

# COMMISSIONER'S GUIDELINE

## CG-PRT-002:

### Employer/employee relationship (employees and independent contractors)

#### Guideline History

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3	1 July 2009	1 July 2009	Current

#### Purpose

This Guideline provides information to assist business operators in determining whether payments to workers are liable for payroll tax because the worker is an employee of the business operator for the purposes of the *Payroll Tax Act* (the Act).

This Guideline provides an in-depth discussion on the aspects that relate to determining whether a worker is an employee or independent contractor. The main principles for determining this relationship are discussed from page 3 of this Guideline. In addition, attached to this Guideline is a non-exhaustive list of the most common factors that the Territory Revenue Office (TRO) will use to determine whether a worker is an employee or independent contractor.

Should a business operator be uncertain as to whether a worker they engage is an employee for the purposes of the Act, professional advice should be sought or TRO contacted for further information.

#### Wages

Section 6 of the Act imposes payroll tax on 'wages paid or payable by an employer or a group'. The term 'wages' is defined in Part 3 of the Act to mean:

wages, remuneration, salary, commission, bonuses or allowances paid or payable to an employee as such...

In simple terms, this means payments made by an employer to an employee are liable to payroll tax unless they are otherwise exempt under the Act.

Where a worker is not an employee, payments to that worker will only be liable to payroll tax if specifically provided in the Act.

The Act also deems an employment arrangement to exist between a worker and a business in the following circumstances:

1. where the worker is engaged, directly or indirectly, by the business under a relevant contract<sup>1</sup>;
2. where the worker that is engaged, directly or indirectly, by a business that is an employment agency to provide services to a client of an employment agent under an employment agency contract<sup>2</sup>; and
3. where the worker is engaged by the business through an interposed entity such as a company or a trust under an agreement, transaction or an arrangement that has the effect of reducing or avoiding the liability of the business to payroll tax<sup>3</sup>.

This Guideline only provides guidance on determining whether a worker is a common law employee of business. A business may have a liability if a worker is not a common law employee but is engaged by a business in manner described above.

## Employees

The relationship between an employer and an employee is a contractual one and is often referred to as a 'contract of service'. The Act does not define the term 'employee', so it is necessary to derive the meaning from common law principles.

The courts have established a set of principles for determining whether an employment relationship exists. The courts have evaluated detailed information about the relationship against these principles to reach a determination as to whether or not an employment relationship exists.

While these principles are well settled, in some instances their application to a particular set of facts can be difficult. Accordingly, in these cases it may be appropriate for the business operator to seek legal advice.

The status of all workers engaged as 'contractors' should be considered

The greatest source of confusion in determining whether a person is an employee is where a person is engaged or referred to as a 'contractor'.

A 'contractor' is not an employee where they are engaged under a 'contract for services', which is different to the employer/employee relationship ('contract of service'). In general terms, an employee contracts to provide their labour for and as part of the employer's business. By contrast, an independent contractor works in their own business and in the course of that business, contracts to achieve a result for the business operator.

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<sup>1</sup> 96 ATC 4,898

<sup>2</sup> 96 ATC 4,898

<sup>3</sup> 96 ATC 4,898

In some cases, determining whether a worker who is referred to as a 'contractor' is an employee is relatively simple. However, over time, a change in work practices and perceptions has, in some cases, tended to blur the traditional distinctions between genuinely independent contractors and employees.

Many different types of workers are engaged by business operators as 'contractors' including tradespeople such as welders, boilermakers, fitters, carpenters, concreters, steelfixers, trades assistants, draftsmen, architects, computer programmers, riggers, site supervisors, various types of installers and in some cases, executive or managerial staff.

Whenever a worker is engaged as a 'contractor', the business operator should be aware that if the worker is actually an employee, payments made to the worker will generally be liable for payroll tax.

