

# ***TR 2023/4A1 - Addendum - Income tax: pay as you go withholding - who is an employee?***

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! There is a Compendium for this document: **TR 2023/4EC2** .

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# Addendum

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## Taxation Ruling

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

Except to the extent that the content considers the meaning of employee for the purposes of section 12 of the *Superannuation Guarantee (Administration) Act 1992*, this Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Taxation Ruling TR 2023/4 to include guidance in Appendix 2 of the Ruling on when a person is considered to be an 'employee' under section 12 of the *Superannuation Guarantee (Administration) Act 1992* (SGAA). Appendix 2 of the Ruling:

- assists the community by confirming the ATO's view in light of developments in case law in the context of the SGAA since SGR 2005/1W *Superannuation guarantee: who is an employee?* (withdrawn) was last updated
- consolidates the ATO's view in respect of the common law definition of employee contained in SGR 2005/1 (withdrawn) and TR 2023/4
- provides a holistic ATO view of the common law meaning of employee and extended meaning of the word as contained in the SGAA.

TR 2023/4 is amended as follows:

#### 1. Ruling title

Omit the title of the Ruling; substitute 'Income tax and superannuation guarantee: who is an employee?'.

#### 2. Preamble

Omit the wording of the preamble; substitute:

*This Ruling (excluding appendixes) 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.*

**3. Table of contents**

Omit the Table of contents; substitute:

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#### **4. Paragraph 2**

After ‘in this Ruling’, insert ‘, except in Appendix 2,’.

#### **5. Paragraph 3**

(a) Omit the wording of the paragraph; substitute:

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 section 12 of the SGAA, but it is not able to be binding on the Commissioner on this aspect.<sup>A1</sup>

(b) At the end of the paragraph, insert new footnote A1:

<sup>A1</sup> 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.

**6. Paragraph 4**

Omit the wording of the paragraph, excluding footnotes; substitute:

In this Ruling, the sections titled *Ruling* and *Appendix 1 – Explanation* deal with the ordinary meaning of employee and do not deal with payments for work and services which are subject to withholding under other provisions, such as payments to directors<sup>1</sup> or office holders<sup>2</sup>, labour hire payments<sup>3</sup> and alienated personal services income.<sup>4</sup> These exclusions do not apply to *Appendix 2 – Meaning of employee under section 12 of the SGAA*.

**7. Paragraph 5**

- (a) Omit the wording of the heading; substitute 'Previous Rulings'.
- (b) In the first sentence, omit 'TR 2005/16 *Income Tax: Pay*'; substitute 'Taxation Ruling TR 2005/16 *Income tax: Pay*'.
- (c) After paragraph 5, insert new paragraph 5A:

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.

**8. Paragraph 11**

In footnote 16, after 'The High Court in *Personnel*', insert ' *Contracting*'.

**9. Paragraph 14**

After paragraph 14, insert new paragraph 14A and signature block, including heading:

**Date of effect**

14A. This Ruling applies 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*).

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**Commissioner of Taxation**

6 December 2023

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**10. Paragraph 15**

- (a) Omit the heading, insert 'Appendix 1 – Explanation'.

(b) After the new heading, insert:

**!** *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 binding public ruling.*

**11. Paragraph 42**

In the quote, omit 'The right to control'; substitute '... The right to control'.

**12. Paragraph 58**

In footnote 66, after '[2011] FCA 366', insert ' (*On Call*)'.

**13. Paragraph 59**

In footnote 67, after '92 ATC 4327', insert ' (*World Book*)'.

**14. Paragraph 61**

In footnote 68, after '[1955] HCA 18', insert ' (*Neale*)'.

**15. Paragraph 63**

In footnote 73, omit '*Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 '.

**16. Paragraph 64**

In footnote 76, omit '125at'; substitute '125 at'.

**17. Paragraph 67**

(a) Omit 'bicycle contractors'; substitute 'bicycle couriers'.

(b) After 'investment in capital', insert ' equipment'.

**18. Paragraph 68**

After 'important, finding', insert ' (footnotes omitted)'.

**19. Paragraph 77**

In the second dot point, after 'Australian business number', insert ' (ABN)'.

**20. Paragraph 79**

In footnote 93, after '*ZG Operations* at [99]', insert '; *EFEX Group Pty Ltd v Bennett* [2024] FCAFC 35 at [45–48] and [53]'.

**21. Paragraph 80**

In footnote 94, after '[2020] FCAFC 118', insert '(Moffet)'.

