TR 2023/4EC - Compendium

Australian Government
Australian Taxation Office

Public advice and guidance compendium – TR 2023/4

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Taxation Ruling TR 2022/D3 *Income tax: pay as you go withholding – who is an employee?* It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	It is unclear why there is such a heavy focus on formation of the contract in the draft Ruling.	The High Court in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) has confirmed that the question of whether a worker is an employee needs to be addressed by analysing the legal rights and obligations between the parties – namely, the terms of contract agreed between the parties. Evidence of the nature of the engagement and what ultimately happens in practice between the parties cannot be relied on to determine a worker's classification, if that evidence does not impact or alter the legal rights and obligations to which the parties agreed.
2	Paragraph 45 of the draft Ruling should be specific to labour hire arrangements and should connect to paragraph 72 (the use of interposed entities) of the draft Ruling.	The purpose of this paragraph (paragraph 49 in the final Ruling) is to show that control will be an important factor if the right to control is necessary for the relevant engaging entity's business operations. *Personnel Contracting* is raised as a recent leading example of this point which involved a labour hire business. However, it is just an illustrative example and is not specifically commenting on when a worker engaged by a labour hire firm will be employed by that firm. Our views on work arranged by an intermediary are contained in Superannuation Guarantee Ruling SGR 2005/2 *Superannuation guarantee: work arranged by intermediaries* (which is also scheduled for review following *Personnel Contracting*).

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3	Generally independent contractor relationships have shorter termination periods and less restrictions on termination compared to employment contracts. However, the draft Ruling points to the right to terminate as indicating a right to control consistent with a worker being engaged as an employee. Similarly, the draft Ruling suggests indemnifying damages as a right to control, but an obligation to indemnify for damages would more likely be a feature of a contractor relationship.	We appreciate that, conventionally, it would be more common for an employment contract to have stricter requirements around termination. However, the observation that broad termination powers may be consistent with control of an employee come from the judgment of Gordon J in *Personnel Contracting*. As with the termination powers, the observation about indemnity also comes from Gordon J in *Personnel Contracting*. We note that the indemnity reference is specifically for damages arising from failing to follow instructions; not necessarily damages for defective or substandard work. See also *Commissioner of State Revenue v Mortgage Force Australia Pty Ltd* [2009] WASCA 24 at [104].
4	It is questioned whether paragraph 61 of the draft Ruling accurately reflects the way the gig economy operates today, as a worker may get a role due to the equipment they bring with them. The test should not differentiate between the value of the equipment that is provided by the worker to the business as this provides advantages to the construction industry.	The purpose of this paragraph (paragraph 67 in the final Ruling), as noted in *Hollis v Vabu Pty Ltd* [2001] HCA 44, is to highlight that more significant assets will weigh more heavily towards independent contracting. Significance in this context may relate to the cost or value of the assets, how critical the item is to the services being provided, or the importance placed on the item in the contract. There is no suggestion that equipment used in the building construction industry is inherently more significant than that seen in other industries. Paragraph 62 of the draft Ruling (paragraph 68 of the final Ruling) refers to *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 as a case with significant equipment in the transport industry.
5	The draft Ruling should more prominently state that the task of characterising the relationship between the parties should be done by reference to the legal rights and obligations established by the contract. This principle first appears at paragraph 9 of the draft Ruling, which may suggest that it is not central to the analysis.	We consider that this change is not necessary as the initial paragraphs within the final Ruling make up the preamble and discuss what the Ruling will cover. As such, we consider that paragraph 9 of the draft Ruling (paragraph 8 of the final Ruling) is the first appropriate place to reference legal rights and obligations, when considered in the context of the preceding paragraphs. When the Ruling is considered as a whole, it is clear that whether a worker is an employee of an engaging entity is a question of fact to be determined by an objective assessment of the legal rights and obligations that make up the parties' relationship.

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6	The final Ruling needs to place a greater emphasis on the terms of the contract and the reference to 'totality of the relationship' should be removed. The references to the 'totality of the relationship' in *Personnel Contracting* were made by Gordon J (Steward J agreeing). The plurality of Kiefel CJ, Keane and Edelman JJ cautioned against the usage of 'totality of the relationship'.	We consider that the plurality in *Personnel Contracting* were not cautioning against the use of the phrase 'totality of the relationship'. Rather, we are of the view that the majority (including the plurality) confirmed, in the context of characterising the relationship between a worker and engaging entity, that the phrase 'totality of the relationship' refers only to the legal rights and obligations which constitute the relationship between the parties – being the legal rights and obligations contained within the terms of the contract agreed to. The draft Ruling reflects this view and as such we did not remove the phrasing in the final Ruling.
7	Paragraph 11 of the draft Ruling suggests the question of whether a worker serves in an engaging entities business is the 'central question' in context. However, *Personnel Contracting* does not go so far as to make that the 'central question'. The question should be whether the person is an employee.	We have reframed the first sentence in paragraph 11 of the final Ruling to avoid confusion about the test. As a result of this reframing, the final Ruling clarifies that the question of whether an employee is working in the business of the engaging entity is a useful tool to determine whether a worker is an employee, rather than being the central question in such a determination.
8	The term 'representative' in paragraph 35 of the draft Ruling may not accurately reflect common scenarios, potentially resulting in misunderstandings for taxpayers and tax practitioners. Certain professionals may operate independently but still 'represent a business' such as agents and legal representatives.	We have amended this paragraph (see paragraph 39 of the final Ruling) to replace 'representative' with 'part', to avoid any confusion which the use of the word 'representative' may have given rise to. This does not change the overall effect of the paragraph.
9	Paragraph 41 of the draft Ruling should be amended so the focus is whether a 'worker is required under a contract', as the current wording appears to take into account matters outside the parties' legal rights and obligations.	We have amended the final Ruling (see paragraph 45 of the final Ruling) to reflect that it is whether a worker is required 'under the contract' to present to the public as part of the engaging entity's business, which is relevant, not whether this is just done for some other (that is, non-contractual) reason.

