# *TR 2022/3EC - Compendium*

Australian Government
Australian Taxation Office

# Public advice and guidance compendium – TR 2022/3

**Relying on this Compendium**

This Compendium of comments provides responses to comments received on Draft Taxation Ruling TR 2021/D2 *Income tax: personal services income and personal services businesses*. 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

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| **All legislative references in this Compendium are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.** | | |
| 1 | No issue with technical content but would like to see the examples in the main body as it makes it easier for the reader to work through the Ruling. | From a readability perspective, the Ruling flows better with numerous examples in one place, as it takes bulk out of the substantive commentary. There are clear references to the examples throughout the Ruling. |
| 2 | Example 40 of the draft Ruling needs to be black and white and not ambiguous; that is, when will Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) apply? | The application of Part IVA of the ITAA 1936 requires consideration of all the facts and circumstances of the case. Example 41 in the final Ruling is provided to indicate when we may consider the application of Part IVA of the ITAA 1936. |
| 3 | The numerous and succinct examples are very useful and it would further assist if the ATO developed more detailed case studies that follow the examples to their conclusion. | The final Ruling contains numerous examples, using a variety of facts and circumstances to demonstrate the application of the personal services income (PSI) rules. A single case study is unlikely to assist numerous clients as the application of the PSI rules is dependent on specific facts and circumstances. |
| 4 | Paragraph 23 of the draft Ruling states '… clarifies the ATO view to take account of several judicial decisions which have further clarified the law …'<br>It is recommended that these decisions be listed in this section and some commentary included on how the respective decision clarified the law, particularly where the court decisions have resulted in the ATO modifying its views. This will help inform | The final Ruling maintains the principles set out in TRs 2001/7 and 2001/8, while taking legislative changes and judicial decisions into account.<br>Paragraph 30 of the final Ruling has been amended to reflect this. The judicial decisions have been referenced throughout the Ruling. |

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| | what is different in this Ruling compared with Taxation Rulings TR 2001/7 *Income tax: the meaning of personal services income* and TR 2001/8 *Income tax: what is a personal services business*. | |
| 5 | The draft Ruling does not cover the attribution process in Division 86 or address the effect of Division 85 on deductions and the interaction of the two. | Attributions of PSI and deductions relating to PSI are not covered by this Ruling. For guidance, refer to Taxation Rulings TR 2003/6 *Income tax: attribution of personal services income* and TR 2003/10 *Income tax: deductions that relate to personal services income*. |
| 6 | It is recommended that the comments at Issue 48 of the Compendium to Law Companion Ruling LCR 2019/5 *Base rate entities and base rate entity passive income* be incorporated into this Ruling. | Passive investment income is not PSI as it is not mainly a reward for an individual's personal efforts and skills.<br>Issue 48 of the Compendium to LCR 2019/5 pertains to attribution of net PSI, which is not covered by this Ruling. |
| 7 | Footnote 16 in paragraph 60 of the draft Ruling should be clearly stated in paragraph 37 rather than hidden in a footnote. As the guidelines are in the binding part of the ruling, one could easily mistake the guidelines as binding on the Commissioner. | Paragraphs 37 and 38, and footnote 16 of the draft Ruling, have been removed from the final Ruling.<br>See the discussion at Issue 11 of this Compendium for further explanation. |
| 8 | Greater detail about what is PSI where different individuals are involved would be beneficial. Example 12 of the draft Ruling highlights this issue and should be expanded upon.<br>Why is the income Kim's PSI rather than David's PSI where David does more than 50% of the work? Is this because, from Big Co's perspective, they are seeking Kim's services and the income would be Kim's even if David was able to perform 100% of the job?<br>How would this apply if the client requests a general service rather than seeking a particular individual; for example, if a member of the public requires an electrician to do some wiring and responds to a public advertisement rather than seeking out a particular individual, would the PSI be that of the individual who performed the job? If the job was delegated to a junior electrician could the fee still be the PSI of the senior electrician because they are the 'principal' or have a supervisory role? | The term 'test individual' has been amended in the final Ruling to clarify it is the individual who has contracted to, and is responsible for, providing the services that generates their PSI through an interposed entity rather than providing those services directly to the service acquirer.<br>The PSI rules only apply to test individuals.<br>The purpose of Example 12 in the final Ruling is to show whose PSI it is. It looks at who the test individual is to whom the PSI rules may apply.<br>Kim is the only test individual. In this example, David is not a test individual.<br>Example 12 has been amended and new Example 13 of the final Ruling has been included to provide further guidance.<br>As stated in paragraph 52 of the final Ruling, where a test individual works though a personal services entity (PSE), the contract for services is with the PSE and payment is made to it. However, unless a personal services business (PSB) test is met, the net PSI is attributable to the test individual, even if the PSE engages another individual to assist the test individual with principal work. |