### Common misconceptions about 'contractors'

Some of the more common reasons given by business operators in explaining why they consider their workers to be independent contractors, rather than employees, include:

- 1) the worker has an Australian Business Number (ABN);
- 2) there is a written contract with the worker that specifies that the worker is not an employee;
- 3) payments for the worker's services are made to another person, such as the worker's family company or partnership;
- 4) income tax on payments for the worker's services are withheld on the basis that the worker is not an employee;
- 5) the worker works for, or has worked for, other businesses;
- 6) the worker is not paid superannuation or leave benefits;
- 7) the worker provides their own tools and/or vehicle;
- 8) workers of the same type are generally regarded in the industry as contractors;
- 9) the worker was engaged for a limited period of time, rather than on a permanent basis; or
- 10) the worker has their own insurance cover (such as income protection, accident or public liability insurance).

Based on the common law principles, none of these reasons alone would provide sufficient grounds to conclude that the worker is not an employee.

## Determining whether a worker is an employee

The courts have established a number of principles that can assist in determining whether a worker is an employee.

The more significant factors that have traditionally been considered by the courts in determining whether a worker is an employee are:

- 1) control and direction;
- 2) contract and practical relationship;
- 3) contracts to achieve a 'given result';
- 4) independent business;
- 5) power to delegate; and
- 6) integration.

These principles are discussed in greater detail later in this Guideline.

### All aspects of the relationship must be considered

In *Stevens v Brodribb Sawmilling Co Pty Ltd*, the High Court made it clear that no single test can be relied on and it is all aspects of the relationship between the parties which must be considered in reaching a determination.<sup>4</sup>

Accordingly, each case must be considered on its own facts using the principles identified by the courts as a guide. The decision cannot be made on the basis of only a few features of the relationship. In each case it is necessary to consider the totality of the relationship between the business operator and the worker and this involves considering a wide range of factors.

Some of these factors may suggest that the worker is an employee, while other factors may suggest that the worker is an independent contractor. If the position is not clear-cut, it is recommended that professional advice be sought as there are complex legal issues to be considered. Alternatively, TRO can be contacted for further information.

This 'multi-factor' approach is illustrated in more recent judgments such as *Vabu Pty Ltd v Federal Commissioner of Taxation*.<sup>5</sup> In that case, which related to a courier company, some couriers used bicycles, some used motor cycles and the rest used a variety of motor vehicles. The bicycle couriers were paid a flag fall payment for each contract of carriage undertaken and the other couriers were paid a flag fall and a running rate per kilometre. They signed three agreements when engaged by the company, which related to work conditions and general rules for drivers. It was held that while Vabu exercised a measure of control over its couriers, other considerations led to the conclusion that on balance the couriers were not employees.

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4 (1986) 160 CLR 16

5 96 ATC 4,898

Indicia considered by the Court to be important in reaching this conclusion was that the couriers:

- 1) supplied their own vehicles and had to bear the expense of providing for and maintaining these vehicles including running repairs, petrol, insurance and registration;
- 2) were taxed as independent contractors and not as employees, using the Prescribed Payment System;
- 3) provided their own street directories, telephone books, trolley, ropes, blankets and tarpaulins;
- 4) received no wage or salary, but were paid for each successful delivery made; and
- 5) could use a business name or corporate name.

However, in *Hollis v Vabu Pty Ltd (T/A Crisis Couriers)*, a later case relating to the same courier company, the High Court held that the bicycle couriers were in fact employees and that not too much could be made of the fact that the bicycle couriers owned their own bicycles and bore the expenses of running them.<sup>6</sup>

A consideration of the nature of their engagement indicated that the bicycle couriers were employees. The following factors were relevant:

- 1) the bicycle couriers were not providing skilled labour or labour which required special qualifications. A bicycle courier was unable to make an independent career as a freelancer or to generate any goodwill as a bicycle courier;
- 2) the couriers had little control over the manner of performing their work;
- 3) the couriers were presented to the public and to those using the courier service as emanations of Vabu and wore uniforms bearing Vabu's logo;
- 4) the courier company superintended the couriers' finances;
- 5) the fact that the couriers were responsible for their own bicycles reflected that they were in a situation of employment that was more favourable to the employer than to the employee, rather than indicating the existence of a relationship of independent contractor and principal; and
- 6) this was not a case where there was only the right to exercise control in incidental or collateral matters. Rather, there was considerable scope for the actual exercise of control by the business operator.

