



## Determination of Status of an Employee

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In developing this policy the University had regard to the provisions of section 40B(1)(b) of the Human Rights Act 2004 (ACT).

### PURPOSE:

The University regularly engages people to perform a range of services on a temporary basis, and as a result there has been some confusion as to whether their appointment should be as an employee or whether they should be engaged as independent contractors.

The University has compliance obligations prescribed under income tax and payroll tax legislation. The Australian Taxation Office and the ACT Government Revenue Office both place responsibility on the University to correctly process payments to 'employees' and 'consultants' and to remit the correct amount of Pay As You Go (PAYG) income tax and payroll tax.

Income tax and payroll tax legislations both provide broad definitions of 'salary and wages' and who is deemed to be an 'employee'. It is acknowledged that categorising the nature of contractual relationships can be complex. In general, remuneration for service can be subject to PAYG provisions and the deduction of income tax at source, for Australian resident taxpayers. In many cases, external consultants are deemed to be employees. This is especially true where external consultants operate under their own name and are not in a position to indemnify the University in circumstances of professional liability, workers compensation and public liability. This policy, including procedures, aims to assist managers and those delegated with engaging such services.

The policy is designed to assist in determining whether payments made to external 'consultants' should be paid as employees through the University's payroll system, or whether they can be paid through accounts payable under normal purchasing processes, as independent contractors. Proper determination will ensure correct legal compliance.

### SCOPE:

It is important that the true nature of the relationship is established early at the time of negotiation between parties. Distinguishing employees from independent consultants/contractors is important, as there are significantly different obligations for both parties.

For the purposes of this policy, an external "consultant" is defined as either an organisation or an individual engaged on a temporary basis to provide advice or services of a professional, technical or general

management nature. The definition is not intended to apply to:

- The hiring of casual, contract or temporary staff for the supply of labour or for work under direction or supervision (all paid via the payroll system); or
- Internal" consultancies, whereby University employees provide consultancy services to other entities.

the principles of this policy will assist in determining the true nature of the relationship.

#### *Employment relationship*

Generally, payments to an individual for personal services will be in the context of an employment relationship and will be paid to the individual through the University payroll and taxation deducted accordingly. Full details of the individual, including: name, address and tax file number will be required.

Payment processing should be made using "Request for Payment" form.

Payments to individuals for these activities will attract the normal University on-costs for worker's compensation and payroll tax.

In all circumstances, additional 'consulting' work performed by current University employees for teaching and teaching related activities will be deemed a payment for employment and will be paid through the University payroll. This is consistent with VCAC Resolution No. 01/01/06.

#### *Consultant/contractor relationship*

Generally, an independent consultant/contractor will be a company, registered business or incorporated association that offers its services to the public in general. An individual may be deemed an independent consultant/contractor only when all requirements are addressed and only if demonstrated that they offer their services to the public in general.

In all circumstances the following criteria for an independent consultant/contractor will be met:

#### *For engagement*

- A contract document must be completed and copy retained by the University. (Template available in this policy at [Attachment A](#)). Copy to be made available to Financial Services on demand.
- Details of ABN and correct registered business name must be provided.
- Copies or details of certificate of currency and indemnity levels for professional indemnity and public liability insurances to be provided
- Worker's compensation insurance details to be provided.

#### *For payment*

- Normal purchase procedures to be followed and University Purchase Order raised.
- A (GST) tax compliant invoice to be provided and approved by appropriate delegated officer.

In the absence of any of the above criteria, and bona-fide work has been completed, payment will be deemed for employment and will be paid through the University payroll.

## PRINCIPLE:

### **Determination of Status Consultant/Contractor/Employee**

August 2002

#### **Introduction**

The University of Canberra is often required to engage persons specifically for the purpose of performing specialist services. Such services may relate to, but not be limited to; professional advisors, guest lecturers, examination invigilators, guest speakers and conference coordinators. The nature of the service being delivered often presents a difficulty in categorizing the relationship between the University and the person/s. As such, there has been some confusion over whether to appoint such persons as employees of

the University or to engage them as independent contractors/consultants.