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| 9 | It is questioned that the view in paragraph 41 of the draft Ruling considers one set of obligations and all the income derived from performing those obligations is either PSI in its entirety or not, particularly as no authority is cited.<br>Paragraphs 29, 41 and 42 of the draft Ruling suggest that an amount of income will either be PSI or not (with no apportionment or dissection) if more than 50% of the income was a reward from the personal efforts and skills of an individual. This suggests a binary approach where either the income is for personal efforts and skills or something else.<br>Would this be the case if the income was for 3 or more things (for example, personal efforts, parts and something else like rent) or should the income streams instead be differentiated as in Example 3 of the draft Ruling?<br>If you could allocate the income as being 40/30/30 for these 3 things, would the whole amount not be PSI because the largest part of the income was for personal efforts or would the whole amount not be PSI because 40% was for personal efforts and 60% was for things other than personal efforts? | It is the substance of the arrangement that is considered when determining whether there is one set of obligations.<br>Paragraph 1.28 of the Explanatory Memorandum to the New Business Tax System (Alienation of Personal Services Income) Bill 2000 states:<br>> The reference in subsection 84-5(1) to the income that is *mainly* a reward for the personal efforts or skills of an individual, requires a conclusion as to the substance of contractual arrangements between the relevant parties to those contracts. Whether the provision of the personal efforts or skills of an individual to a service acquirer is the chief or the principal component of a contract will depend on the terms and conditions of that contract.<br>We have amended paragraph 48 of the final Ruling to refer readers to that paragraph.<br>The purpose of Example 3 of the final Ruling is to demonstrate different income streams of an entity; that is, which income streams are PSI and which are not. If parts and labour amount to one obligation under a contract and the labour amounts were more than the parts, this may be considered to all be PSI as the amount received under the contract is mainly (more than 50%) a reward for the personal efforts and skills of an individual. However, rent is not a reward for personal efforts and skills so is not PSI. |
| 10 | It is questioned that the view in paragraph 41 of the draft Ruling considers one set of obligations and all the income derived from performing those obligations is either PSI in its entirety or not.<br>There is no authority cited in this paragraph and no consideration of the cases of *Allsop v Commissioner of Taxation* (Cth) [1965] HCA 48 and *McLaurin v Commissioner of Taxation* (Cth) [1961] HCA 9, which state that an entire amount of an undissected lump sum will not be ordinary income if there are a number of claims and the sum is paid to settle all claims, some of which are capital in nature.<br>In Example 1 of the draft Ruling, Andre is able to dissect the $250 invoice and attribute the amount to individual items. If one of those items were capital in nature, one could dissect the item that is income in nature and treat it as ordinary income (that is, it talks about the 'income' being mainly a reward for | See Issue 9 of this Compendium. |