**22. Paragraph 83**

- (a) Omit the paragraph, including the heading.
- (b) After paragraph 83, insert new paragraphs 84 to 155 including headings:

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

**ⓘ** *This Appendix is not legally binding on the Commissioner. However, if the Commissioner later takes the view that the law applies less favourably to you than this Appendix indicates, the fact that you acted in accordance with this Appendix would be a relevant factor in your favour in the Commissioner's exercise of any discretion in regards to the imposition of penalties.*

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.<sup>96</sup> 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 – for instance, a person who would be considered an independent contractor under the common law but may be treated as an employee under subsection 12(3). 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 (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, or of a 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)).<sup>97</sup>

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<sup>98</sup> 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.<sup>99</sup>

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.

*Is there a contract?*

96. This first element of subsection 12(3) (that is, that there is a contract), requires<sup>100</sup>:

... 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.<sup>101</sup> The superannuation regime cannot be circumvented by the simple device of forming a contract which names more than 2 parties.<sup>102</sup>

98. Subsection 12(3) requires attention to the rights under the contract and not to the actual performance of the contract.<sup>103</sup>

*Does the person work under the contract?*

99. The concept of 'works under a contract' is one of personal exertion and personal effort.<sup>104</sup>

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.<sup>105</sup> 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).<sup>106</sup>

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

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

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

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)<sup>111</sup>, or

- the contract is for the provision or production of a result and the worker is paid for that result<sup>112</sup> (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).<sup>113</sup>

#### 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.<sup>114</sup> 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.<sup>115</sup>

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.<sup>116</sup>

#### '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.<sup>117</sup> That is, the essence of the contract must be to achieve a specified result and not to do work. Where the contract is genuinely for the provision of a result, 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<sup>118</sup>, and is assessed by reference to the benefit or benefits that the engaging entity receives out of the bargain.<sup>119</sup>

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.<sup>120</sup>

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.<sup>121</sup> For example, in *ZG Operations Remittal*, Perram and Anderson JJ held that the benefit the engaging entity, 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.<sup>122</sup>

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.<sup>123</sup>

#### *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.<sup>124</sup>

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.<sup>125</sup> 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*.

#### ***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.<sup>126</sup> None of the usual indicators of an employer or 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.<sup>127</sup>

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 in 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.

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.<sup>128</sup> 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<sup>129</sup>:

... 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 referable 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 connection with an activity referred to in paragraph 12(8)(a) – paragraph 12(8)(b)*

127. The scope of subsection 12(8) is further extended by paragraph 12(8)(b). This paragraph states 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.

128. Paragraph 12(8)(b) does not require a person to actively participate in a performance, presentation, or other activity described within paragraph 12(8)(a) to be defined as an employee; rather, the paragraph specifies that the person will be an employee if they provide a service in connection with the activity.

*Payments for services provided in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast – paragraph 12(8)(c)*

129. 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 under paragraph 12(8)(c). The terms of paragraph 12(8)(c) do not require the person to perform in such a broadcast using their physical or personal skills.

*In connection with – paragraph 12(8)(b) and paragraph 12(8)(c)*

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

The words "in connection with"... do not necessarily require a causal relationship between the two things: see Commissioner for Superannuation v Miller (1985) 8 FCR 153 at 154, 160, 163. They may be used to describe a relationship with a contemplated future event: see Koppen v. Commissioner for Community Relations (1986) 11 FCR 360 at 364 and 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.”

131. As can be seen from the statement in paragraph 130 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.<sup>131</sup> 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)***

132. 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).

133. 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 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)***

134. 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.

135. 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) is to also bring those members into the superannuation guarantee system.

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

136. 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.

137. 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'.<sup>132</sup>

138. Examples of work of a domestic or private nature include cooking, cleaning, shopping, assisting with shopping, showering, dressing and general household duties.<sup>133</sup> 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.

139. 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.<sup>134</sup> 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.<sup>135</sup> Rather, the exemption is only for the benefit of a householder for whom the relevant work is done.<sup>136</sup>

140. 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.<sup>137</sup>

141. 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 domestic, it cannot be characterised as being of a domestic or private nature, in the context of the SGAA.<sup>138</sup> 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.<sup>139</sup>

### **Employment-like setting**

142. 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.

143. 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<sup>140</sup>:

... 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.

144. 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?

145. 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.<sup>141</sup> 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**

146. 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.

147. 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.<sup>142</sup>

148. 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 person is a partner and even if the contract requires the partner to do the work.<sup>143</sup> 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.

149. At common law, a partnership (except an incorporated limited partnership)<sup>144</sup> is not a legal entity separate and distinct from its members.<sup>145</sup> The views in paragraphs 146 to 148 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.