## Employment relationship – the principles examined

Bearing in mind the importance of examining all of the factors of the relationship between a business operator and a worker, the following is an examination of significant factors that have traditionally been considered by the courts as key aspects to consider.

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<sup>6</sup> 2001 ATC 4,508

### *Control and direction*

An important factor in determining the nature of the relationship between a business operator and the worker is the degree of control which the business operator can exercise over the worker. The importance of control lies not only in its actual exercise, but also in the right of the business operator to exercise it.

The right of a business operator to control or to direct how, where, when and who is to perform the work in question is a strong indication that a worker is an employee. For example, if a worker is required to work with others or if their work is coordinated with the work undertaken by others, the business operator appears to exercise a significant degree of control and direction over the worker. Similarly, if the worker works on a project that is subject to quality control measures or under the control of a supervisor employed by the business operator (whether or not that supervisor is also labelled as a ‘contractor’), it is likely that the worker is subject to the control and direction of the employer.

The absence of control may indicate that the relationship is not one of employer/employee; however, this is not necessarily conclusive. In *Stevens v Brodribb Sawmilling Co Pty Ltd*, the High Court noted that control is not the sole determinant of the nature of the relationship. It is merely one of a number of principles to be considered in making that determination, and therefore, it is the totality of the relationship between the parties that must be considered.

For example, in the case of *Vabu Pty Ltd v Federal Commissioner of Taxation* discussed above, clearly other factors outweighed the fact that Vabu exercised control over the couriers. Nonetheless, the control test is still an important guide as to whether a person is contracting independently or working as an employee. This was demonstrated in *Hollis v Vabu Pty Ltd (T/A Crisis Couriers)*, also discussed above, where the High Court, in deciding that the bicycle couriers were employees, placed considerable weight on the fact that the bicycle couriers had little control over the manner of performing their work and there was considerable scope for the actual exercise of control by the courier company.

With some businesses, the business operator does not actually exercise much control or direction over a worker in practice. In this context the issue to be considered is whether the business operator has the right or authority to exercise control or direction over the worker – not whether such control is actually exercised.

In considering whether the business operator has the right or authority to exercise control over how the worker performs the work, it is important to recognise that in certain circumstances there may be very limited scope or need to exercise control. For instance, where a worker is a highly skilled tradesperson, there may be little need for the business operator to supervise or direct the manner in which the worker goes about providing their services, even though they could do so. Where the business operator does not have the qualifications or experience of the worker, the business operator will have little scope to exercise control over how the worker routinely goes about their tasks.

Where the business operator does not exercise direct control, there may be scope to exercise control in relation to incidental or collateral matters and this will be sufficient to satisfy the element of control. Such control of incidental or collateral matters may be that the business operator exercises their right to control not by instructing the worker on how to perform work, but by directing the worker as to which jobs to perform at a given time or by checking on the standard of the worker's services.

## Examples

A project management firm engages a worker as a site supervisor. The site supervisor is responsible for overseeing all things that happen on-site. In this example, the site supervisor could be either a professional or a highly skilled or experienced tradesperson. The general manager of the firm may not have the technical skills and experience to be able to tell the site supervisor how to actually go about performing the work. However, the project management firm may be able to control or direct the site supervisor in relation to the general nature of the work to be undertaken, as well as incidental or collateral matters such as the hours of his attendance at the work site, the records he must maintain and the format of his reports on progress.

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The owner of a fishing boat may engage a worker to captain the boat. The owner remains on shore, the captain has the day to day control over the boat and the crew while at sea and there is very little scope for the boat owner to control how the captain carries out his work while the boat is at sea. However, there is scope for the boat owner to give the captain directions on general matters such as what areas are to be fished and what fish are being sought, as well as incidental or collateral matters such as safety procedures on the boat and how the catch is to be processed and stored while at sea.

In both of these examples, the fact that the business operator has the right to exercise control in relation to incidental and collateral matters satisfies the principle of control in the context of determining whether a worker is an employee.

When considering whether a business operator has the right or authority to exercise control or direction over a worker, it is important to consider this issue in the context of the entire period that the worker has worked for the business operator and not simply to concentrate on the recent history. For example, the worker may perform the tasks in accordance with the instructions they were given when they first commenced working for the business operator. Similarly, the worker may carry out the tasks in accordance with manuals or other written instructions provided by the business operator.