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| | personal efforts or skills). It is arguable that where one is able to dissect a receipt into 2 individual items of income, then each can be treated separately as PSI or not.<br>This would still give work to do for the 'mainly' test where the income cannot be easily dissected; for example, the application of section 84-5 in Example 2 of the draft Ruling, which requires one to consider whether the transportation fee is mainly for personal efforts or mainly for the use of the semi-trailer where the income would not normally be dissected into separate components for the individual's time and for the use of the equipment. | |
| 11 | In relation to business structure, paragraph 38 of the draft Ruling defines 'principal practitioners' as those who own or share in the ownership of the practice. There is no materiality here.<br>An employed practitioner who is offered participation in an employee share scheme (very common in a lot of engineering firms) may have an ownership interest of less than 1% or up to 5%. Would every one of those employees, therefore, be considered principal practitioners notwithstanding the existence of goodwill, a large operation, income-producing assets, etc? A case officer may focus too much on this rule of thumb and ignore the other factors described in paragraph 36 of the draft Ruling. | As outlined in paragraph 44 of the final Ruling, all the relevant factors would need to be considered in determining whether the income was generated from a business structure rather than from the rendering of personal services.<br>We do, however, recognise that the paragraphs which discuss 'guidelines for determining whether the income from a practice company or trust is from a business structure' may lead to inconsistent outcomes.<br>Paragraphs 37 and 38 of the draft Ruling have been removed from the final Ruling, and the ATO is also considering other opportunities to better clarify the practice company or trust principles.<br>See Issue 30 of this Compendium. |
| 12 | Paragraphs 44 to 49 and Example 12 of the draft Ruling need further elaboration, particularly around the comment that PSI generated under the contract is wholly attributable to the test individual even if the PSE engages another individual to assist the test individual with principal work.<br>In *The Engineering Company and the Commissioner of Taxation* [2008] AATA 934 at [18–19], cited in footnote 17 in paragraph 49 of the draft Ruling, the Tribunal member provided his view of how to determine whose PSI it is when different individuals perform the work for the PSE. | PSB tests apply to a test individual. In Example 12 of the final Ruling, Kim is the only test individual.<br>Example 12 has been amended and new Example 13 of the final Ruling has been included to provide further guidance. |

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| | In light of the Tribunal member's view, it is recommended more commentary should be included after paragraph 48 of the draft Ruling to provide guidance on what to consider in the invoice and in determining the amount of income that should be examined for PSI.<br>What seems to be missing in the draft Ruling is commentary around where an amount shown on a particular invoice is itself a total amount, and not capable of dissection into distinct components, compared with where an amount shown on the invoice is capable of dissection. | |
| 13 | In 'determining whose PSI it is', paragraphs 44 to 48 and Examples 9 to 12 of the draft Ruling do not clearly state whether one is required to test each invoice under the one contract separately. It would be useful if there was an example in which 2 principals perform a contract which is billed periodically (for example, monthly) during the course of the work (for example, does each monthly invoice need to be analysed separately or does one look at the overall contract and determine who is the primary person performing the contract overall)?<br>Further, in Example 13 of the draft Ruling it seems strange that, under a contract that does not stipulate who provides a service, the work orders do. Is the ATO implying that this arrangement is a sham? If the work orders did not specify a person, would the same result occur?<br>If the work orders and invoices did not say who provided the service would the same result occur? When is a person a subcontractor as opposed to a test individual? What is the difference between Example 12 and Example 13 of the draft Ruling? | See Issue 12 of this Compendium.<br>The purpose of Example 9 in the final Ruling is to demonstrate that income derived under separate contracts is mainly a reward for each test individual's personal efforts and skills as they each have separate obligations.<br>The purpose of Examples 12 and 13 of the final Ruling is to demonstrate situations where there may be multiple service providers under the one contract.<br>Example 13 shows that relevant business records can provide factual clarity around what services each individual performed and the value of those services. This will support the assessment of each test individual for the purposes of the PSB tests. |

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| 14 | Further clarification of the testing of a PSB in relation to each individual would be beneficial. Paragraph 51 of the draft Ruling states that a PSE is able to self-assess that they conduct a PSB in respect of the test individual. Paragraph 59 of the draft Ruling suggests that a PSE self-assess the 4 PSB tests in relation to each test individual. This indicates that a PSE may conduct a PSB in relation to some individuals who derive PSI through that entity and not conduct a PSB for other individuals. This view should be made clear and elaborated upon in the final Ruling.<br>The exception to attribution in subsection 86-15(3) is where the amount of PSI is income 'from the PSE conducting a PSB'. Under section 87-15, a PSE conducts a PSB if the entity meets at least one of the 4 PSB tests. The wording of the 4 PSB tests suggests that either a PSB will meet the test for an income [year] or it will not, rather than being able to meet the test 'in relation to an individual' for a year and not meet it in relation to another individual.<br>On the other hand, paragraph 87-15(1)(b) requires the PSE to have a PSBD in force 'relating to an individual whose PSI is included in the entity's income' and therefore suggests that a separate determination is required in respect of each such individual.<br>The Ruling should clearly explain how the law applies on this issue and whether, in fact, a PSE can meet one of the PSB tests in respect of some but not all individuals whose PSI is derived by the PSE. | Paragraph 76 of the final Ruling highlights that the tests must be applied to each test individual. This is because, as per subsection 84-5(2), only individuals can have PSI.<br>The final Ruling has been amended at paragraph 13 to clarify that the PSB tests apply to each test individual. |
| 15 | Paragraphs 73 to 75 of the draft Ruling discuss the 'producing a result' element of the results test. This is one of the main areas of confusion and misunderstanding in the PSI rules and recommend the final Ruling provide a more detailed explanation. For example, if a tradesperson is engaged to conduct repairs, they may charge a call-out fee and also invoice based on the time spent on the job. Even if the client is (from their perspective) paying the tradesperson to produce a result, | The essence of the contract is considered in determining if the income is for producing a result.<br>Appropriate judicial decisions are also footnoted for reference.<br>Paragraphs 83 to 86 of the final Ruling have been amended to clarify this point. |

