TR 2023/4DC1 - Income tax and superannuation guarantee: who is an employee?

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Draft Taxation Ruling

Income tax and superannuation guarantee: who is an employee?

Relying on this Ruling

This is a draft consolidation outlining proposed changes to TR 2023/4 to update and incorporate Superannuation Guarantee Ruling SGR 2005/1 *Superannuation guarantee: who is an employee?* (now withdrawn) into proposed draft Appendix 2. The Addendum which makes these changes, when finalised, will be a public ruling for the purposes of the *Taxation Administration Act 1953*.

The following preamble will apply to this Ruling once the Addendum is finalised.

This Ruling (excluding appendices) is a public ruling for the purposes of the Taxation Administration Act 1953, except to the extent that the Ruling considers the meaning of employee for the purposes of section 12 of the Superannuation Guarantee (Administration) Act 1992.

Subject to that exception, if this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

To the extent that this Ruling aids in understanding the meaning of 'employee' for the purposes of section 12 of the Superannuation Guarantee (Administration) Act 1992, it is not binding on the Commissioner. However, if the Commissioner later takes the view that section 12 applies less favourably to you than this Ruling indicates, the fact that you acted in accordance with this 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[A1] 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, except in Appendix 2, 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 both the ordinary and extended meaning of employee for the purposes of subsection 12 of the SGAA, but it is not able to be binding on the Commissioner on this aspect.[A2]

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[1] or office holders[2], labour hire payments[3] and alienated personal services income.[4]

Previous Rulings

5. Taxation Ruling TR 2005/16 *Income tax: Pay As You Go – withholding from payments to employees* previously provided guidance on this issue and was withdrawn with effect from 15 December 2022 when the draft of this Ruling was issued for comment. This Ruling takes into account developments in case law[5] since TR 2005/16 was last updated.

5A. Appendix 2 of this Ruling replaces Superannuation Guarantee Ruling SGR 2005/1 *Superannuation guarantee: who is an employee?* which has been withdrawn with effect from 26 June 2024. Where the Commissioner's views in that Ruling still apply, they are incorporated into this Ruling.

[A1] For readability, all further references to 'this Ruling' refer to the Ruling as it will read when finalised.
[A2] This explanation does not extend to the application of sections 27, 28 and 29 of the SGAA. These sections exclude salary or wages paid to certain employees in certain circumstances for the purposes of calculating the superannuation guarantee charge.
[1] Section 12-40.
[2] Section 12-45.
[3] Section 12-60.
[4] Division 13.
[5] Specifically, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (*ZG Operations*).

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.[6]

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.[7] The task is to construe and characterise the contract at the time of entry into it.[8] 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.[9]

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.[10] 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.[11]

10. However, evidence of how a contract was actually performed may be considered to establish the contractual terms or to challenge the validity of a written contract 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.[12]

11. A useful approach for establishing whether or not a worker is an employee of an engaging entity when analysing and weighing up each of the indicia of employment identified in the case law is to consider whether the worker is working in the business of

[6] *Personnel Contracting* at [61] and [172–173].
[7] *Personnel Contracting* at [60], [124] and [173].
[8] *Personnel Contracting* at [174].
[9] *Personnel Contracting* at [175].
[10] *Personnel Contracting* at [43], [59] and [173]; *WorkPac Pty Ltd v Rossato* [2021] HCA 23 at [56–57] and [63].
[11] *Personnel Contracting* at [55], [59], [173] and [185–189].
[12] *Personnel Contracting* at [42] and [177].

the engaging entity, based on the construction of the terms of the contract.[13] This evaluative exercise should not be approached on the basis that there is a checklist against which ticks and crosses may be placed to produce the answer.[14] Rather, the terms of the contract between the parties must be considered holistically to determine whether, on balance, the worker is an employee or independent contractor. It requires an approach which involves standing back and viewing the contract from a distance such that an informed, considered, qualitative appreciation of the whole can be undertaken.[15] Further '[n]ot all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.'.[16]

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.[17]

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.[18]

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.

Date of effect

14A. When finalised, this Ruling 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
26 June 2024

[13] *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]).
[14] *Personnel Contracting* at [34].
[15] *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 at page 944 (*Lorimer*).
[16] *Lorimer* at page 944. See also *Construction, Forestry, Maritime, Mining and Energy Union v. Personnel Contracting Pty Ltd* [2020] FCAFC 122 at [20] in which Allsop CJ observed the value of how Mummery J expressed the task in *Lorimer*:
> because it illuminates, in language of metaphor, the relevance of intuitive appreciation and assessment of the whole, rather than a process of mechanically disaggregating and deconstructing different parts of the relationship by tests drawn from other cases.

The High Court in *Personnel Contracting* did not suggest this approach was incorrect at [34].
[17] *Personnel Contracting* at [181].
[18] *Personnel Contracting* at [63] and [66].

Status: **draft for comment**

Appendix 1 – Explanation

This Explanation is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the proposed binding public ruling.

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[19] 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.

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.[20] This examination of the established contractual relationship is undertaken through the focusing question of whether the worker is working in the business of the engaging entity.[21]

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.[22] The indicia point to whether the worker is working in the business of the engaging entity or not.[23]

[19] 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.
[20] *Personnel Contracting* at [44], [61] and [172].
[21] *Personnel Contracting* at [36–39], [61–62], [121] and [183].
[22] *Personnel Contracting* at [174].
[23] *Personnel Contracting* at [34], [61] and [183].

21. While no factor will be determinative, the more control the engaging entity can exercise over how, when and where the worker personally 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.[24] With the increasing usage of skilled labour and consequential reduction in supervisory functions, the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it.[25]

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 – that is, the contractual relationship between the parties.[26] To determine the nature of the contractual relationship between a worker and an engaging entity, it is the terms of the contract alone, whether express or implied, which are to be taken into account.[27]

23. As such, the first step in determining whether an employment relationship exists is to identify the contract between the parties. Employment contracts may be:

- wholly in writing
- wholly oral, or
- comprised of any combination of written terms, oral terms and terms implied from conduct.

24. The second step is to identify the terms of the contract, that is the legal rights and obligations agreed between the parties, whether written, verbal or a combination of the two.[28]

25. Where a contract is purported to be wholly in writing, it will also be necessary to determine if the contract is a comprehensive account of all the terms agreed to between the parties, or whether there are in fact oral and implied terms which also comprise the contract.