### *Contract and practical relationship*

The terms of the contract provide evidence of the nature of the relationship between the parties. However, it is necessary to consider all of the facts and circumstances of the parties' relationship, including their conduct towards each other at the time they entered into the contract and after.

Little weight can be given to a particular term of the contract if it contradicts the effect of the agreement as a whole, or the practical relationship between the parties. Moreover, there is considerable legal authority that the parties' labelling of their relationship as 'independent contractor and principal' or 'to produce a result' whether by a clause in a written contract or otherwise, will have no effect where that relationship, in practice, is really one of employment.

#### *Contracts to achieve a 'given result'*

A contract to produce a given result is one in which the focus is on what ultimate result will be produced by the worker, rather than one that focuses on the manner in which the worker is to provide services. That is, the business operator is contracting with the worker for the worker to achieve a certain result in accordance with agreed contract specifications and conditions for the work, without concern for the manner in which the result is to be achieved. Accordingly, the worker is able to use his or her own means, such as by delegating the work or subcontracting another person and using their own significant capital equipment, to achieve the result. This is distinct from merely hiring the worker to provide labour to be used in the business operator's business.

An indicator of whether a contract is for a given result is where the contract is for a negotiated fixed price known at the commencement of the contract and where payment is made subject to meeting various milestones specified in the contract or at its completion. It is acknowledged that there will be situations where the final price may not be known until the work is complete. However, payments made to a worker on a regular basis rather than on the completion of part or all of the contracted result, is an indicator that the contract is not for a given result. An indicator of this type of arrangement could be where a worker provides a 'labour only' service pursuant to a contract and is paid at an hourly or daily rate, or set rate of pay (including piecework rates and commission).

If the purpose of a contract is to achieve a given result, this is an indication that the worker is not an employee of the business operator. If the contract is not to achieve a given result, but is really for the labour of the worker, the arrangement will tend to have the characteristics of employer and employee. However, this factor is only an indicator and all of the characteristics of the working arrangement would need to be considered before a conclusion could be made on the arrangement.

## Examples

A construction company enters into a contract with a property developer for the construction of a building for an agreed fee of \$3 million. The company has entered into a contract to produce a given result for a fixed fee.

For the purpose of carrying out the work required by the contract, the company engages various construction workers to perform tasks required for the construction of the building and the company pays the workers an hourly rate. The construction workers are not entering into a contract to produce a given result but rather are entering into a contract to provide services for an hourly fee.

The construction company engages a landscaper to carry out the landscaping required for the building for a fixed fee of \$10 000. The landscaper has entered into a contract to produce a given result for a fixed fee.

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The owner of a mango farm engages a number of workers to prune trees. The workers are paid on the basis of the number of trees pruned and are free to work whatever days and or hours they wish. The workers are not entering into a contract to produce a given result but rather are entering into a contract to provide services at piecework rates.

A worker's labour is not restricted simply to physical exertion. A worker may be engaged to provide services of a non-physical nature such as drafting services because of their skills, knowledge, experience or abilities and does not bring anything of a tangible nature to the job in the form of materials and equipment. In this instance, the contract under which the worker is engaged would be considered to be a contract wholly or principally for labour.

## Example

An electrical contracting company engages an electrician to install security alarm systems for its clients. The company provides all of the materials required for each job. The electrician collects the materials, takes them to the client's premises and installs them. Although required to use his own tools of trade, the electrician is essentially providing labour only.

In project-based industries, a business operator may only need a small core of permanent employees. When undertaking a large project, the business operator may engage additional workers as needed for the duration of the project on the basis that the services of those workers will be terminated at the completion of the project. In such circumstances, the mere fact that a worker is only engaged for the period of the project does not mean that the worker is employed to achieve a given result.

### *Independent business*

If a worker is engaged by a business operator in the ordinary course of operating the worker's own independent business, then this is indicative that the worker is not engaged as an employee, particularly if the worker works for a number of clients. The issue to be considered is whether the worker is conducting a business on his or her own account as distinct from participating in the business of the business operator. If the worker was engaged by a business operator as a result of advertising their services to the public as a normal part of carrying on a business, or as a result of winning a tender, then this will tend to indicate that the worker is not an employee.