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| | the fee is calculated by reference to time spent on the job. Is this income for producing a result or merely an hourly rate? | |
| 16 | In relation to paragraph 73 of the draft Ruling (specifically producing a result), many labour-intensive industries still use hourly or daily rates as the method of calculating the charge even though the delivery is of a specified output or result. This has not been adequately demonstrated in the draft Ruling or in the Examples. There are also cases where businesses are engaged on fixed retainers (for example, monthly) that cover a range of services within the scope yet are still being engaged for producing specific results.<br>For instance, an accounting firm may be contracted to provide weekly reconciled accounts, fortnightly payrolls, monthly management reports, quarterly business activity statement lodgment and annual tax returns and financial statements. This is a clear set of deliverables, for which the accountant must provide all the tools and is responsible to rectify errors and bears professional indemnity risk. They also bear the economic risk of mispricing if the work takes significantly longer than anticipated but capture the positive upside when the work can be delivered efficiently. However, paragraph 74 of the draft Ruling would seem to indicate that completing identifiable tasks that form part of the work for a regular ongoing basis would not meet the results test. | See Issue 15 of this Compendium.<br>Paragraph 79 of the final Ruling states the essence of a contract that is for a result must be to achieve a specific result and not to do work. It also states that completing identifiable tasks are not the same as a specified result if those tasks merely form part of the work being paid for on an ongoing basis. Appropriate judicial decisions are also footnoted for reference.<br>Paragraphs 83 to 86 of the final Ruling have been amended to clarify this point. |
| 17 | The ATO's approach to referrals, as discussed in paragraph 93 of the draft Ruling, is questioned. According to the ATO, if the clients you accept are through referrals rather than from public advertisement, it would not count towards unrelated clients test from public offers. This seems contrary to a very typical way to attract clients in many service-based industries, particularly professional services. | As the law requires, it must be demonstrated that the contract was obtained as a direct result of making offers or invitations to the public at large or a section of the public. Making an offer or invitation to the public at large or section of the public requires the individual or PSE to hold out or inform the public of the services they are able to provide and to attract or solicit members of the public to enter into agreements for their services. |