26. This will require an examination of the factual arrangement to ensure an appropriate understanding of the contractual terms (written, oral, or a combination of the two) that exist under the contractual arrangement.

[24] *Personnel Contracting* at [62], [73] and [193].
[25] *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; 160 CLR 16 (*Stevens*) at [24], per Mason J and [36], per Wilson and Dawson JJ. In *Stevens,* the High Court was adjusting the notion of 'control' to modern industrial conditions and, in doing so, continued the developments in *Zuijs v Wirth Bros Pty Ltd* [1955] HCA 73 (*Zuijs*) and *Humberstone v Northern Timber Mills* [1949] HCA 49. The control test as articulated in *Stevens* was cited and adopted with approval by the majority of the High Court in *Hollis v Vabu Pty Ltd* [2001] HCA 44 at [43] (*Hollis*); *Personnel Contracting* at [74] and [174] and the Full Federal Court in *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76 (*JMC*) at [83].
[26] *Personnel Contracting* at [44].
[27] The relationship may also be affected by statutory provisions and by awards made under statutes (*Personnel Contracting* at [41]).
[28] *Secretary, Attorney-General's Department v O'Dwyer* [2022] FCA 1183 at [29–33].

27. This was demonstrated in *Hollis*, where the High Court found that the contractual relationship between Vabu and its bicycle couriers was partly oral, despite the existence of a written contract.[29] The High Court came to this conclusion on the basis 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.[30]

28. Where a contract is not comprehensively committed to writing, evidence of how the contract was performed, including subsequent conduct and work practices, will be considered to the extent that such evidence identifies the contractual terms agreed between the parties.

29. Once the terms of the contract between the worker and the engaging entity have been established, it is these terms alone that are relevant to a determination of the nature of the relationship between the parties.[31] As such, the process of characterising the nature of the relationship between the parties remains the same regardless of the form the contract takes. Even where there is only an oral contract, the task is to establish the terms of the contract from the evidence and from those terms determine the nature of the relationship. The former 'multifactorial test' is no longer necessary nor appropriate for this process.[32]

30. In addition to identifying the terms of the contract between the parties, evidence surrounding a contract's formation, or how a contract was actually performed, may be taken into account, consistent with general contract law principles, to:

- assist with the identification of the object or purpose of a contract
- demonstrate that a subsequent agreement has been made varying, waiving or discharging one or more of the terms of the original contract (noting this may also become apparent when considering and determining the terms of the relevant contract as discussed in paragraphs 24 to 28 of this Ruling)
- show the contract was a sham, or
- establish evidence of an estoppel, rectification or other legal, equitable or statutory rights or remedies.[33]

Evidence surrounding the formation of the contract

31. Regardless of the form a contract takes, it is to be construed and characterised at the time it was entered into.[34] 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.

[29] *Hollis* at [24]. Relevantly, in *Personnel Contracting*, the plurality, comprising Kiefel CJ, Keane and Edelman JJ, provided the written contractual relationship between Vabu and its bicycle couriers as an example of a contract that was not comprehensively committed to writing (see *Personnel Contracting* at [57]).
[30] *Hollis* at [24].
[31] *Personnel Contracting* at [55], [59], [173] and [185–189].
[32] *Personnel Contracting* at [55–59] and [185–189].
[33] *Personnel Contracting* at [42] and [177].
[34] *Personnel Contracting* at [174].

32. 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[35]:

> … 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.

Variation, discharge, or waiver

33. 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.[36] A variation of the terms of a contract may also occur by implication, for example as a result of the conduct of the parties.[37]

34. 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

35. 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).[38]

36. 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.

37. 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

38. 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.[39] Where one of the contracting

[35] *ZG Operations* at [61].
[36] *Personnel Contracting* at [42], [177] and [188].
[37] *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* [1952] HCA 10; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37 at [149].
[38] *Raftland Pty Ltd as trustee of the Raftland Trust v Commissioner of Taxation* [2008] HCA 21 at [34–35]; *Personnel Contracting* at [177]. A reference to a 'sham' in this Ruling is not a reference to 'sham arrangements' considered under Division 6 of Part 3-1 of the *Fair Work Act 2009*.
[39] *Personnel Contracting* at [177].

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

39. 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 part 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 out the work as principal of their own business, not part of another.[40]

40. In reference to the terms of the contract between an engaging entity and worker, the focusing question through which any determination of the existence of an employment relationship will always be 'is the worker an employee of the engaging entity?'[41] A useful approach for assessing this is to ask whether the worker is working in the business or enterprise of the engaging entity, based on the terms of the contract, having regard to the various employment indicia (outlined in paragraphs 45 to 75 of this Ruling) identified in case law.[42]

Characterising an engaging entity's business

41. 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.[43]

42. 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)[44]:

> … 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

43. 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.[45] This is because a worker may realistically have a business

[40] *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; 46 CLR 41 at [48].
[41] *Personnel Contracting* at [39] and [121].
[42] *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].
[43] *Personnel Contracting* at [69–71], [89] and [200].
[44] *Personnel Contracting* at [89].
[45] *Personnel Contracting* at [180–181].

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.[46]

44. While the 'own business/employer's business dichotomy'[47] 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.[48]

Presenting as an emanation of the business

45. Whether a worker is required under a contract to present 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 in supporting the majority's decision that the bicycle couriers were employees.[49]

46. 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 do so. As a result, the High Court held that this did not change the contractual rights which comprised the relationship between the parties.[50]

Control and the right to control

47. An employer generally has a right to control how, where and when its employee performs their work.[51] 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.[52]

48. The importance of a right to control was emphasised by Kiefel CJ, Keane and Edelman JJ in *Personnel Contracting* where they stated[53]:

> … 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.

49. 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

[46] *Personnel Contracting* at [181–183], *Tattsbet Limited v Morrow* [2015] FCAFC 62 at [61].
[47] *Personnel Contracting* at [36], [39] and [73].
[48] *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]).
[49] *Hollis* at [50–52].
[50] *ZG Operations* at [32–33] and [52–53].
[51] *Zuijs* at [571–573]; *Stevens* at [9] and [15–20], per Mason J.
[52] *Stevens* at [24]; *Hollis* at [43]; *Personnel Contracting* at [74] and [174]; *JMC* at [83].
[53] *Personnel Contracting* at [73].