150. 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**

151. 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.<sup>146</sup> The alienation measures will not apply where the income is derived in the course of conducting a personal services business.<sup>147</sup>

152. 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'<sup>148</sup> 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.<sup>149</sup> 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**

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

### **The interaction of the *A New Tax System (Australian Business Number) Act 1999* and the SGAA**

154. Section 8 of the *A New Tax System (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.<sup>150</sup>

155. 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.<sup>151</sup> 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.

- (c) In new paragraph 87, after the first sentence, insert new footnote 96:

<sup>96</sup> Unless one of the limited exceptions in subsections 12(9A) and (11) of the SGAA applies.

- (d) In new paragraph 89, after the last dot point, insert new footnote 97:

<sup>97</sup> Subsection 12(10).

- (e) In new paragraph 91, after 'of a body corporate', insert new footnote 98:

<sup>98</sup> 'Body corporate' is a general term to describe an artificial entity having a separate legal existence.

- (f) In new paragraph 94, after the last dot point, insert new footnote 99:

<sup>99</sup> *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.

- (g) In new paragraph 96, after 'contract), requires', insert new footnote 100:

<sup>100</sup> *ZG Operations Remittal* at [32].

- (h) In new paragraph 97, after the first sentence, insert new footnote 101:

<sup>101</sup> 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 (paying entity) on one side of the contract and on the other side there was the dentist and his trust.

- (i) At the end of new paragraph 97, insert new footnote 102:

<sup>102</sup> *ZG Operations Remittal* at [32].

- (j) At the end of new paragraph 98, insert new footnote 103:  
<sup>103</sup> *JMC* at [106].
- (k) At the end of new paragraph 99, insert new footnote 104:  
<sup>104</sup> *ZG Operations Remittal* at [33], affirming the view of Wigney J in *JMC Pty Ltd v Commissioner of Taxation* [2022] FCA 750 at [189].
- (l) In new paragraph 100, after the first sentence, insert new footnote 105:  
<sup>105</sup> *ZG Operations Remittal* at [33–43], [71].
- (m) At the end of new paragraph 100, insert new footnote 106:  
<sup>106</sup> *ZG Operations Remittal* at [44–48] and [73–74].
- (n) In new paragraph 101, after ‘engaging entity’, insert new footnote 107:  
<sup>107</sup> *ZG Operations Remittal* at [49], affirming the view of Perram and Anderson JJ in *Moffet* at [84–85].
- (o) In new paragraph 101, after the first sentence, insert new footnote 108:  
<sup>108</sup> *ZG Operations Remittal* at [50], affirming the view of Perram and Anderson JJ in *Moffet* at [86].
- (p) In new paragraph 101, after ‘chiefly’ or ‘mainly’, insert new footnote 109:  
<sup>109</sup> *On Call* at [303].
- (q) At the end of new paragraph 101, insert new footnote 110:  
<sup>110</sup> *Deputy Commissioner of Taxation v Bolwell* [1967] VicSC 172; 1 ATR 862 at [873].
- (r) In new paragraph 102, after ‘or assign the work)’, insert new footnote 111:  
<sup>111</sup> *ZG Operations Remittal* at [51], [58] per Perram and Anderson JJ; *JMC* at [106]; *Neale* at [425].
- (s) In new paragraph 102, after ‘paid for that result’, insert new footnote 112:  
<sup>112</sup> *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].
- (t) At the end of new paragraph 102, insert new footnote 113:  
<sup>113</sup> *Moffet* at [93–104]; *ZG Operations Remittal* at [54], [57], [59–60].
- (u) In new paragraph 103, after the first sentence, insert new footnote 114:  
<sup>114</sup> *ZG Operations Remittal* at [51], [58], per Perram and Anderson JJ; *JMC* at [106]; *Neale* at [425].
- (v) At the end of new paragraph 104, insert new footnote 115:  
<sup>115</sup> *ZG Operations Remittal* at [51]; *JMC* at [106]; *Neale* at [425].
- (w) At the end of new paragraph 105, insert new footnote 116:  
<sup>116</sup> *JMC* at [76–77], read in conjunction with [106].
- (x) In new paragraph 106, after the first sentence, insert new footnote 117:  
<sup>117</sup> *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].