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| 18 | Paragraph 144 of the draft Ruling suggests that a sole trader or PSE cannot rely on industry-wide circumstances and that the unusual circumstances must apply to the particular sole trader or PSE. It is suggested that the final Ruling address or provide examples of whether the consequences of COVID-19 can be considered unusual circumstances, given how wide in reach they were and the impact on entire industries. For example, if a PSE had business premises for which the lease expired sometime in 2020 and chose not to renew the lease or enter into a new lease over other premises until 2021 due to the principals of the PSE being forced to work from home, will this be an unusual circumstance for which a Personal Services Business Determination (PSBD) can be given to the entity? | The outcome will be dependent on the facts and circumstances of each case, and the direct impact COVID-19 had on the individual or PSE. |
| 19 | The paragraphs regarding Part IVA of the ITAA 1936 and Example 40 of the draft Ruling are too hasty in concluding that Part IVA of the ITAA 1936 could apply.<br>In particular, Example 40 in paragraph 251 of the draft Ruling does not address the tax benefit element of Part IVA of the ITAA 1936 and does not propose an alternative postulate. It should be made clear whether the establishment of the structure is a Part IVA of the ITAA 1936 scheme or if the annual resolutions by the trustee stand alone as a Part IVA of the ITAA 1936 scheme.<br>If the dominant purpose of the establishment of the structure is not the purpose of obtaining a tax benefit (for example, the structure may provide limited liability, asset protection, benefits for family members and so on), could the distributions alone be a scheme to which Part IVA of the ITAA 1936 applies? If so, how would this be distinguished from a different business conducted by a family trust which does not derive PSI (such as a retail business) even if there is a sole individual effectively running the entire business as their full-time occupation?<br>Further, and in contrast to Practical Compliance Guideline PCG 2021/D2 *Allocation of professional firm profits – ATO* | The application of Part IVA of the ITAA 1936 is decided on the specific facts of the case.<br>The purpose of Example 41 in the final Ruling is to show in what circumstances we may consider the application of Part IVA of the ITAA 1936. The conclusion that it is likely the dominant purpose of the arrangement is income splitting to which Part IVA of the ITAA 1936 applies is based solely on the specific facts contained in the Example.<br>Depending on all the facts of the particular case, PCG 2021/D2 may or may not apply. The draft Guideline concerns whether the Commissioner proposes to apply their compliance resources to a particular set of circumstances; it is not a view on the application of Part IVA of the ITAA 1936 to any given circumstance.<br>The PSI rules attribute all net PSI to the individual who generated that income. Part IVA of the ITAA 1936 applies to situations that are outside the PSI rules. We will identify the scheme based on the relevant facts of each case and may identify a wider and a narrower scheme.<br>The final Ruling has been amended to include references to a number of cases where Part IVA of the ITAA 1936 and its predecessor, section 260, have been applied to assist the reader get a feel for the wide variety of scenarios where it may apply. |

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| | *compliance approach*[1], the conclusion in Example 40 of the draft Ruling would tend to suggest that Part IVA of the ITAA 1936 would apply even if JB returned 99% of the net income of the trust (which is PSI) in his own name; for example, if only $450 of the $45,000 was distributed to JB's wife. As JB would have split some of the income that is a reward or his personal efforts and skill to someone else, the draft Ruling suggests that Part IVA of the ITAA 1936 could apply to include that 1% in his assessable income. PCG 2021/D2 applies a risk framework and suggests there is a low risk of the ATO seeking to devote compliance resources to the application of Part IVA of the ITAA 1936 if a certain proportion of net income is returned by the relevant individual professional practitioner and a certain effective rate of tax is paid on that income.<br>By taking the view that any level of income splitting is likely to result in Part IVA of the ITAA 1936 applying, this effectively suggests that the PSI rules have little work to do as Part IVA of the ITAA 1936 would effectively achieve attribution to the individual whose PSI is being derived even if that income is derived by a PSE that is conducting a PSB.<br>In relation to paragraph 10 of the draft Ruling, specifically Part IVA of the ITAA 1936, it may be worth asking if the below market salary is the primary indication that the 'dominant purpose of the arrangement is income splitting'? If, for instance in Example 40 of the draft Ruling, he was remunerated $90,000, the trust would still have taxable income of $5,000 that would be distributed. It is also not clear that the $90,000 quoted value of JB's services is the value of him 'doing work' or the value of the 'result' of undertaking the work. Presumably, the ATO intends for it to mean the former and do not agree with the ATO using the isolated term 'value' and would prefer the use of terms such as 'market value' or 'arm's length' remuneration. There are plenty of other areas of tax law that require | |

[1] Since finalised as Practical Compliance Guideline PCG 2021/4 *Allocation of professional firm profits – ATO compliance approach.*

