, other than the power of delegation.

[36] Refer to the discussion in this ruling of *Concept of public office* at paragraphs 68 to 76; *Independent existence* in this ruling at paragraphs 77 to 84; and *Duties, functions or powers attach to the office rather than the individual who occupies the office* at paragraphs 85 to 91.

office to be performed because of the position held.[37]

98. Where an Act provides that a Minister may appoint such persons as are necessary for the effective administration of the Act and then states the functions and powers of appointments and sets the tenure of their appointment, then remuneration of that individual would be considered to be covered by paragraph 12-45(1)(b) in Schedule 1 to the TAA. That is, it is not necessary for the Act to specify a particular number of positions so long as there is an identified mode of appointment so that the positions are clearly identifiable, have an independent existence and have independent duties, functions or powers attached.

99. Where a statutory instrument provides for a body, for example, a government advisory committee, to advise the Minister on a specified matter, but is silent on the constitution of the committee such that the number of positions on the committee may vary from time to time, and appointments are to be on an ad hoc basis, the individual members of the committee are not the holders of an office, position or appointment *under an Act*. The constitution of the advisory committee is not revealed in the Act. The Act does not contain any specific duties or functions similar to those of a public office holder that the advisory committee can exercise. Its functions are merely advisory to assist the Minister in his or her duties as a public office holder. Payments of salary, wages, commissions, bonuses or allowances to members of such committees would not be within paragraph 12-45(1)(b) of Schedule 1 to the TAA.

Examples in relation to paragraph 12-45(1)(b)

Example 1 – Not an office under an Australian law - ad hoc advisory committee

100. Section 20B of the *Marketing of Potatoes Act 1946* (WA) states that:

> The corporation may establish consultative groups of persons for the purpose of considering and advising the Corporation on, any matter relating to the performance of the functions of the Corporation that is referred to them by the Corporation…

101. Persons appointed to those consultative groups would not be considered covered by paragraphs 12-45(1)(b) or (d) in Schedule 1 to the TAA. The *Marketing of Potatoes Act 1946* does not specify actual positions which members of consultative groups can occupy, and the constitution of the group may vary from time to time as the members are appointed on an ad hoc basis without tenure of appointment. There are no duties, powers or functions which attach to the position

[37] Refer to paragraph 90.

itself. The positions, duties and functions are at the discretion of the Corporation and would be covered by the contract between the Corporation and the individual engaged on the advisory group. The individual's engagement will be governed by contract between the parties – that contract will either be a common law employment contract or an independent contract.[38] The functions or duties which the consultative group performs – that is, an advisory function – are not in the nature of the functions or duties which would be exercisable by a statutory or common law office holder.

Example 2 – Board established under an Act

102. The Nurses Board of Victoria is established under section 65 of the *Nurses Act 1993* (Vic). Section 67 of the Act deals with the constitution of the Nurses Board of Victoria:

> ***Membership of the Board***
>
> (1) The Board consists of 12 members nominated by the Minister and appointed by the Governor in Council.
>
> (2) Of the persons appointed to the Board –
>
> (a) 9 must be nurses registered under this Act ...; and
>
> (b) 1 must be a lawyer; and
>
> (c) 2 must be persons who are not nurses.

103. The powers that the board can exercise are also prescribed in the *Nurses Act 1993*, for example, – section 66 (about 'Powers, functions and consultation requirements', section 90 ('Power of Board to accredit courses, approve education programs and conduct examinations') and section 91 ('Powers of Board in relation to fees').

104. The *Nurses Act 1993* also deals with other conditions of appointment - section 68 ('Terms of office'), section 69 ('Resignation and Removal') and section 72 ('Payment of members').

105. Payments to board members of the Nurses Board of Victoria are subject to withholding under paragraph 12-45(1)(b) in Schedule 1 to the TAA: the board positions are created under an Act and the Act provides for the powers that the board can exercise.