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10	Paragraph 46 of the draft Ruling should be revised to reflect the fact that it will only be in limited circumstances that an employer won't control all of when, where, and how an employer performs work. The paragraph appears relevant solely to casual employment relationships.	This paragraph (paragraph 50 in the final Ruling) has been revised to more clearly reflect that casual employment is but one example where control may not extend to 'when' work is done. However, we do not agree with the view that an employer controls all of how, when and where work is done, outside of limited exceptions. Modern working arrangements often have increased flexibility and particular industries, professions and work types will lead to an increased or decreased importance placed on one or more of how, when or where work is done.
11	Paragraph 65 of the draft Ruling incorrectly suggests that independent contractors cannot be reimbursed for expenses. Both independent contractors and employees may be reimbursed and this factor on its own should not be determinative.	We have revised this paragraph (paragraph 71 in the final Ruling) to provide a more complete picture of the differences between employees and independent contractors regarding reimbursements. Generally, an independent contractor would be more likely to negotiate or charge a higher total price for services, that accounts for expected expenditure and equipment value on the part of the contractor. In comparison, an employee who is contracted to provide their labour, but may also incur some expenditure from the use of their own equipment or transport would generally be separately reimbursed or provided an allowance to compensate for this expenditure.
12	Paragraphs 72 and 73 of the draft Ruling should be expanded to clarify whether an engaging entity may enter into a contractual relationship with both a worker and an interposed entity, and have the worker be an employee.	We have not expanded these paragraphs (paragraphs 79 and 80 of the final Ruling) as we consider that these paragraphs sufficiently capture the principle. Where there is an interposed entity and the engaging entity enters into contracts with both the interposed entity and the worker, there may be an employment relationship between the worker and the engaging entity depending on the terms of the contract. However, we have removed the reference to 'intention' in paragraph 79 of the final Ruling as the crucial element is the rights and obligations created under the contractual agreement.
13	The definition of sham in paragraph 32 of the draft Ruling is confusing as it is different to how sham is defined under the *Fair Work Act 2009.*	We have clarified in footnote 38 of the final Ruling that the reference to 'sham' is not a reference to 'sham arrangements' considered under Division 6 of Part 3-1 of the *Fair Work Act 2009*. The High Court in *Personnel Contracting* only made reference to the contract law doctrine of 'sham'.
14	Paragraphs 10, 29 and 30 of the draft Ruling should be amended to narrow the times where conduct will need to be	We have made substantial revisions to paragraphs (paragraphs 22 to 30 of the final Ruling) to more comprehensively cover the range of situations where

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	reviewed. Conduct should only be reviewed to demonstrate that the contract is a sham or that the contractual terms have been varied.	the Commissioner will need to review evidence outside the written contract in order to establish the legal rights and obligations between the parties. Such revisions are consistent with the majority decision in *Personnel Contracting.* The Commissioner, not being party to the contract between the engaging entity and the worker, may need to gather the necessary evidence to establish whether the contractual agreement is written, verbal or a combination of the two.
15	The draft Ruling's emphasis on various indicia to demonstrate whether a worker is serving in the engaging entity's business reflects a return to the multifactorial test that was rejected by the High Court in *Personnel Contracting*.	We consider that the various indicia referred to in the final Ruling aid in determining whether a worker is an employee or contractor, and their usage is consistent with the majority decision in *Personnel Contracting*. We have made some changes to the final Ruling so that it is clear that the focus, when using the indicia to determine whether the worker is working in the business of the engaging entity, is still the construction of the contract.
16	Paragraphs 39 and 40 of the draft Ruling discount the significance of finding that a worker conducts their own business. The final Ruling should acknowledge that the existence of an independent enterprise is a significant factor in the assessment of the true relationship between an entity and a worker. This is borne out where the enterprise bears the risks and rewards of doing so. It is consistent with the decision in *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.	We have not made any changes to these paragraphs (paragraphs 43 and 44 of the final Ruling) as we consider that we have correctly characterised the legal principles that underpin these 2 paragraphs. The focus of these paragraphs is on the fact that whether the worker conducts their own business is not determinative. This is consistent with the majority decision in *Personnel Contracting.*