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.[54]

50. An employer may not always retain a right to control all aspects of how, when and where work is performed; different kinds of control may be contractually available depending on the nature of the arrangement. For example, in a casual employment arrangement, in the ordinary sense, the employee retains control over when or for how long they work because they may refuse a particular offer of work from their employer.[55]

51. 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 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.[56]

Other rights that confer a capacity to control

52. 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.[57]

53. 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.[58]

Other indicia

The ability to delegate, subcontract or assign work

54. 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. As such, the existence of a right which allows a worker to delegate, subcontract or assign their work to another, qualified[59] or otherwise, is generally to be viewed as inherently inconsistent with an employee relationship.[60]

55. Where a worker has an entirely unfettered right to delegate, subcontract or assign their work to others, in the absence of countervailing considerations, the existence of this right will be a very strong indicator against the worker being an employee.[61] Where the right is fettered, the degree of inconsistency between it and the other terms of the contractual relationship between the parties will reveal the degree to which the fettered right to delegate, subcontract or assign tends against a finding of employment.[62]

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[54] *Personnel Contracting* at [71–77].
[55] *Personnel Contracting* at [84] and [109].
[56] *ZG Operations* at [69] and [105].
[57] *Personnel Contracting* at [196]; *Commissioner of State Revenue v Mortgage Force Australia Pty Ltd* [2009] WASCA 24 at [104].
[58] *Personnel Contracting* at [196].
[59] An example of a qualified right of delegation, subcontracting or assignment of work is such a right which requires the consent of the engaging entity to be exercised (see *JMC* at [79]).
[60] *JMC* at [74–76].
[61] *JMC* at [74–75].
[62] *JMC* at [74] and [76].

56. As such a right to delegate, subcontract or assign work which is[63]:

- not limited in scope (that is, the worker can delegate, subcontract, or assign the entirety of their work to another, as opposed to only discrete tasks)
- not a sham[64], and
- legally capable of exercise[65]

will indicate a worker is not an employee of the engaging entity. Whether the worker is, however, an independent contractor will depend upon an examination of the totality of the legal rights and obligations between the parties.

57. The concept of delegating, subcontracting and assigning work 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.

58. 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.[66] 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, subcontracting or assignment of work being exercised by the worker.

'Results' contracts

59. 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.[67] The reference to a '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.

60. 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.

61. Consideration for a specified result is often a fixed sum paid on completion of the particular job[68] as opposed to an amount paid by reference to hours worked, activities performed or a commission.

62. 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

[63] *JMC* at [76–77].
[64] Sham in this context is a reference to the common law doctrine of sham. This is discussed in further detail in paragraphs 35 to 37 of this Ruling.
[65] Whether a right to delegate, subcontract or assign work is capable of being legally exercised should not be confused with whether such a right is unlikely to be exercised in the future as a matter of fact. A right to delegate, subcontract or assign work which is unlikely to be exercised will still be an indicator against a finding of employment, unless the right is a sham or limited in scope (see *JMC* at [77]).
[66] *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 (On Call) at [105] and [253].
[67] *World Book (Australia) Pty Ltd v FC of T* 92 ATC 4327 (*World Book*) at [4334], per Shelley JA.
[68] *Neale v Atlas Products (Vic) Pty Ltd* [1955] HCA 18 (*Neale*); 94 CLR 419 at [424–425].

volume of timber delivered[69] and in *Queensland Stations Pty Ltd v Federal Commissioner of Taxation*[70], 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.[71]

63. 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.[72] 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.[73]

64. 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[74]
- bicycle couriers paid a flag fall rate per delivery, rather than per time period engaged[75]
- fruit pickers paid daily per bin of fruit picked[76]
- 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.[77]

65. The Full Federal Court in *JMC* observed that the manner in which a lecturer was remunerated for his teaching services, being paid an amount per hour for giving a lecture and a different amount per hour for marking, was 'not inherently incompatible with either an employment relationship, or an independent contract relationship'[78] although they were inclined to it favouring an independent contractor relationship.[79] We note that this observation of the Full Federal Court was made in the context of the facts of *JMC*, where a number of the terms of the relevant written contract were considered to favour against a finding of an employment relationship.

Provision of tools and equipment

66. 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

[69] *Stevens* at [10].
[70] [1945] HCA 13; 70 CLR 539 at [542].
[71] *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2010] FCAFC 52 (*Roy Morgan*) at [42].
[72] *Hollis* at [54].
[73] *Hollis* at [54]; *On Call* at [277]; *Roy Morgan* at [42].
[74] *Commissioner of Taxation (Cth) v Barrett* [1973] HCA 49.
[75] *Hollis* at [54].
[76] *JA & BM Bowden & Sons Pty Ltd v Chief Commissioner of State Revenue* [2001] NSWCA 125 at [95].
[77] *Roy Morgan* at [42].
[78] *JMC* at [45].
[79] *JMC* at [104].

contractor.[80] 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.

67. 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[81]:

> In classifying the bicycle couriers 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 equipment was more significant, and greater skill and training were required to operate it.

68. 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 (footnotes omitted)[82]:

> 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'.

69. 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.[83] This may include personal electronic devices such as a mobile phone or laptop, or modes of transport that are also used for personal or recreational purposes (for example, bicycles).

70. 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.

71. Further, an employee, may be reimbursed (or receive an allowance) for expenses incurred in the course of employment, including for the use of their own assets such as a car. In contrast it may be more common for an independent contractor to factor these anticipated expenses into a negotiated price for services.

Risk

72. 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.[84] On the other hand, an independent contractor bears the commercial risk and responsibility for any poor workmanship or injury sustained in the performance of work.

73. A clause in a contract that requires a worker to take out public liability or indemnity insurance in the Commissioner's view will likely be a neutral factor in determining the

[80] *Stevens* at [12].
[81] *Hollis* at [47].
[82] *ZG Operations* at [88].
[83] *Hollis* at [56].
[84] In *Hollis*, Vabu undertook the provision of insurance for the couriers and deducted the amounts from their payments to the couriers.

nature of the relationship between the worker and the engaging entity, unless an examination of the totality of the legal rights and obligations between the parties supports a conclusion that the worker is an independent contractor. In such a case, while not determinative, the worker's obligation to take out public liability or indemnity insurance will incline towards the finding of an independent contractor relationship.[85]

Generation of goodwill

74. 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.

75. However, not all businesses will necessarily generate goodwill. In *ZG Operations* Kiefel CJ, Keane and Edelman JJ found[86]:

> … 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

76. Often contracts include clauses that purport to characterise or label the relationship, for instance as being one of an independent contractor. 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.[87] In *Personnel Contracting*, Kiefel CJ and Keane and Edelman JJ[88] stated[89]:

> 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.