The issue is contentious because of the different consequences attaching to each relationship. An employee relationship gives rise to various obligations and consequences including PAYG, workers compensation insurance, industrial law, award rates and conditions, superannuation and payroll tax. Other consequences may include vicarious liability (employer is liable for acts of employees). A contractor/consultant relationship gives rise to other obligations and consequences including GST and contract law.

The issue of whether the engagement is one of an employee or independent contractor must be clearly specified **before** any engagement is undertaken, for the purpose of clarifying the relationship and avoiding dispute. The University may require a level of control and supervision that deems the relationship to be that of an employer/employee. Conversely, the person/s may consider themselves to be an independent contractor providing a service. The University and the person/s must have determined the relationship up front, with the nature of the relationship examined in truth and reality.

### **Responsibility of the University**

1. The employment relationship gives rise to rights and obligations both at common law and from legislation. As a minimum the University needs to be fully aware of employee matters in respect to:
  - Industrial Law, i.e. awards, termination provisions, leave entitlements etc.
  - Injury to third parties
  - Workplace injuries
  - Taxation requirements i.e. income tax (PAYG, withholding tax), payroll tax
  - Superannuation
  - Vicarious liability
  - Corporate governance, delegations of authority, conflicts of interest.
2. It is important for all Academic and Administrative Divisions of the University of Canberra to have an understanding of the relationship under which engaged person/s may be classified so that they can be prepared for the consequences. This understanding must be ascertained at the commencement of the relationship so that both parties are fully aware of their legal obligations and standing.
3. It should be noted that the taxation aspect of this area is important in every engagement. However, there will be times when other areas as detailed in (2.1) could also present significant concerns for the University.
4. The Human Resources Section of the Division of Resources has the authority to issue formal contracts of employment. Levels of authority for the approval of employment contracts are referred to in *Delegations – Human Resource Matters*.

### **University Policy**

1. The University's position is clear in its treatment of staff engaged for the purposes of teaching and teaching related activities. Resolution No. 01/01/06 of the Vice Chancellor's Advisory Committee has specified that any staff member performing lecturing or other academic duties in either award or non-award courses will be paid by the University as salary. It is stipulated such payment will be paid through the payroll. Payment in this situation must only be made to the individual and not to a separate business entity or corporation. This also applies in circumstances where the staff member is engaged for additional academic activity over and above or outside their appointed position.
2. In situations where University staff are engaged in such additional activities, and payment is to be made in accordance with VCAC Resolution No. 01/01/06, the Request For Payment form (Attachment C) must be completed and forwarded to the Salaries Office.
3. The University's position in regard to other persons may not be so well defined and depends very

much on the interpretation of the relationship. In such situations, reference must be made to the nature of the engagement and how it sits in relation to both common law and legislation. It is paramount that advice is sought from the offices of Financial Services and Human Resources before any engagement so that the correct classification is made and both parties are aware of the terms of the engagement. This is particularly important in the area of taxation where the law is complex and is open to interpretation.

4. Where, under this policy, an engagement is classified as an independent contractor/consultant and not an employee, then a contract form (Attachment A) must be completed, in addition to an approved Purchase Order, and forwarded to the Financial Services Office. Normal purchasing procedures will apply. Existing contracts currently in place in the Academic Divisions of the University will continue to be recognized for the remainder of their term.

5. In all circumstances, where a contract form (Attachment A) is completed, in accordance with Paragraph 3.4, evidence of relevant insurance coverage for the period specified in the contract must be supplied. Relevant insurance coverage must be provided for worker's compensation; professional indemnity; and public liability.

6. In all circumstances, where no evidence of insurance can be provided (Paragraph 3.5), the contract for consultancy (Attachment A) will not be completed and the consultancy engagement will be nullified.

