

6-Webinar series

 Hot topics by members for members

1.5 CPD hours per webinar

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Part 2: The Employee v Contractor Distinction

Presenters:

Andrew Henshaw, CTA, Velocity Legal

Jessica Hill, Velocity Legal

Katherine Stewart, Velocity Legal

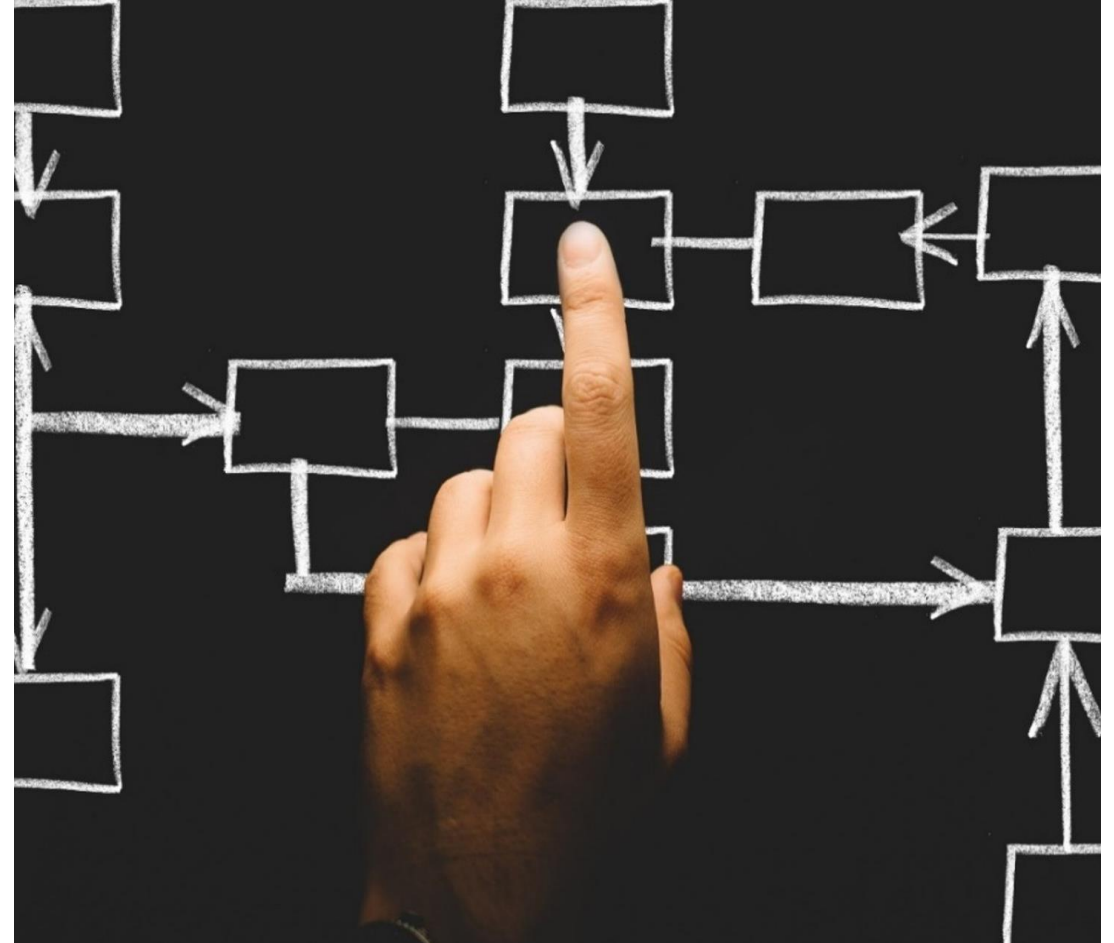
Welcome and opening address

Presenter:

Frank Hinoporos, CTA, Vice Chair, VIC State Council

Agenda

- Fair Work Act: a return to the multi-factor test.
- Superannuation and PAYG withholding obligations.
- Payroll Tax on payments to contractors.



A Multitude of Tests

Fair Work

- Multi-factor test.
- Common law meaning if 'opt-out' occurs.

From 26 August 2024

Superannuation

- Common law meaning of employee.
- Extended meaning of employee.

PAYG Withholding

- Common law meaning of employee.

Payroll Tax

- Relevant contract and exemptions.

Fair Work Act: A Return to the Multi-factor Test

Return to the Multi-factor Test

- The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (Cth)* (**Closing Loopholes Act No. 2**) overturns the contract primacy principle from *ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2* (**Jamsek**) and *CFMMEU v Personnel Contracting [2022] HCA 1* (**Personnel Contracting**).
- The multifactor test must consider not only the written contract but also the totality of the relationship to determine the '*real substance, practical reality and true nature of the relationship*'.
- Effective: 26 August 2024 or a date proclaimed.