77. Further, clauses of a contract such as the following which require:

- a worker to use a registered business name
- a worker to work under an Australian business number (ABN)
- a worker to provide invoices as a prerequisite to payment
- an engaging entity to provide the worker with one or more of sick pay, holiday pay and superannuation

are more than mere labels reflecting the parties' opinion of the nature of their relationship,

[85] *JMC* at [48–49].
[86] At [58].
[87] *Personnel Contracting* at [58], [63], [127] and [184].
[88] Gageler and Gleeson JJ in agreement with the majority on this point.
[89] At [66].

and rather are operative terms of the contract between the parties, unless they have been varied, are unenforceable or considered to be a sham.[90]

78. While the first 3 obligations listed in paragraph 77 of this Ruling may be consistent with an independent contractor relationship[91] and the last obligation consistent with an employment relationship, the Commissioner does not consider that these factors in themselves are determinative.[92] It is necessary to examine the totality of the legal rights and obligations between the parties to determine whether the worker is an independent contractor or employee.

Where a business engages with a non-individual entity

79. 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 employment relationship has not been created.[93] This is because there may be no contractual rights and obligations existing between the business and the worker (in their individual capacity).

80. 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.[94]

Neither employee nor independent contractor – lease or bailment

81. 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.

82. 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*[95], 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.

83. [Omitted.]

[90] *JMC* at [48–49].
[91] *JMC* at [104].
[92] *JMC* at [49].
[93] *Personnel Contracting* at [174]; *ZG Operations* at [99]; *EFEX Group Pty Ltd v Bennett* [2024] FCAFC 35 at [45-48] and [53].
[94] See, for example, *Dental Corporation Pty Ltd v Moffet* [2020] FCAFC 118 (*Moffet*).
[95] [1998] FCA 361.

Appendix 2 – Meaning of employee under section 12 of the SGAA

This Explanation is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the proposed binding public ruling.

84. Employers are required to make superannuation contributions into a complying superannuation fund or retirement savings account for the benefit of their eligible employees in accordance with minimum prescribed levels. If an employer does not make the required superannuation contributions, they will be subject to the superannuation guarantee charge. No liability for the superannuation guarantee charge will arise if a person is not an employee, or the person is otherwise exempted, under the SGAA.

85. The expressions 'employee' and 'employer' in the SGAA have both their ordinary meaning and an extended meaning.

86. All legislative references in this Appendix are to the SGAA, unless otherwise indicated.

Ordinary meaning

87. Under subsection 12(1), if a person is an employee at common law, that person is an employee under the SGAA.[96] Paragraphs 18 to 82 of this Ruling explain when a person is an employee at common law.

Extended meaning

88. As stated in paragraph 85 of this Ruling, the classification of a person as an employee for the purposes of the SGAA is not solely dependent upon the existence of a common law employment relationship. While the definition includes persons who at common law would be regarded as employees, subsections 12(2) to (10) list a number of further persons who are also treated as employees. These subsections deem persons who fall within them to be employees for the purposes of the SGAA, even if they are not common law employees.

89. These deemed employees for superannuation purposes are:

- a person who is entitled to payment for the performance of duties as a member of an executive body of a body corporate (subsection 12(2))
- a person who works under a contract that is wholly or principally for the labour of the person (subsection 12(3))
- members of the Commonwealth and State Parliament, members of the Australian Capital Territory (ACT) Legislative Assembly and members of the Northern Territory (NT) Legislative Assembly (subsections 12(4) to (7))
- a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills

[96] Unless one of the limited exceptions in subsections 12(9A) and (11) of the SGAA applies.

(paragraph 12(8)(a))

- a person who is paid to provide services in connection with any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills (paragraph 12(8)(b))
- a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast (paragraph 12(8)(c))
- a person who holds, or performs the duties of, an appointment, office or position under the Constitution or under the law of the Commonwealth, State or Territory (paragraph 12(9)(a))
- a person who is otherwise in the service of the Commonwealth, of a State or of a Territory, including service as a member of the Defence Force or as a member of the police force (paragraph 12(9)(b))
- a person who is a member of an eligible local governing body (subsection 12(10)).[97]

90. The following paragraphs consider each of these categories of deemed employees under the SGAA.

Members of executive bodies of bodies corporate – subsection 12(2)

91. Under subsection 12(2), a person who is entitled to payment for the performance of duties as a member of an executive body (whether described as the board of directors or otherwise) of a body corporate[98] is, in relation to those duties, an employee of the body corporate for superannuation purposes.

92. In the majority of circumstances, such a person will be called a 'director'. The SGAA will apply even if the person is not referred to as a director but falls within the terms of subsection 12(2).

Contracts for the labour of the person – subsection 12(3)

93. Under subsection 12(3), a person who works under a contract that is wholly or principally for their labour, will be an employee of the other party to the contract.

94. As expressed by the Full Federal Court in *Moffet*, for subsection 12(3) to apply, 3 elements must be satisfied:

- firstly, there must be a contract
- secondly, the contract must be wholly or principally 'for' the labour of a person, and
- thirdly, the person must 'work' under that contract.[99]

95. These elements are considered in detail in paragraphs 96 to 111 of this Ruling. The first and third elements are discussed first, as they are contextually intertwined.

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[97] Subsection 12(10).
[98] 'Body corporate' is a general term to describe an artificial entity having a separate legal existence.
[99] *Moffet* at [82], [111] and [116], affirmed in *Jamsek v ZG Operations Australia Pty Ltd (No 3)* [2023] FCAFC 48 (*ZG Operations Remittal*) at [29] and in *JMC* by implication where [58–59] and [106] are read together.

Is there a contract?

96. This first element of subsection 12(3) (that is, that there is a contract), requires[100]:

> … a bilateral exchange of promises of labour and payment between two sides of the contract. On one side of the contract, a promise to provide labour and on the other side of the contract, a promise to make payment.

97. A contract can be bilateral even though there are more than 2 parties to the contract.[101] The superannuation regime cannot be circumvented by the simple device of forming a contract which names more than 2 parties.[102]

98. Subsection 12(3) requires attention to the rights under the contract not to the actual performance of the contract.[103]

Does the person work under the contract?