Example 3 – Independent existence of positions

106. In addition to the Nurses Board (see paragraphs 102 to 105 above), the *Nurses Act 1993* provides in section 44 that where a formal hearing is to be held into the professional conduct of a nurse

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[38] The *Superannuation Guarantee (Administration) Act 1992* provides that superannuation obligations may apply if the contract is one of employment or wholly or principally for labour.

the Nurses Board of Victoria may appoint a panel to hold the hearing. Section 45 of the *Nurses Act 1993* deals with the constitution of the panel:

> ***Constitution of a hearing panel for a formal hearing***
>
> (1) Subject to sub-section (2), a panel appointed by the Board under section 44 is to consist of not less than 3 members of the Board, of whom at least 1 must be a lawyer and at least 1 must be a registered nurse.
>
> (2) If –
>
> (a) the Board is unable to appoint a panel because there are not enough members available to sit on it; or
>
> (b) the Board is of the opinion that a persons with special expertise is required for the hearing - the President or, in the absence of the President, the Deputy President may fill the vacant positions on the panel by appointing persons who are not members of the Board from a list of persons who are approved by the Governor in Council under subsection (4).
>
> (3) The following people are not entitled to be members of a panel –
>
> (a) a person who has undertaken a preliminary investigation of the matter which is the subject of the hearing;
>
> (b) a person who has been a member of a panel which held an information hearing into the matter.
>
> (4) The Governor in Council, on the recommendation of the Minister, may approve persons who are not members of the Board to be available to be appointed to a panel under sub-section (2).

107. The powers, functions, or duties which the panel can exercise are included in the Act, for example: section 48 ('Findings and determinations of a formal hearing into conduct'), section 49 ('Findings and determinations of a formal hearing into ability to practise'), section 51 ('Powers of panel conducting a formal hearing'), section 52 ('Determinations'), section 53 ('Removal of suspension, condition, limitation or restriction')', section 54 ('Reasons for determinations of panel'), section 55 ('Notification of determinations'). Determinations which the formal hearing panel can make include imposing fines, suspension or cancellation of registration.

108. The terms and conditions of appointment of panel members are provided for under section 57 of the *Nurses Act 1993*.

109. It should be noted that the panel members (other than those who are also board members) are appointed under the *Nurses Act*

1993 from a list of persons approved by the Governor in Council. Although the positions may be vacant at various times, they continue to exist independently with the possibility of being filled when the need arises (refer to paragraphs 80 and 82).

110. Payments to panel members of the Nurses Board of Victoria are subject to withholding under paragraph 12-45(1)(b) in Schedule 1 to the TAA: the panel positions are created under an Act and the Act provides for the powers that the panel can exercise.

Example 4 – Independent existence of position - Royal Commission established by legislation

111. In the Northern Territory, the *Commission of Inquiry (Chamberlain Convictions) Act 1986* established a Commission of Inquiry into the Chamberlain convictions. The Attorney-General was given the power to appoint the Commissioner under section 3 of that Act. The term of the Commission was for the period until the Commission reported to the Administrator on the conclusions drawn from the evidence and material information received by the Commission. If the individual appointed to the Commission vacated that position before the report was provided to the Administrator, the Attorney-General would have been required to appoint another individual to finalise the investigating and reporting of the Commission.

112. The *Commission of Inquiry (Chamberlain Convictions) Act 1986* also clearly provided for the powers, functions and duties of that Commission. The powers, functions and duties attached to the Commission, rather than the particular individual who occupied the office of the Commission. The powers, functions and duties included:

- the nature and scope of the Commissioner's inquiry and report (section 4);
- the power to summon witnesses and take evidence (section 6);
- the power of the Commission in relation to documents and other things (section 14); and
- incidental powers (section 25).

113. The position of Commissioner was clearly established under the Act. Although the position was not permanent, because it ceased to exist once the reporting requirements were completed, the position had to be filled continuously until that time and it was not dependent on the tenure of one person. The position had an independent existence and the duties, powers and functions attached to the position rather than to the individual who occupied the position.

114. Payments of salary, wages, commission, bonuses or allowances to Royal Commissioners appointed under an Act with similar terms to the *Commission of Inquiry (Chamberlain Convictions) Act 1986* would be subject to withholding under paragraph 12-45(1)(b) in Schedule 1 to the TAA.

115. For an example in relation to a Royal Commission established under the Crown prerogative at common law, see paragraphs 130 to 134 of this Ruling. Also refer also to paragraphs 135 to 136 in relation to counsel assisting a Royal Commission.