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| | consideration of these terms and are therefore better understood.<br>Given that a detailed consideration has not been provided in the draft Ruling it is suggested that the last sentence be removed. | |
| 20 | The position adopted by the Commissioner in Example 40 of the draft Ruling appears to be based upon the New Zealand (NZ) general anti-avoidance rules case of *Penny and Hooper v Commissioner of Inland Revenue* [2011] NZSC 95 and NZ's Revenue Alert RA 21/01 *Diverting personal services income by structuring revenue earning activities through a related entity such as a trading trust or a company: the circumstances when Inland Revenue will consider this arrangement is tax avoidance*.<br>The *Penny and Hooper* case involved a change in business structure by 2 orthopaedic surgeons who transferred their respective practices as sole traders to a new related company owned by various family trusts. This change of structure allowed the profits of the business to be split among other family members instead of being fully taxable to the respective surgeon in their own name. The Supreme Court of NZ held that section BG1 of the *Income Tax Act 2007* (NZ) applied to the arrangements and the use of this new structure went beyond Parliamentary contemplation, as the tax purpose was considered to be the overriding purpose driving the whole restructure. Consequently, the NZ Commissioner was entitled to tax the taxpayers by reference to a 'commercially realistic salary' effectively negating the tax advantage achieved by the restructure.<br>NZ's RA 21/01 identifies concerns about arrangements involving taxpayers who effectively divert some or all of the income they earn (or could earn) from a business or activity of supplying personal services to a related entity where it has the effect of taking advantage of lower marginal income tax rates payable by that entity or by family members as beneficiaries or shareholders of that entity. | Part IVA of the ITAA 1936 applies to situations outside the PSI rules. The purpose of Example 41 of the final Ruling is to demonstrate in what circumstances we may consider Part IVA of the ITAA 1936. |

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| | To provide interpretative certainty, it is suggested the Commissioner should consider a test case to determine whether the Australian judiciary agrees that Part IVA of the ITAA 1936 would apply to such a case as illustrated in Example 40 of the draft Ruling. | |
| 21 | As a general comment, the PSI rules may no longer reflect or accommodate modern business practices, as many smaller businesses may now operate from non-exclusive premises such as shared office spaces or be able to operate from home post-COVID-19, and the roll-out of the national broadband network and 4G/5G infrastructure. Additionally, for the purposes of the unrelated clients test, the way in which advertising is done has changed from standard practice 20 years ago. To this end, it may be worthwhile for the ATO to consider developing a practical compliance guideline that addresses issues raised by the contemporary business environment and provides taxpayers and advisors with a methodology to self-assess their risk exposure to PSI issues. It is also suggested that the ATO review the PSI tool web page and other PSI guidance material to make direct reference to seeking advice from tax agents and professional advisers given the complexity and potential misapplication of the rules by taxpayers. | The PSI rules are clear that the unrelated clients test requires an offer to be made to the public. How that may be done, including by using new technologies, is open to businesses and taxpayers. The end result, however, must be an offer being made to the public in order to satisfy the unrelated clients test.<br>Similarly, it is also clear in the PSI rules that the business premises test requires exclusive use.<br>Updates to PSI public advice and guidance (PAG) material will be considered. |
| 22 | More practical guidance, including examples, would be useful to include in the final Ruling in the application of Part IVA of the ITAA 1936 on PSI.<br>Provide an explanation of the consequences under the PSI rules of not conducting a PSB. Many taxpayers do not understand the benefits and drawbacks of conducting a PSB or the consequences of not conducting a PSB. | Updates to PAG products will be considered, including educational products. |
| 23 | There is repeated reference to the PSI rules:<br>• applying where the PSE is not conducting a PSB, and<br>• not applying where the PSE is conducting a PSB.<br>The PSI rules must be considered and applied where the | The expression 'PSI rules do not apply' is used in the final Ruling for ease of reference; however, we recognise that the PSI rules still apply to assessing whether an entity is conducting a PSB.<br>Paragraph 25 of the final Ruling has been amended. |