99. The concept of 'works under a contract' is one of personal exertion and personal effort.[104]

100. Subsection 12(3) only applies where the party providing the labour (that is, the worker) is a natural person who was a party to the contract in his or her individual capacity and not in any other capacity such as a trustee of a personal services trust or a partner in a partnership.[105] Subsection 72(1) does not operate to deem a partnership or other entity to be a natural person for the purposes of being treated as an employee under subsection 12(3).[106]

Is the contract wholly or principally 'for' the labour of the person?

101. Whether the contract is wholly of principally 'for' the labour of a person, is to be assessed from the perspective of the engaging entity[107] and is to be determined by reference to the terms of the contract.[108] In this context:

- the word 'principally' assumes its commonly understood meaning, that is, 'chiefly' or 'mainly'[109], and
- 'labour' includes mental and artistic effort as well as physical toil.[110]

102. A contract is not wholly or principally for the labour of a person where:

- the contract leaves the worker free to do the work themselves or to employ another person to carry it out (that is, the contract contains a right to delegate, subcontract or assign the work)[111], or

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[100] *ZG Operations Remittal* at [32].
[101] For example, in *Moffet* there were 3 parties to the contract; the dentist, the trustee of the trust and the paying entity. It was held this was a bilateral agreement as there was the employer (the paying entity) on one side of the contract and on the other side there was the dentist and his trust.
[102] *ZG Operations Remittal* at [32].
[103] *JMC* at [106].
[104] *ZG Operations Remittal* at [33], affirming the view of Wigney J in *JMC Pty Ltd v Commissioner of Taxation* [2022] FCA 750 at [189].
[105] *ZG Operations Remittal* at [33–43], [71].
[106] *ZG Operations Remittal at* [44–48] and [73–74].
[107] *ZG Operations Remittal* at [49], affirming the view of Perram and Anderson JJ in *Moffet* at [84–85].
[108] *ZG Operations Remittal* at [50], affirming the view of Perram and Anderson JJ in *Moffet* at [86].
[109] *On Call* at [303].
[110] *Deputy Commissioner of Taxation v Bolwell* [1967] VicSC 172; 1 ATR 862 at [873].
[111] *ZG Operations Remittal* at [51], [58] per Perram and Anderson JJ; *JMC* at [106]; *Neale* at [425].

- the contract is for the provision or production of a result and the worker is paid for that result[112] (that is, results contracts), or
- the contract is principally for a benefit other than the labour of the worker (for example, the contract is principally for the provision of equipment).[113]

Right to delegate, subcontract and assign the work

103. A contract will not be wholly or principally for the labour of a worker, where that contract contains a right which allows the worker to delegate, subcontract or assign their work to another, whether subject to the consent of the engaging entity or not.[114] Such a right to delegate, subcontract or assign work is discussed in paragraphs 54 to 58 of this Ruling.

104. It is the existence of the right to delegate, subcontract or assign the work which is relevant to the application of subsection 12(3), and not the exercise of that right.[115]

105. Where a contract contains a right to delegate, subcontract or assign the work of a worker, the worker will not fall within the extended definition of employee under subsection 12(3). This position is subject to the contractual right to delegate, subcontract or assign the work not being challenged as being a sham, limited in scope or legally incapable of exercise.[116]

'Results' contracts

106. A contract will not be wholly or principally for the labour of a worker where the contract is properly characterised as being for the provision of a result.[117] Where this occurs, the worker will not fall within the extended definition of 'employee' under subsection 12(3).

107. The characteristics of a contract for a result are discussed in paragraphs 59 to 65 of this Ruling.

Is the contract principally for a benefit other than the labour of the worker?

108. To the extent that a contract is partly for labour and partly for something else, for example, the hire of plant or machinery, whether the contract is principally for the worker's labour will be a question of fact. This involves an evaluation of the terms of the relevant contract or contracts[118], and is assessed by reference to the benefit or benefits that the engaging entity receives out of the bargain.[119]

109. Where the provision of the contracted service requires the use of a substantial capital asset, this is a factor supporting the characterisation of the contract as not being wholly or principally for labour.[120]

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[112] *ZG Operations Remittal* at [36], [52]; *Neale* at [425]; *World Book* at [385-386]; *JMC Pty Ltd v Commissioner of Taxation* [2022] FCA 750 at [31], [195]; *Vabu Pty Limited v FC of T* 96 ATC 4898 at [4903].
[113] *Moffet* at [93–104]; *ZG Operations Remittal* at [54], [57], [59–60].
[114] *ZG Operations Remittal* at [51], [58], per Perram and Anderson JJ; *JMC* at [106]; *Neale* at [425].
[115] *ZG Operations Remittal* at [51]; *JMC* at [106]; *Neale* at [425].
[116] *JMC* at [76–77] read in conjunction with [106].
[117] *ZG Operations Remittal* at [36], [52]; *Neale* at [425]; *World Book* at [385–386]; *JMC Pty Ltd v Commissioner of Taxation* [2022] FCA 750 at [31], [195]; *Vabu Pty Limited v FC of T* 96 ATC 4898 at [4903].
[118] *ZG Operations Remittal* at [49]; *Moffet* at [84–85], per Perram and Anderson JJ.
[119] *ZG Operations Remittal* at [50]; *Moffet* at [86], per Perram and Anderson JJ.
[120] *ZG Operations Remittal* at [57] and [63].

110. In certain cases, where a contract is properly characterised, it may be that the benefit received by the engaging entity under the contract is a single integrated benefit, of which labour is just one component, rather than a number of separate benefits.[121] For example, in *ZG Operations Remittal*, Perram and Anderson JJ held that the benefit the employer, ZG Operations, received under the contract was a single integrated benefit being a delivery service, and not separate benefits of driving labour and the use of a truck.[122]

111. Regardless of whether a contract is for several discrete benefits or one integrated benefit of which labour is just one component, to determine whether labour is the principal benefit or component contracted for, a quantitative valuation, or where appropriate a qualitative analysis, must be undertaken. This will require the use of available evidence. For example, in *ZG Operations Remittal*, a quantitative valuation was regarded by the Full Federal Court as required if the workers in that case were to establish that they fell within the scope of subsection 12(3), on the basis that the contracts were at least principally for their labour. Perram and Anderson JJ further commented on the type of evidence that would be relevant to such an analysis which included the market value of hiring similar trucks on similarly favourable terms and the market cost of the labour involved in providing the delivery services during the relevant period.[123]

Arrangements involving labour hire firms

112. In a labour hire arrangement, where the arrangement does not fall within subsection 12(1), but the elements of subsection 12(3) are satisfied, the relevant worker will be an employee of the labour hire firm and not the third party to whom they provide their labour. This is because the worker is working under the contract between the worker and the labour hire firm, and not under the contract between the labour hire firm and the third party.[124]

113. Further, it is considered that a contract between a labour hire firm and a worker is not properly characterised as a contract for a result. In a labour hire arrangement, the contract between the labour hire firm and the worker, in substance, requires the particular worker to provide some services for the benefit of a third party. The particular worker does not undertake to produce a given result; rather, the particular worker undertakes to perform some work for a client of the labour hire firm.[125] The worker is thus an employee of the labour hire firm under subsection 12(3).