A person who is otherwise in the service of the Commonwealth, a State or a Territory (paragraph 12-45(1)(d))

116. Paragraph 12-45(1)(d) in Schedule 1 to the TAA provides that an entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as a person who is otherwise in the service of the Commonwealth, a State or a Territory.

117. The intention of this paragraph is to capture payments made to individuals who are in the service of the Commonwealth, a State or a Territory where the payment is not caught by any of the other preceding paragraphs in subsection 12-45(1) or by section 12-35 in Schedule 1 to the TAA. Paragraph 12-45(1)(d) is a catch-all provision in the context of a section designed to ensure that there is PAYG withholding from salary, wages, commission, bonuses or allowances paid to persons 'employed' in public service.

118. In the context of the former PAYE system, service as a member of the Defence Force or as a member of a police force was a subset of 'otherwise in the service of'.[39]

119. Historically, members of the Defence Force and police force held their positions at the pleasure of the Crown. The meaning and history of offices held at the pleasure of the Crown was discussed in *Marks v. The Commonwealth*,[40] particularly in the judgment of Windeyer J.

120. Traditionally both public servants and members of the defence forces were engaged only during the pleasure of the Crown. This was based on the common law doctrine that the Sovereign had the right to compel any of his or her subjects to serve in any station, capacity or office as required by Sovereign or the public good. A refusal to

[39] Paragraph (c) of the definition of 'eligible person' in subsection 221A(1) of the ITAA 1936.
[40] *Marks v. The Commonwealth* (1964) 111 CLR 549.

perform such duties when called upon to do so was a punishable offence.[41]

121. Today this common law doctrine is obsolete. When the Crown in Australia requires the service of its subjects, it is done under statute and not under the Crown prerogative.[42] Today the nature of public service appointments and military appointments is governed by statute, but only to the extent that the common law rule is specifically overridden by statute. This view was expressed by Windeyer J in *Marks v. The Commonwealth*:[43]

> Servants of the Crown, civil and military, are by common law employed only during the pleasure of the Crown. Except when modified by statute, that rule has an overriding place in all engagements to serve the Crown. All offices under the Crown are so held at common law, except some ancient offices of inheritance and certain offices created by patent with a tenure for life or during good behaviour, as in the case of judges of the superior courts.

122. Even in 1896 the notion of public servants holding their offices at the pleasure of the Crown was antiquated. In *Gould v. Stuart*,[44] a civil servant was found to be appointed under the *Civil Services Act 1884*. The provisions of that Act in relation to dismissal were inconsistent with the common law rule, and therefore restricted the power of the Crown in that respect.

123. Paragraph 12-45(1)(b) in Schedule 1 to the TAA covers statutory offices. From the history of the PAYE section and the historical nature of military and police service, it can be concluded that paragraph 12-45(1)(d) in Schedule 1 to the TAA is confined to common law offices.

124. Historically, common law offices included:

- Sheriffs;[45]
- Judges;[46]
- members of the diplomatic service;[47]
- licensed harbour pilots;[48]
- civil servants;[49]

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[41] *Marks v. The Commonwealth* (1964) 111 CLR 549, per Kitto J at 557 and Windeyer J at 574.
[42] *Marks v. The Commonwealth* (1964) 111 CLR 549, per Windeyer J at 574.
[43] *Marks v. The Commonwealth* (1964) 111 CLR 549, per Windeyer J at 586.
[44] *Gould v. Stuart* [1896] AC 575.
[45] Parke J in *R v. Patteson* (1932) 110 ER 358 at 364.
[46] *Terrell v. Secretary of State for the Colonies* (1953) 2 QB 482.
[47] For example, a consular agent - *Dunn v. The Queen* [1896] 1 QB 116.
[48] *Oceanic Crest Shipping Co. v. Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626.

- members of the Defence Force;[50]
- members of the police force;[51] and
- Royal Commissioners.[52]

125. Today, in an Australian context, these types of positions are more likely to be enshrined in statute than in the common law. However, there may be rare circumstances where a position still exists solely at the pleasure of the Crown. And in those cases, where an individual receives a payment of salary, wages, commission, bonuses or allowances as a common law office holder in the service of the Commonwealth, a State or Territory, those payments will be subject to withholding under paragraph 12-45(1)(d) in Schedule 1 to the TAA.