It is more likely that a worker is operating their own business, rather than operating as an employee where the worker is exposed to making a profit or loss as a result of the work undertaken. Where the business operator who engages the worker bears all the risk, the worker is less likely to be operating their own business. Similarly, where a worker has an opportunity to create their own goodwill, then they are more likely to be operating their own business.

In addition, the greater the expenditure incurred in earning income and the greater the materials and equipment supplied by the worker, the more likely the worker is operating a business rather than operating as an employee. In contrast, if a worker simply provides their labour to a business operator, it is unlikely that the worker will be operating their own independent business, especially where the worker does not provide skilled labour or is not specially qualified.

In *Hollis v Vabu Pty Ltd*, the High Court, in concluding that the bicycle couriers were employees and not independent contractors, stated that:

Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations. ...

A bicycle courier is unable to make an independent career as a free-lancer or to generate any 'goodwill' as a bicycle courier. The notion that the couriers somehow were running their own enterprise is intuitively unsound, and denied by the facts disclosed.

Some of the features usually regarded as indicating that workers are operating their own independent business are:

- 1) they have their own business premises;
- 2) the business is able to generate goodwill of its own;
- 3) they incur significant business expenses on a job;
- 4) they have staff who are engaged in the principal work of the business;
- 5) they work for a number of clients;
- 6) they own and maintain significant capital equipment and assets (not just hand tools);
- 7) they bear the commercial risk of making a profit or loss on a job;

- 8) they advertise to the general public; and
- 9) they bear the liability and responsibility for any poor workmanship or injury.

## Example

A transport company operates a fleet of trucks in the transport industry. Due to staff shortages they require additional workers to meet their delivery demands. If they engage a driver who is paid an hourly rate to drive the transport company's truck on a full time basis it is unlikely that the driver would be operating his own independent business. Alternatively, if they engage a driver who supplies and maintains his own truck and who works for others as well as the transport company, it is more likely that this driver will be regarded as operating his own independent business.

In project based industries, a business operator may only need a small core of permanent employees. When undertaking a large project, the business operator may engage additional workers as needed on the basis that the services of those workers will be terminated at the completion of the project. In such circumstances, the mere fact that a worker is only engaged for a short period of time will not be conclusive as to whether the worker is operating an independent business or not – even though the worker may work for a number of business operators over the course of the year or even work for more than one business operator at the same time.

### *Power to delegate*

The power to delegate work or subcontract another person to complete the services for which a worker was engaged, is one factor that is indicative that the worker is an independent contractor rather than an employee. However, in a principal and independent contractor relationship, the power to delegate will generally be implicit, as the focus is generally on achieving a result rather than obtaining the services of any particular person.

Consequently, delegation clauses in contracts must be considered in the context of the arrangement between the parties to ensure that they accurately reflect what occurs in practice. Where there is a delegation clause in which a replacement worker must be approved by the business operator and this approval is not provided in practice, this may mean that the 'right' to delegate is illusory.

Where a business operator claims that the workers engaged have the power to delegate their work, TRO will usually attempt to ascertain whether there is evidence that the delegation power is actually exercisable in practical terms.

If the worker has actually engaged other persons to assist in the completion of the work and pays remuneration to these other persons, it will generally be accepted that the worker has the power to delegate. However, if the worker performs all of the work and in practice does not engage others to assist with the performance of the work, or where the business operator provides a replacement when the worker is unable to provide their services, it is unlikely that the worker has a power to delegate.

## Example

A worker is engaged on a contract by a steel fabrication firm and is paid an hourly rate. It is claimed that under the terms of the contract the worker has the power to delegate. On the occasions when the worker has been unable to attend work (for example, due to illness), the steel fabrication firm has allocated the worker's work to someone else, pays that other person rather than the worker and does not permit the worker to provide a replacement. This indicates that the worker has no real or practical power to delegate.