114. The nature of labour hire arrangements under both subsection 12(1) and under subsection 12(3) are discussed in greater detail in Superannuation Guarantee Ruling SGR 2005/2 *Superannuation guarantee: work arranged by intermediaries*.

[121] *ZG Operations Remittal* at [59]; *Moffet* at [101–104]; *JMC* at [106].
[122] *ZG Operations Remittal* at [59].
[123] *ZG Operations Remittal* at [62–63].
[124] *ZG Operations Remittal* at [41].
[125] The view that the contracts in labour hire arrangements are not 'results' contracts is supported by case law including *Construction Industry Training Board v Labour Force Ltd* [1970] 3 All ER 220; *Building Workers' Industrial Union of Australia & Ors v Odco Pty Ltd* [1991] FCA 96 and *Drake Personnel Ltd & Ors v Commissioner of State Revenue* [2000] VSCA 122. In these cases, the workers supplied by the labour hire firm to the end users of the labour were paid an agreed rate per hour for the hours worked and there was no evidence, either express or implied, which suggested that the workers could delegate their contractual work.

Members of Commonwealth and State Parliament, members of ACT Legislative Assembly and members of NT Legislative Assembly – subsections 12(4) to (7)

115. Members of the Commonwealth House of Representatives and of the Senate, members of State Legislative Assemblies and Legislative Councils and members of the NT and ACT Legislative Assemblies are not common law employees because they have no identifiable employer.[126] None of the usual indicators of an employer/employee relationship, such as an express or implied contract of employment or an ability to direct activities or exercise control over the employee, apply to members.

116. However, the members in question are specifically incorporated into the definition of employee in the SGAA by virtue of subsections 12(4) to 12(7).

Entertainers, artists, musicians, sports persons et cetera – subsection 12(8)

117. Approaching subsection 12(8) on a textual basis, the tests contained in paragraphs 12(8)(a) to (c) must be applied on a payment-by-payment basis. This is because the character of the payments received by the relevant person will be determinative of whether that person will be treated as an employee of the payer under subsection 12(8). In determining the character of the relevant payment, reference must be made to the substance of the arrangement, and not merely by reference to what the parties have agreed to label the payment.

118. Identifying the relevant payment to which the tests in subsection 12(8) must be applied will often be straightforward. Each payment should be examined separately to determine the character of that payment.

119. Subsection 12(8) is not limited in the way that subsection 12(3) is limited to contracts wholly or principally for a person's labour. However, it is necessary that the particular person is actually paid to provide, perform or present services rather than for some other purpose. For example, a person engaged to write a script is performing services but one who sells existing scripts is not – they are merely selling property.

120. If a person is an employee by virtue of subsection 12(8) applying, then the person liable to make the payment is their employer for the purposes of the SGAA.[127]

121. Superannuation Guarantee Ruling SGR 2009/1 *Superannuation guarantee: payments made to sportspersons* provides further insight into the Commissioner's interpretation and application of the extended definition of employee contained subsection 12(8) as it applies to sportspersons.

Payments for participation or performance – paragraph 12(8)(a)

122. Under paragraph 12(8)(a), an entertainer, artist, musician, sportsperson et cetera. who is paid to perform, present or to participate in the performance or presentation of any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills is an employee under the SGAA of the person liable to make the payment.

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[126] See, for example, *State Chamber of Commerce & Industry v Commonwealth* [1987] HCA 38 and paragraph 36 of Taxation Ruling TR 1999/10 *Income tax and fringe benefits tax: Members of Parliament – allowances, reimbursements, donations and gifts, benefits, deductions and recoupments.*

[127] *Commissioner of Taxation v Racing Queensland Board* [2019] FCAFC 224 at [50–52], *Commissioner of Taxation v Scone Race Club Limited* [2019] FCAFC 225 at [10–11], per Griffiths J (adopted by Steward J at [82] and [84]), whose reasons were agreed with by Derrington J at [80].

123. One clear limitation on the extended meaning of employee in paragraph 12(8)(a) is that the relevant person is required to actively participate in the performance or presentation. This is implicit in the statement that a person is 'paid to perform... or to participate in' the performance of that activity.[128] A painter, for instance, does not perform or present a painting exhibition. They merely produce the works used in the exhibition. Therefore, even though the products of their work can form part of, for example, a display, individuals who produce paintings or photographic displays do not usually come within the scope of paragraph 12(8)(a).

124. For the purposes of paragraph 12(8)(a), the word 'entertainment' has been given a broad definition. Specifically, Senior Member O'Loughlin in *General Aviation*, in finding that skydiving was a form of entertainment, stated[129]:

> … an activity that gives amusement or enjoyment can be accepted as provision of entertainment.

125. Further, that the word 'similar' is used in paragraph 12(8)(a) shows that 'activity' is limited to things of a like kind. Similar activities include those activities which derive their artistic or sporting content from the performance or presentation.

126. A payment, or part thereof, made to a person must be directly referrable to that individual's performance or participation in the relevant activity for paragraph 12(8)(a) to apply. The requirement to establish this causal link is implicit in the use of the word 'to', as in 'paid to perform'. 'Performance' in this context refers to the execution of the physical or personal skills of the person and does not focus on the level of success achieved (if this is relevant to the specific activity).

Payments for services provided in, or in connection with, an activity referred to in paragraph 12(8)(a) or the making of any film, tape or disc or of any television or radio broadcast – paragraphs 12(8)(b) and (c)

127. The scope of subsection 12(8) is further extended by paragraphs 12(8)(b) and (c). These paragraphs state:

- a person who is paid to provide services in connection with an activity referred to in paragraph 12(8)(a) is an employee of the person liable to make the payment (paragraph 12(8)(b))
- a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast is an employee of the person liable to make the payment (paragraph 12(8)(c)).