126. *Holly v. Director of Public Works*[53] discussed the concept of '…in the service of the Crown' in the context of the definition of 'employee' in section 4(1) of the *Government and Related Employees Appeal Tribunal Act 1980* (NSW)[54]. Mahoney JA acknowledged that the powers of Ministers to appoint persons to act in the service of the Crown under general law are now generally superseded or restricted by statute. Paragraph 12-45(1)(b) will apply to those appointments, offices or positions that have been created by statute.

127. Mahoney JA distinguished the types of individuals said to be 'in the service' of the Crown:

> A person who is, as I have described it, acting in the service of the Crown may do so in one or other of several different relationships which may exist between him and the Crown… Thus, he may act in the Crown's service because he has been appointed to an office in which he acts in that way. The office of a constable is an example of this: *Attorney-General for New South Wales v. Perpetual Trustee Co (Ltd)* (1955) 92 CLR 113 at 118. Or he may act in the Crown's service because, I think, a contract of employment has been made with him by the Crown and he is, in the ordinary sense, in a master and servant relationship to the Crown…
>
> As I have indicated, either of these relationships may be brought into existence in a number of ways and by a number of different kinds of persons. Thus, a person may be appointed to an office in the service of the Crown or enter into a contract of employment as the result of a formal act of the Crown itself… The relationship may be created

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[49] *Riordan v. War Office* (1959) 1 QLR 1046.

[50] *Marks v. The Commonwealth* (1964) 111 CLR 549; *Coutts v. The Commonwealth of Australia* (1985) 157 CLR 91.

[51] *Kaye v. Attorney-General for Tasmania* (1956) 94 CLR 193; *Attorney-General for NSW v. Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237.

[52] *Johns & Waygood Ltd v. Utah Australia Limited* [1963] VR 70.

[53] *Holly v. Director of Public Works* (1988) 14 NSWLR 140.

[54] Section 4(1) of the *Government and Related Employees Appeal Tribunal Act 1980* (NSW): '(e) … a person who is employed in the service of the Crown by a person other than the Public Service Board or an employing authority.'

> because of what a Minister or other authorised servant of the Crown does within the scope of his authority, in the sense referred to by Griffith CJ in *Ryder v Foley* (at 432 et seq). And the relationship may be created by the exercise of a statutory power…
>
> But the relationship so created exists, not with the person who, by the exercise of a general law or statutory power, has brought it into existence but with the Crown itself.[55]

128. In Mahoney JA's judgment, quoted in paragraph 127 above, essentially two types of individuals are identified to be in the service of the Crown:

- office holders; and
- common law employees of the Crown.

129. Payments to common law employees of the Crown are subject to withholding under section 12-35 in Schedule 1 to the TAA. Payments to office holders whose office is under the Constitution or an Australian law are covered by paragraph 12-45(1)(b) in Schedule 1 to the TAA. Payments to individuals in other offices, such as police officers, military officers and members of Parliaments or local governing bodies are specifically subject to withholding under paragraphs 12-45(1)(a), (c) and (e) in Schedule 1 to the TAA. Therefore the only office holders who are not already covered by the previously mentioned withholding events are common law office holders. This interpretation of paragraph 12-45(1)(d) in Schedule 1 to the TAA is consistent with the interpretation based on the history of the phrase 'a person who is otherwise in the service of the Commonwealth, a State or a Territory' under the former PAYE system.

Examples in relation to paragraph 12-45(1)(d)

Example 5 – Common law office holder – Royal Commission established under the Crown's prerogative

130. Where a Royal Commission is established or created under the Crown's prerogative at common law rather than by a particular enactment, an individual is issued a Commission to inquire into and report on matters specified in the prerogative instrument (that is, the Letters Patent).

131. The term and scope of the Commission are also identified in the prerogative instrument. Therefore the relationship is with the Crown itself through the Letters Patent, rather than through a contract between the parties.

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[55] *Holly v. Director of Public Works* (1988) 14 NSWLR 140 at 147.