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| | income being derived is PSI. These references may be confusing for taxpayers and their advisers.<br>The final Ruling should instead state that 'there are no consequences under the PSI rules'.<br>See paragraphs 23, 57, 59 and 158 of the draft Ruling. | |
| 24 | It is suggested the ATO consider whether the word 'may' should be changed to 'will generally' in paragraph 59 of the draft Ruling. The only situation where pay as you go withholding not being required where a PSB is not being conducted is where the amount is below the tax-free threshold, and this would be highly unusual. | Paragraph 61 of the final Ruling has been amended. |
| 25 | Concern has been raised that the draft Ruling uses the term 'test individual'. Paragraph 27 of the draft Ruling provides the definition of the term 'test individual', which could be confused with the same term used in section 272-95(1) of Schedule 2F of the ITAA 1936 in relation to family trust election rules. | We acknowledge the term 'test individual' is also used in section 272-95(1) of Schedule 2F of the ITAA 1936 but is not used in this Ruling to reference the meaning of the term in that section.<br>Footnote 7 and paragraph 29 of the final Ruling have been amended to clarify this point. |
| 26 | Disagree with the ATO view recorded in paragraph 91 of the draft Ruling and recommend the paragraph to be omitted.<br>Considering *IRG Technical*[2] as a whole, we refer to paragraphs 105, 106 and 119 of the case.<br>• In *IRG Technical*, there is no particular claim of the contract that attributes liability to the personnel provided by the PSE.<br>• Allsop J considered the terms of the contract as a whole and the individual (or PSE) would have been exposed to liability for rectification of defective work they carried out.<br>• Feedback disagrees that the rectification condition in the results test will not be met if rectification occurs during 'usual working time'. The results test turns on whether the individual (or PSE) is liable for the rectification of any | Paragraph 92 of the final Ruling has been amended. |

[2] *IRG Technical Services Pty Ltd v Deputy Commissioner of Taxation* [2007] FCA 1867 (*IRG Technical*).

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| | defective work. The rectification condition is satisfied by reference to who bears the cost or when the rectification occurs. The ATO position appears to read into the rectification condition different criteria that is not evident in paragraphs 87-18(1)(c) and (3)(c).<br>• The ATO position solely relies on *IRG Technical* at [105] and should be reviewed. The ATO should consider [105–106] of *IRG Technical*. Read as a whole, the paragraphs support the individual (or PSE) can be liable for the rectification of any defective work subject to the facts and circumstances of the individual (or PSE). | |
| 27 | Additional guidance should be provided in paragraph 96 of the draft Ruling on how the taxpayer could evidence this direct causal effect for the direct result of making offers or invitations; for example, retaining documentation such as emails. | Paragraph 100 of the final Ruling provides examples of how offers or invitations are made to the public. The subsequent paragraphs state the taxpayer must keep evidence to show the direct causal effect for the direct result of making offers or invitations.<br>Updates to PAG products will be considered, including educational products. |
| 28 | Digital platforms such as LinkedIn could be included in the examples provided in paragraph 97 of the draft Ruling. The Full Federal Court's decision in *Commissioner of Taxation v Fortunatow* [2020] FCAFC 139 was raised to support the suggestion. Including the digital platform as an example would reflect the contemporary nature of making offers and invitations to the public in the digital age. | There are numerous ways of making an offer to the public, or section of the public, and paragraph 100 of the final Ruling outlines some of those.<br>Using digital platforms such as LinkedIn would require something more than simply having a profile. The taxpayer would need to show how their profile was making an offer to a section of the public. |
| 29 | Recommend that the Examples at paragraph 135 of the draft Ruling would be useful to demonstrate how the 50% threshold of deriving PSI is measured if more than one activity is carried on at a business premise. The suggestions made are hours worked to produce PSI or proportion of revenue. | The requirement is clear that the business premises test is met when the individual or entity mainly conducts activities from which PSI is gained or produced. The method used by a taxpayer to measure this could vary. |

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| 30 | Taxation Ruling IT 2639 *Income tax: personal services income* provides a rule of thumb, which provides that income is considered to be derived from a business structure. IT 2639 has been heavily relied upon in practice for a long time.<br>The draft Ruling does not explicitly state that the position in IT 2639 is going to change. Rather than take away the rule of thumb for everyone, explicit examples of when the 'rule of thumb' will not be applied should be provided. Such an approach would provide greater clarity and minimise the compliance burden. | The Ruling is about the PSI rules. It considers how to identify PSI, how the PSI rules apply to an individual or entity and the application of the PSB tests.<br>IT 2639 is to assist tax officers and practitioners in applying other taxation rulings, such as:<br>• IT 2503 *Income tax: Incorporation of medical and other professional practices*<br>• IT 2121 *Income tax: family companies and trusts in relation to income from personal exertion*, and<br>• IT 2330 *Income Tax: Income Splitting*.<br>Those Rulings have not been changed.<br>New paragraph 4 has been added to the final Ruling. |