128. Neither of these paragraphs requires a person to actively participate in a performance, presentation, broadcast or other activity described within paragraph 12(8)(a) to be defined as an employee; rather, the paragraphs specify that the person will be an employee if they provide a service in connection with the activity.

129. The words 'in connection with' do not have a specific technical meaning and should take on their ordinary meaning having regard to the context in which they appear. The term 'in connection with' has been considered by the courts in the context of the income tax legislation and as far as those cases discuss the ordinary meaning of the term those cases are useful references for the purposes of the SGAA. A summary of the relevant case law

[128] *General Aviation Maintenance Pty Ltd and Commissioner of Taxation* [2012] AATA 120 (*General Aviation*) at [30].
[129] *General Aviation* at [29].

was undertaken by Wilcox J in *Our Town FM Pty Ltd v Australian Broadcasting Tribunal & Anor*. This statement was upheld on appeal (emphasis added)[130]:

> The words "in connexion with"... do not necessarily require a causal relationship between the two things: see Commissioner for Superannuation v. Miller (1985) 63 ALR 237 at pp. 238, 244, 247. They may be used to describe a relationship with a contemplated future event: see Koppen v. Commissioner for Community Relations (1986) 67 ALR 215 at p. 220; Johnson v. Johnson [1952] P. 47 at pp.50-51. In the latter case the United Kingdom Court of Appeal applied a decision of the British Columbia Court of Appeal, In re Nanaimo Community Hotel Limited [1945] 3 DLR 225, in which the question was whether a particular court, which was given "jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act", had jurisdiction to deal with a matter which preceded the issue of an assessment. The trial judge held that it did, that the phrase "in connection with'" covered matters leading up to, or which might lead up to, an assessment. He said, at [at 639]:
>
> > "One of the very generally accepted meanings of 'connection' is ' **relation between things one of which is bound up with or involved in another**'; or, again 'having to do with.' **The words include matters occurring prior to as well as subsequent to or consequent upon so long as they are related to the principal thing.** The phrase 'having to do with' perhaps gives as good a suggestion of the meaning as could be had."

130. As can be seen from the statement in paragraph 129 of this Ruling, the term 'in connection with' can be given a relatively wide meaning, depending on the context in which that term appears. However, having regard to the context in which the term appears in the SGAA, 'in connection with' requires that the services a person provides or performs must relate directly to the relevant activity in question.[131] Services provided or performed before or after the relevant activity occurs may fall within the scope of paragraphs 12(8)(b) or (c) as long as the services are 'bound up or involved in' that activity. That is, the use of the term 'in connection with' in paragraphs 12(8)(b) and (c) is intended to cover persons providing the 'behind the scenes' services which enable the relevant activity to occur. For example, a technician engaged to control the sound quality for a concert is not an active participant in any performance. Even though the technician is not within paragraph 12(8)(a), they are still an employee because they are paid for services in connection with a musical performance.

A person who holds, or performs the duties of, an appointment, office or position under the Constitution or under a law of the Commonwealth, of a State or of a Territory – subsection 12(9)

131. A person who holds, or performs the duties of, an appointment, office or position under the Constitution or under a law of the Commonwealth, of a State or of a Territory is an employee by virtue of paragraph 12(9)(a). Similarly, 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 the police force, is an employee of the Commonwealth, State or the Territory, as the case requires under paragraph 12(9)(b).

132. The wording in subsection 12(9) is very similar to the wording contained in paragraphs 12-45(1)(b), (c), and (d) of Schedule 1 to the TAA. Taxation Ruling TR 2002/21 *Income tax: Pay As You Go (PAYG) Withholding from salary, wages, commissions, bonuses, or allowances paid to office holders* provides comprehensive guidance on the

[130] [1987] FCA 479; 16 FCR 465 at [479–480].
[131] In *General Aviation* at [30], it was found that the Tandem Master's video recording of skydives was a service covered by either paragraph 12(8)(b) or (c).

interpretation of the wording contained in those paragraphs. A similar interpretation applies for the purposes of interpreting subsection 12(9).

Members of an eligible local governing body – subsection 12(10)

133. Subject to subsection 12(10), a person who holds office as a member of a local government council is not an employee of the council.

134. Under subsection 12(10), a person who is covered by paragraph 12-45(1)(e) of Schedule 1 to the TAA is an employee for the purposes of the SGAA. Paragraph 12-45(1)(e) of Schedule 1 to the TAA is about members of local governing bodies that are subject to PAYG withholding. A local governing body is a body that made a resolution which, in effect, brought the remuneration of its members into the PAYG system. The effect of subsection 12(10) of the SGAA is to also bring those members into the superannuation guarantee system.

Work of a domestic or private nature – subsection 12(11)

135. Unlike subsections 12(2) to (10) which extend the meaning of employee and employer, subsection 12(11) narrows the concept and provides that a person who is paid to do work wholly or principally of a domestic or private nature for 30 hours or less per week is not an employee in relation to that work.

136. The words 'domestic' and 'private' are not defined in the SGAA, as such it is their ordinary meaning which is relevant to an application of subsection 12(11). To this end, the *Macquarie Dictionary* defines 'domestic' to mean 'of or relating to the home, the household or household affairs' and 'private' to mean 'belonging to oneself', 'being one's own', 'individual or personal'.[132]

137. Examples of work of a domestic or private nature include cooking, cleaning, shopping, assisting with shopping, showering, dressing and general household duties.[133] The Commissioner is also of the view that the minding of children, the making of repairs or maintenance on a home, or to tend to a residential garden could also be work of a domestic or private nature.

138. In *Newton* the Full Court held that the phrase 'work…of a domestic or private nature' for the purposes of subsection 12(11) is a composite one.[134] That is, work will not be of a private or domestic nature for the purposes of subsection 12(11) solely by reference to the work that the person performs.[135] Rather, the exemption is only for the benefit of a householder for whom the relevant work is done.[136]

139. Therefore, subsection 12(11) only applies where there is a direct arrangement between the householder making the payment and the person carrying out the work of a domestic or private nature.[137]

140. As such, the exemption under subsection 12(11) is not available to a business (that is, a school, hotel, hospital, labour hire firm et cetera) who pays a worker to do work of a domestic nature, so far as the end-user or client is concerned. For example, while some work done in a school, hotel, hospital or in a retirement village might be characterised as

[132] Macmillan Publishers Australia, *The Macquarie Dictionary online*, www.macquariedictionary.com.au, accessed 19 March 2024.
[133] *Commissioner of Taxation v Newton* [2010] FCA 1440 (*Newton*) at [4] and [6].
[134] *Newton* at [20].
[135] *Newton* at [18–20] and [27].
[136] *Newton* at [24].
[137] *Newton* at [24].

domestic, it cannot be characterised as being of a domestic or private nature, in the context of the SGAA.[138] Whether a person carrying out such work is, however, an employee for superannuation purposes will depend on whether they fall within the other subsections of section 12.[139]

Employment-like setting

141. In determining if a person is an employee under subsections 12(2) to (10) consideration of whether the personal services provided were done so in an employment-like setting will not be relevant.