132. Where the individual occupying the Commission vacates that office before concluding the inquiry and reporting to the Crown the usual practice would be for the Crown to appoint another individual to that office to complete the inquiry/report in respect of the same matter.[56] This would require the issuing of Letters Patent to the occupant's successor to complete the inquiry and report. Although the appointment of a Royal Commissioner under Crown prerogative will cease at the end of the term of a particular Commission or earlier if the individual otherwise ceases to perform the role, the Crown still has the prerogative to issue a commission to an individual to complete an existing inquiry, or to issue new commissions and appoint a Commissioner to inquire and report on other matters. Therefore there is the possibility of another person being appointed as a Royal Commissioner, either to complete an existing inquiry or to commence a different inquiry. This would satisfy the modern concept of 'independent existence' from *Edwards (Inspector of Taxes) v. Clinch*[57] in which a *degree* of permanence and continuity is essential.

133. In each jurisdiction, the relevant legislation[58] provides for the Commission's powers, such as compulsory interrogation, punishment for contempt and the issuing of search warrants. The relevant legislation refers to those powers, functions or duties in terms of the Commission, rather than of a particular individual.

134. Therefore payments of salary, wages, commission, bonuses or allowances paid to an individual as a Royal Commissioner of a commission established under Crown prerogative at common law are subject to withholding under paragraph 12-45(1)(d) in Schedule 1 to the TAA.

Example 6 – Not a common law office holder – Counsel assisting a Royal Commission

135. A legal practitioner is appointed to assist a Royal Commission established under Crown prerogative. However, the appointment, office or position is not provided for under the Constitution or an Australian law. Furthermore, the powers, functions and duties of the counsel assisting the Royal Commission are not contained in any legislation. Instead they would be under the direction of the Commission. The counsel assisting the Royal Commission does not exercise any independent powers, functions or duties that could be described as belonging to an office.

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[56] See for example, *State of Queensland v. Wyvill* 18 ALD 712; 90 ALR 611.

[57] *Edwards (Inspector of Taxes) v. Clinch* [1982] AC 845 at 876.

[58] *Royal Commissions Act 1902* (Cth), *Evidence Act 1958* (Vic), *Royal Commissions Act 1968* (WA), *Commissions of Inquiry Act 1995* (Tas), *Royal Commissions Act 1991* (ACT), *Inquiries Act 1985* (NT), *Royal Commissions Act 1923* (NSW), *Commissions of Inquiry Act 1950* (Qld), and *Royal Commissions Act 1917* (SA).

136. Payments to the counsel assisting the Royal Commission would therefore not be subject to withholding under section 12-45 in Schedule 1 to the TAA. Withholding would depend upon the characterisation of the agreement with the payer – either as an employee (where payments of salary, wages, commission, bonuses or allowances would be subject to withholding under section 12-35 in Schedule 1 to the TAA) or as an independent contractor (who would only be subject to withholding where they either failed to quote their ABN in relation to a supply of their services (section 12-190 in Schedule 1 to the TAA)), they entered into a voluntary agreement with their payer (section 12-55 in Schedule 1 to the TAA) or received a payment under a labour hire arrangement or a payment specified by regulation (section 12-60 in Schedule 1 to the TAA).

Interaction with other withholding events

137. It should be noted that in practice, from the payer's perspective, there is little real difference between withholding under sections 12-35, 12-40 or 12-45 in Schedule 1 to the TAA. The amount to withhold from a payment is determined by reference to the Schedules published by the Commissioner (*PAYG Withholding Tax Tables*) and the payer is required to issue the payee with a Payment Summary, among other obligations.[59]

Section 12-35 - Payment to employee

138. Section 12-35 in Schedule 1 to the TAA provides that:

> An 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).

139. In the case of some public sector employees, it is arguable that they hold a position under an Australian law or perhaps are considered otherwise in the service of the Commonwealth, a State or a Territory. Payments to Public Sector employees might potentially be subject to withholding under both section 12-35 and paragraph 12-45(1)(b) or 12-45(1)(d) in Schedule 1 to the TAA. It is therefore necessary to view the instrument of appointment. In the case of most APS employees that is the *Public Service Act 1999* (Cth). As discussed in paragraph 64, APS employees engaged under the *Public Service Act*

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[59] Under section 15-15 in Schedule 1 to the TAA, the Commissioner has varied to nil the amount required to be withheld from withholding payments that are covered by section 12-45 in Schedule 1 to the TAA and the payment is made to an individual appointed as an office holder who is required to remit those payments to another entity. The Commissioner has also exempted this class of cases from issuing payment summaries. Commonwealth of Australia Gazette (No S676, 28 December 2000).