- (y) In new paragraph 108, after ‘relevant contract or contracts’, insert new footnote 118:  
<sup>118</sup> *ZG Operations Remittal* at [49]; *Moffet* at [84–85], per Perram and Anderson JJ.
- (z) At the end of new paragraph 108, insert new footnote 119:  
<sup>119</sup> *ZG Operations Remittal* at [50]; *Moffet* at [86], per Perram and Anderson JJ.
- (aa) At the end of new paragraph 109, insert new footnote 120:  
<sup>120</sup> *ZG Operations Remittal* at [57] and [63].
- (ab) In new paragraph 110, after the first sentence, insert new footnote 121:  
<sup>121</sup> *ZG Operations Remittal* at [59]; *Moffet* at [101–104]; *JMC* at [106].
- (ac) At the end of new paragraph 110, insert new footnote 122:  
<sup>122</sup> *ZG Operations Remittal* at [59].
- (ad) At the end of new paragraph 111, insert new footnote 123:  
<sup>123</sup> *ZG Operations Remittal* at [62–63].
- (ae) At the end of new paragraph 112, insert new footnote 124:  
<sup>124</sup> *ZG Operations Remittal* at [41].
- (af) In new paragraph 113, after ‘client of the labour hire firm.’, insert new footnote 125:  
<sup>125</sup> 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.
- (ag) In new paragraph 115, after the first sentence, insert new footnote 126:  
<sup>126</sup> 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*.
- (ah) At the end of new paragraph 120, insert new footnote 127:  
<sup>127</sup> *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].
- (ai) In new paragraph 123, after ‘performance of that activity.’, insert new footnote 128:  
<sup>128</sup> *General Aviation Maintenance Pty Ltd and Commissioner of Taxation* [2012] AATA 120 (*General Aviation*) at [30].
- (aj) In new paragraph 124, after ‘form of entertainment, stated’, insert new footnote 129:  
<sup>129</sup> *General Aviation* at [29].
- (ak) In new paragraph 130, after ‘(emphasis added)’, insert new footnote 130:  
<sup>130</sup> [1987] FCA 479; 16 FCR 465 at [479–480].

- (al) In new paragraph 131, after the second sentence, insert new footnote 131:  
<sup>131</sup> 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).
- (am) At the end of new paragraph 137, insert new footnote 132:  
<sup>132</sup> Pan Macmillan Australia (2024) *The Macquarie Dictionary online*, [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au), accessed 19 March 2024.
- (an) In new paragraph 138, after the first sentence, insert new footnote 133:  
<sup>133</sup> *Commissioner of Taxation v Newton* [2010] FCA 1440 (*Newton*) at [4] and [6].
- (ao) In new paragraph 139, after the first sentence, insert new footnote 134:  
<sup>134</sup> *Newton* at [20].
- (ap) In new paragraph 139, after the second sentence, insert new footnote 135:  
<sup>135</sup> *Newton* at [18–20] and [27].
- (aq) At the end of new paragraph 139, insert new footnote 136:  
<sup>136</sup> *Newton* at [24].
- (ar) At the end of new paragraph 140, insert new footnote 137:  
<sup>137</sup> *Newton* at [24].
- (as) In new paragraph 141, after the second sentence, insert new footnote 138:  
<sup>138</sup> *Newton* at [20].
- (at) At the end of new paragraph 141, insert new footnote 139:  
<sup>139</sup> *Newton* at [25].
- (au) In new paragraph 143, after 'intended to cover', insert new footnote 140:  
<sup>140</sup> *On Call* at [306].
- (av) In new paragraph 145, after the first sentence, insert new footnote 141:  
<sup>141</sup> *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.
- (aw) At the end of new paragraph 147, insert new footnote 142:  
<sup>142</sup> *Ellis v Joseph Ellis & Co* [1905] 1 KB 324.
- (ax) In new paragraph 148, after the second sentence, insert new footnote 143:  
<sup>143</sup> *ZG Operations Remittal* at [42–48].
- (ay) In new paragraph 149, after '(incorporated limited partnership)', insert new footnote 144:  
<sup>144</sup> 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).
- (az) In new paragraph 149, after the first sentence, insert new footnote 145:  
<sup>145</sup> *Rose v Commissioner of Taxation* [1951] HCA 68.

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- (ba) In new paragraph 151, after the second sentence, insert new footnote 146:  
<sup>146</sup> Section 84-5 of the ITAA 1997.
- (bb) At the end of new paragraph 151, insert new footnote 147:  
<sup>147</sup> Division 87 of the ITAA 1997.
- (bc) In new paragraph 152, after 'results test', insert new footnote 148:  
<sup>148</sup> The results test is set out in section 87-18 of the ITAA 1997.
- (bd) In new paragraph 152, after the second sentence, insert new footnote 149:  
<sup>149</sup> 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.
- (be) At the end of new paragraph 154, insert new footnote 150:  
<sup>150</sup> This is subject to certain exceptions stated in subsection 9-20(2) of the *A New Tax System (Goods and Services Tax) Act 1999*.
- (bf) In new paragraph 155, after the second sentence, insert new footnote 151:  
<sup>151</sup> 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.

This Addendum applies from both before and after its date of issue.

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**Commissioner of Taxation**  
11 December 2024

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