### **Determination of the Relationship**

1. The general rules, which have been developed for determining when a worker is an employee or independent contractor/consultant, are fairly easy to state. However, the application of these rules to a factual situation can sometimes prove difficult. It is only with a detailed examination of the facts relating to each engagement that the relationship can be adequately determined. *Taxation Ruling TR 2000/14* (Clauses 27 – 46) provides references to the key indicators of whether a contract is one **of service** or **for services**.

2. The relationship between an employer and an employee is a contractual one. It is referred to as a **contract of service**. This is contrasted with the independent contractor/consultant/principal relationship, which is a **contract for services**. The difference is essentially that an independent contractor/consultant contracts to achieve a result, whereas an employee contracts to provide his or her labour to enable the employer to achieve a result.

3. An important factor in distinguishing between an employee and contractor/consultant relationship is that of **control**. From the University's perspective, which is a situation where many employees possess specialised skills and talents, it is often impractical for the University to do more than notionally supervise the manner in which the job is performed. A high degree of direction is not uncommon in contracts for services, particularly in relation to how the contracted services are performed.

4. In examining the **integration** of the services being delivered it can be determined whether the person is carrying on their own business or working for a superior. If the worker's duties form an integral part of the operations of the enterprise for which they work, they are more likely to be an employee, than if their job is just ancillary to the operations. The integration test provides an ancillary check to reinforce any conclusion based on the lawful authority to command concept.

5. Generally a contract that identifies the specific services to be performed in return for an agreed payment is a contract for a **result**. Satisfactory completion of the specified service is the result for which payment is made. Such contracts usually provide a strong indication that the contract is one for services. However, in applying the results test the other terms of the contract must still be considered.

6. An important indication that a service provider is an independent contractor is where the contract provides for an unlimited **power to delegate**. In this situation the emphasis is on performance of the agreed result or service. Accordingly, the work may be delegated by the contractor in order to achieve completion. However, the notion of the contractors specified personnel is a commonly used concept in

contracting for a particular person's unique skills. Many contracts also include delegation clauses. Again, it is vital to consider such facts within the overall context and the apparent essence of the contract.

7. Generally, an employee of an organisation bears little exposure to **risk** of the costs or commercial losses. An employee is not likely to expend gross income or contribute assets in deriving the income. In examining the risk to determine the independence of the contract, the higher degree to which a person is exposed to a commercial loss, the more they are likely to be regarded an independent contractor.

8. The various tests may provide strong indications of an employee/employer relationship. Examination of the **conditions of engagement** may assist in establishing the nature of the relationship. Generally, the following factors can be used as indicators in determining each case:

- Who has the right to exercise overall control of the manner of performing the task?
- Has a company or individual been hired to perform the task. If the worker is unavailable (i.e. through illness), is a replacement provided. If so who provides this?
- What is the nature of the task and the unique degree of skill required?
- What level of freedom of action and degree of autonomy is given?
- Who has the authority to hire or fire, and is there a right to suspend or dismiss the person engaged?
- Has the individual the right to delegate the function - can the person himself or herself employ others to perform the work?
- What is the basis and manner of payment?
- (Although this is a circular question) What is the mode of income tax deductions?
- Who provides materials, consumables and equipment?
- Are there regular or defined hours of work or is there an explicit timetable?
- Is there a regular place of work provided at the employer's premises?
- What is the expressed intention of the parties in the way the contract is worded?
- Who bears the risks and exposure?
- Was a position of 'employee' advertised or was there a tender for the provision of a service?
- What was the original basis of the engagement?

9. While the various features have been identified, and acknowledged by the courts, as indicators of the nature of the relationship; individual features are only a guide. It is necessary in each case to examine all the terms of the arrangement to determine whether, on balance, the relationship is that of an employee or an independent contractor.

### Summary

The following factors will assist in qualifying a relationship.