1999 (Cth) are common law employees and therefore withholding under section 12-35 in Schedule 1 to the TAA takes priority over the other withholding events. In the case of public servants of each State and Territory it would be necessary to refer to the relevant legislation or other instruments dealing with the employment of public servants.

Section 12-40 - Payment to a company director

140. Section 12-40 in Schedule 1 to the TAA provides that:

> A company must withhold an amount from a payment of remuneration it makes to an individual:
>
> (a) if the company is incorporated – as a director of the company, or as a person who performs the duties of a director of the company; or
>
> (b) if the company is not incorporated – as a member of the committee of management of the company, or as a person who performs the duties of such a member.

141. For the purposes of this section, 'company' is defined in section 995-1 of the ITAA 1997 to mean: '(a) a body corporate; or (b) any other unincorporated association or body of persons.'

142. Some government bodies have the status of a company. Whether a government body has the status of a company can be ascertained by examining any constituting documents or statutes.

143. It is arguable that members of the board of management of government bodies that have the status of a company are potentially subject to withholding under section 12-40 and section 12-45 in Schedule 1 to the TAA. However, the priority rules in section 12-5 in Schedule 1 to the TAA indicate that as a general rule, the provision to apply is the one that is most specific to the circumstances of the payment. In the cases of payments to members of the board of management of government bodies that have the status of a company, section 12-40 in Schedule 1 to the TAA should be applied in priority to section 12-45 in Schedule 1 to the TAA.

Example 7– Payments to directors

144. The Western Australian Greyhound Racing Authority (WAGRA) is established under the *Western Australian Greyhound Racing Authority* Act *1981* (WA). Section 9 of that Act provides that the control and management of WAGRA are vested in a board of the Authority. The composition of the board is dealt with in section 12: 'The board shall consist of 5 members appointed by the Governor on the nomination of the Minister.'

145. This at first appears to lead to the conclusion that withholding from payments to members of this board would be required under paragraph 12-45(1)(b) in Schedule 1 to the TAA. However, a closer examination of the WAGRA Act reveals that the WAGRA is in fact a body corporate: 'The Authority is a body corporate with perpetual succession and shall have a common seal.' (subsection 5(2) WAGRA Act). Withholding would be required under the more specific provision – that is, section 12-40 in Schedule 1 to the TAA.

Advisory committee members

146. Advisory committees may be established, often through the exercise of a statutory power, by a person or statutory body to provide advice on matters referred to the committee. The positions, duties and functions of the committees are not covered by a statute, nor is there a relationship created with the Crown itself. They are at the discretion of the person or body that establishes the committee and would be covered by the contract with the committee members. As such, the positions do not have an independent existence and cannot have powers, duties or functions attached to the positions.

147. Therefore, members of these types of committees would not be statutory or common law office holders. Section 12-45 in Schedule 1 to the TAA does not apply to payments made to members of these ad hoc advisory committees.[60]

148. The PAYG withholding treatment of payments made to ad hoc advisory committee members will be dependent upon the contract of engagement between the payer and payee – that is, whether it is a contract *of service* or a contract *for service*.[61] Where there is a contract *of service*, withholding will be required under section 12-35 in Schedule 1 to the TAA. Where there is a contract *for service* (such as in the case of an independent contractor), withholding will only be required where the individual has entered into a voluntary agreement with the payer (section 12-55 in Schedule 1 to the TAA); where the individual receives a payment under a labour hire arrangement or payment specified by regulations (section 12-60 in Schedule 1 to the TAA); or where the individual is considered to be supplying their services in the course or furtherance of an enterprise and fails to quote

[60] See Example 1 at paragraphs 100 to 101.

[61] Taxation Ruling TR 2000/14, *Pay As You Go – withholding from payments to employees*, contains a detailed discussion on the distinction between a contract of service and a contract for service.

an Australian Business Number (section 12-190 in Schedule 1 to the TAA).[62]

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[62] For further information on the application of section 12-190 in Schedule 1 to the TAA refer to Taxation Ruling TR2002/9, *Pay As You Go – withholding from payments where recipient does not quote an ABN*.

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- Defence Force members
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