142. This employment-like setting concept originates from Bromberg J in *On Call* where in considering subsections 12(2) to (10), His Honour introduced the concept, commenting in *obiter*, that subsections 12(2) to (10) were intended to cover[140]:

> … persons who may not be common law employees but who earn remuneration in exchange for the provision of personal services in the context of an employment like-setting.

143. His Honour went on to state:

> … [w]hether an employment-like setting exists may be best answered by asking: Whether, in all the circumstances, the labour component of the contract in question could have been provided by the recipient of the labour employing an employee?

144. Perram and Anderson JJ in *Moffet*, however, found that Bromberg J's comments above had no textual anchor to section 12 and constituted a gloss on the provision.[141] Such that subsections 12(2) to (10) are not limited to instances where a person provides personal services in what appears to be an employment-like setting, which is not of a domestic or private nature.

Partnerships

145. A partner in a partnership cannot be an employee of the partnership. It is not possible for a person to meet the common law definition of employee and still have the powers and responsibilities of a partner. In particular, the degree of control over an individual required for the individual to be an employee at common law is incompatible with the degree of independence that a partner has in relation to the conduct of the partnership enterprise.

146. Agreements that allow a partner to draw a 'salary' against the partnership do not create an employment relationship but are rather agreements to vary the sharing of partnership profits between the partners.[142]

147. If a partnership has contracted to provide services, then the person who actually does the work is not the employee of the other party to the contract. This is so even if the

[138] *Newton* at [20].
[139] *Newton* at [25].
[140] *On Call* at [306].
[141] *Moffet* at [80], affirming the view of Logan J in *Racing Queensland Board v Commissioner of Taxation* [2019] FCA 509 at [73–74]. It is noted that *Moffet* only concerned the application of subsections 12(1) and 12(3), and this comment made by Perram and Anderson JJ was made in respect of subsection 12(3), but also section 12 more generally. Further, while the decision of Logan J in *Racing Queensland Board v Commissioner of Taxation* [2019] FCA 509 was reversed by the Full Federal Court in *Commissioner of Taxation v Racing Queensland Board* [2019] FCAFC 224, Logan J's specific comments on not applying an employment-like setting gloss to section 12 was not overturned.
[142] *Ellis v Joseph Ellis & Co* [1905] 1 KB 324.

person is a partner and even if the contract requires the partner to do the work.[143] However, if partners contract outside the partnership in their own personal capacity to provide their labour to fulfil a contractual obligation, they can be employees of the other party to the contract.

148. At common law, a partnership (except an incorporated limited partnership)[144] is not a legal entity separate and distinct from its members.[145] The views in paragraphs 145 to 147 of this Ruling are not affected by subsection 72(1), which deems a partnership to be a separate legal entity for the purposes of the SGAA.

149. An individual other than a partner engaged by the partnership to perform work for the partnership may be an employee of the partnership, depending on the circumstances of the contractual arrangement.

Personal services income measures

150. Part 2-42 of the *Income Tax Assessment Act 1997* (ITAA 1997) contains the alienation measures that set out the income tax treatment of the ordinary or statutory income of an individual or personal services entity that is an individual's personal services income (PSI). Income will constitute PSI if the income is mainly a reward for an individual's personal efforts or skills.[146] The alienation measures will not apply where the income is derived in the course of conducting a personal services business.[147]

151. It is recognised that there is some overlap between the tests used to determine whether a personal services business exists, particularly between the 'results test'[148] and subsection 12(3). However, section 84-10 of the ITAA 1997 ensures that the application of the alienation measures to an individual does not make the individual an employee for the purposes of the SGAA.[149] Whether or not an individual is subject to the PSI measures is distinct from and separate to the determination of whether that individual is an employee within the meaning of section 12.

Lease or bailment

152. Paragraphs 81 and 82 of this Ruling in respect of lease or bailment apply equally to section 12.

The interaction of the *Australian Business Number Act* and the SGAA

153. Section 8 of the *Australian Business Number Act 1999* provides in part that an entity is entitled to an ABN if they carry on an enterprise in Australia. An enterprise includes activities done in the form of a business but does not include activities done by a person as an employee.[150]

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[143] *ZG Operations Remittal* at [42–48].
[144] Incorporated limited partnerships are bodies corporate with a separate legal personality from the partners, for example, see section 84 of the *Partnerships Act 1958* (Vic).
[145] *Rose v Commissioner of Taxation* [1951] HCA 68.
[146] Section 84-5 of the ITAA 1997.
[147] Division 87 of the ITAA 1997.
[148] The results test is set out in section 87-18 of the ITAA 1997.
[149] Section 84-10 of the ITAA 1997 states that the application of Part 2-42 to an individual does not imply, for the purposes of any Australian law or any instrument made under an Australian law, that the individual is an employee.
[150] This is subject to certain exceptions stated in subsection 9-20(2) of the *A New Tax System (Goods and Services Tax) Act 1999*.

154. A person with an ABN may undertake a contractual engagement which is a contract for services and be an employee for SGAA purposes. This is because the scope of the SGAA is extended beyond common law employees.[151] For example, a person who has an ABN may be an employee under subsection 12(3) if they have been contracted wholly or principally for their labour.

[151] Employee is not otherwise defined in the *A New Tax System (Goods and Services Tax) Act 1999* so it takes its common law meaning. Paragraphs 18 to 82 of this Ruling explain when a person is an employee at common law.

Appendix 3 – Your comments

155. You are invited to comment on this draft Ruling. Please forward your comments to the contact officer by the due date.

156. 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

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

Due date: 9 August 2024

Contact details have been removed as the comments period has ended.

Status: **draft for comment**

References

Previous draft:

TR 2022/D3

Related Rulings/Determinations:

TR 1999/10
TR 2002/21
TR 2006/10
SGR 2005/2
SGR 2009/1

Previous Rulings/Determinations:

TR 2005/16
SGR 2005/1

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Status: **draft for comment**

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