### *Integration*

Another factor that indicates that the worker is an employee is if the worker is an integral part of the principal's business. That is, if the services provided by the worker are of the type that are ordinarily required in the course of the business operator's business, particularly if the worker is engaged for a lengthy period of time. Similarly, if the worker is required to work in conjunction with employees or other workers as part of a team engaged by the business operator this would also be indicative that the worker is an employee.

Another factor of the integration test is whether the worker is held out as an 'emanation' of the business or appears to the public to be no different from other employees of a business, for example by being required to wear a uniform or drive a vehicle that identifies the worker to the public as part of the business.

It is also relevant to consider whether there are workers identified by the business operator as employees who are performing the same type of work as the worker. In such a case, the business operator should be able to identify what factors distinguish the worker from the employees providing the same services. Similarly, where the business operator formerly identified a worker as an employee and the worker is still doing the same work but is now identified as a contractor, the business operator should be able to identify what aspects of the relationship have altered such that the worker is no longer an employee.

## Example

A firm sells air-conditioning units. The firm has a number of salaried employees who are sales people and also has several commissions-based sales people. Although the manner in which they are remunerated is different, the commission-based sales people perform work that is identical to the work of the salaried employees. As the business of the firm is the selling of air-conditioners, the commission-based sales staff are integral to the business, especially where there are insufficient salaried employees to perform all of the work.

**Commissioner's Guideline CG-GEN-001, which sets out information on the revenue publication system, is incorporated into and is to be read as one with this Guideline. All Guidelines are available from TRO's website.**

**Date of effect**

This version of the Guideline takes effect from 1 July 2009.



Craig Vukman

**COMMISSIONER OF TERRITORY REVENUE**

Date of issue: 1 July 2009

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## CG-PRT-002 – Attachment

# Guidelines on the process for determining whether workers are employees or independent contractors

In determining whether workers are employees, TRO will seek documentation and responses to a number of questions to draw out sufficient information on which to base a decision.

Based on the principles which require all aspects of the relationship to be taken into account, each worker's arrangement will be considered on its own particular facts. However, in order to provide business operators and their advisers with some guidance in respect of the Commissioner of Territory Revenue's position on employer/employee relationships in general, the following non-exhaustive lists of factors are provided. Of note is that no one factor may categorically determine whether a worker is an employee or independent contractor.

### Employees

'Employee like' factors include where:

- the worker is subject to the direction of the business operator, or the direction of an employee of the business operator, as to where, when and how the work is to be performed;
- the worker is paid on a time basis or at 'piece rates';
- the worker wholly or predominantly provides labour;
- the worker receives superannuation, sick leave, recreation leave or long service leave or is paid extra in lieu of such entitlements;
- the worker provides services (either individually or in teams with other workers) that are integral to the day-to-day operations of the business operator's business;
- the worker performs services similar to work carried out by employees of the business operator;
- the worker works set hours (either by agreement with the business operator or under an award);
- the worker has been working for the business operator for a continuous extended period of time;
- the worker is recognised as part of the business operator's business;
- the business operator, not the worker, is legally responsible for the quality of the work performed by the worker;
- the worker is required to perform the work personally (they are not able to delegate or subcontract the work);
- the business operator supplies all or most of the materials and equipment necessary for the worker to perform their services; and

- the business operator can suspend or dismiss the worker, or the worker can cease to work for the business operator, regardless of whether the worker has completed any particular task or not.

## Independent Contractors

Independent contractor factors include:

- the worker is legally liable for the quality of the work performed;
- the worker bears the commercial risk of deriving a profit or suffering a loss for the work performed and incurs significant expenses in deriving income;
- the business operator pays the worker on the basis of a quote to achieve a set result (generally without regard for the time taken);
- the worker is free to decide the manner in which they will complete the agreed result;
- the worker is free to choose whether to accept or refuse work from the business operator;
- the worker employs others to assist them in doing the work, or is able to delegate or subcontract the work, to other persons of their choice;
- the worker provides services and advertises to other businesses and/or the public generally; and
- the worker supplies all or most of the materials, equipment and tools needed to complete the contracted work (not just tools of the trade or a motor vehicle used to drive to and from a work site).

Should there be any doubt as to whether an arrangement would attract payroll tax, independent legal advice should be obtained or the business operator should write to TRO specifying the details of the arrangement and attaching the relevant documentation.