Indicative Criteria		Employee	Consultant
1	Is the work performed on a continuing basis and at the direction of the University?	Y	N
2	Is the work performed at the University's premises?	Y	N
3	Are the required equipment and materials provided by the University?	Y	N

4	Are office space, telephone, power and other facilities provided by the University?	Y	N
5	Is control exercised over the manner in which the work is to be performed?	Y	N
6	Can unlimited delegation take place?	N	Y
7	Is the University responsible for scheduling the work?	Y	N
8	Is payment based on, or fixed by the time actually worked? (Hourly, daily or piece rates)	Y	N
9	Is the work an integral part of the operation of the University, or ancillary to it?	Y	N
10	Are invoices to be submitted by the person performing the work?	N	Y
11	Does the University have responsibility for losses occasioned by poor workmanship or negligence?	Y	N
12	Is cover required for workers' compensation?	Y	N
13	Has the person the opportunity to profit/lose from sound/unsound management in the performance of the work?	N	Y
14	Is the substance of the contract to achieve a specified result?	N	Y
15	Is the service provided by an individual who normally carries on a business or professional practice rendering similar services to the public?	N	Y

### The Obligation to Deduct Tax

1. The nature of the relationship, be it one of employee or contractor/consultant, gives rise to certain taxation obligations that came into effect on 1 July 2000. A series of tax measures, collectively forming The New Tax Scheme, have introduced the Goods and Services Tax (GST) and significant changes to the Pay As You Go (PAYG) withholding system.
2. The changes introduced by PAYG withholding legislation have replaced the previous systems of withholding tax on various income payments. PAYG has replaced PAYE; PPS; RPS; and withholding on investments. PAYG also imposes additional withholding requirements in relation to labour hire arrangements; a supply where no Australian Business Number (ABN) has been quoted; services where there is a voluntary agreement to withhold; payments of alienated personal services income; and some non-cash benefits.
3. The legislation provides for compliance responsibilities that are imposed on the entity making the payment. Payments identified under the legislation as withholding payments include, but not are limited to:
  - o A payment of salary or wages to employees. This extends to include: payments of remuneration to directors; return to work payments; payments to office holders; payments covered by voluntary agreements; pension, annuities or social security type payments; eligible termination payments; retirement or termination payments; compensation, sick or accident payments.

- A payment for a supply where the payee does not quote an ABN.

The University in making such payments is required to withhold an amount from the payment and remit that amount to the Australian Tax Office. Therefore, it is essential that the nature of the relationship, discussed in the context of this policy, is established and determined at the time of engagement.

“Employee” for the purposes of the PAYG system means employee at common law, and may also be an employee of another entity. The PAYG interpretation incorporates the elements described in *Taxation Ruling TR 2000/14*, and is discussed in Paragraph 4 above.

4. From 1 July 2000, the new legislative framework for taxation reform also included changes to taxation obligations in relation to personal services entities. A personal services entity is a company, partnership or trust whose income includes the personal services income of one or more individuals. Under the legislation, a personal services entity must pay tax under PAYG if it receives an alienated personal services payment. Alienated payments are payments for personal services which are assessed against an individual under income tax law (*Income Tax Assessment Act 1997*, Division 86). Personal services income is income that is gained mainly as a reward for the personal services or skills of an individual. This leads to significant obligations in relation to consultancy and contract services businesses.
5. Consultancy and contract services businesses, considered to be in receipt of personal services income, are required to pass self assessment criteria in relation to alienated personal services income. The criteria relate to:
  - Establishing that less than 80 per cent of the personal services income of the business is from one source;
  - Establishing that the provision of services by the businesses is delivered to unrelated clients obtained by tender or advertising to the public;
  - Establishing that the business engages additional employees that achieve at least 20 percent of the income producing work; and
  - Establishing that the business maintains separate bona fide business premises.
6. Failure of personal services business in meeting these criteria results in the business being subject to PAYG withholding for personal services payments. Principally, for the University as an authorised payer, this requires that PAYG withholding compliance requirements are to be followed. Any variation to this is by application by the personal services business to the ATO for a special determination.