New Definition of Employee

*...[I]n considering the **totality of the relationship** between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors relating to the totality of the relationship including, but not limited to, **how the contract is performed in practice.***

s15AA of the *Fair Work Act 2009* (Cth)

Kimber

***Kimber v Western Auger Drilling Pty Ltd* [2015] FWCFB 3704**

- Ms Kimber performed health and safety work for a drilling company. Arrangement evolved over time.
- Brought an unfair dismissal claim – jurisdictional question whether she was an employee.
- Held to be an employee from 11 July 2013:
 - worked under supervision and control of the company;
 - worked solely for the company, unable to subcontract;
 - provided with company equipment and uniform; and
 - no evidence of running her own business or creating goodwill.
- Continued invoicing not determinative. Full Bench found this was due to company delay in changing arrangements.
- Totality of relationship pointed strongly to employment, despite some contractor-like elements.
- Appeal upheld. Minimum employment period met for unfair dismissal claim.

EFEX

***EFEX Group Pty Ltd v Bennett* [2024] FCAFC 35**

- Mr Bennett performed sales for a technology services company. Contract was wholly oral.
- Brought an unfair dismissal claim – jurisdictional question whether he was an employee.
- Held to be a contractor:
 - not given directions about how to carry out his tasks. Had the freedom to decide when and where he would meet clients;
 - provided his own vehicle / mobile - essential tools in sales. Expenses were paid out of trust funds;
 - set up a trust for the **very purpose** of work under the contract. Used structure to hold income, pay business costs and take advantage of tax benefits.
- Whether a worker takes advantage of tax benefits of a structure can be highly relevant to classification. See also the use of partnerships in *Jamsek*.

Some Indicia

Employee	Independent Contractor
Subject to contractual right of control over how, when and where work is done	Retains right of control
No financial risk	Carries the risk for making a profit or loss
Paid for time worked	Can be paid to achieve a result
Not responsible for providing tools and equipment	Responsible for providing tools and equipment
Personal service required	Entitled to delegate or subcontract work
Receive paid leave	No paid leave
Part of the employer's business	Operating a business independently

Qualified 'Opt Out'

- Providing certain notice requirements are complied with, a worker whose earnings are above the contractor high income threshold can effectively opt out of the multi-factor test.
- If this happens, the worker's status as a contractor or employee will be determined by the contract primacy principle in *Jamsek* and *Personnel Contracting*.
- A worker can, in writing, revoke their opt out election at any time.



Sham Contracting

- Sham contracting under the FW Act remains a civil offence with an amended defence.
- A business will be able to establish the defence if they can show they 'reasonably believed' the contract was a contract for services.
- Significant maximum penalties:
 - \$93,900 for businesses with fewer than 15 employees; and
 - \$469,500 for other businesses.



Doll House Training

Fair Work Ombudsman v Doll House Training Pty Ltd (No 2) [2024] FCA 811

- Doll House operated a business conducting research into robotics, coding and AI applications to the health and wellness industry.
- Terminated three workers' employment to re-engage them as independent contractors to perform substantially the same work. Workers each had disabilities.
- Felt that they had “no alternative” but to sign the contract.
- \$197,000 in Court-ordered penalties for sham contracting and other breaches.
- Note: Maximum penalties have now increased.

Implications

- A well-drafted contractor agreement will not fully mitigate risk, but is the first line of defence.
- Consider developing internal criteria for engaging contractors.
- Assess the risks and benefits of issuing a written 'invite' for the contractor to issue an opt-out notice.



Superannuation and PAYG Withholding Obligations

‘Employee’ for Superannuation

- Under s12 of the *Superannuation Guarantee (Administration) Act 1992 (Cth) (SGA Act)*, employee has:
 - its ‘ordinary’ meaning as set out in *Jamsek* and *Personnel Contracting*; and
 - an extended meaning.
- Draft ruling *TR 2023/4DC1: Income tax and superannuation guarantee: who is an employee?*
- Appendix 2 replaces *SGR 2005/1*.
- *TR 2023/4DC1* responds to recent decisions (*Personnel Contracting*, *Jamsek*, *Jamsek no.3* etc). Largely consistent with prior ruling with some new elements.



Contract not for Labour

A contract is not wholly or principally for labour if:

- the contract contains a right to delegate, subcontract or assign the work;
- the contract is for the provision or production of a result and the worker is paid for that result; or
- the contract is principally for a benefit other than labour of the worker.



***TR 2023/4DC1* - Some Developments**

- **Contract primacy:** Focus on contractual rights rather than post-contract conduct (*Jamsek and Personnel Contracting*).
- **Right to delegate:** Must be 'legally capable of exercise' and not 'limited in scope' or 'a sham'.
- **Natural person:** Labour must be provided by a natural person who is also a party to the contract (*Jamsek no.3*).
- **Benefit other than labour:** Contract may be 'partly for labour and partly for something else' (*Jamsek no.3*).

Moffet

Dental Corporation Pty Ltd v Moffet [2020] FCAFC 118

- Dr Moffet was one of three parties to a Services Agreement.
- Court affirmed three elements of s 12(3) of the SGA Act:
 - *that there should be a ‘contract’;*
 - *which is wholly or principally ‘for’ the labour of a person; and*
 - *that the person must ‘work’ under that contract.*
- Dental Corporation received the benefit of Dr Moffet’s dentistry services and promise that the practice would achieve a minimum cash flow.
- Services Agreement was therefore wholly or principally ‘for’ Dr Moffet’s labour.
- Held to be an employee under s 12(3) of the SGA Act - not a common law employee.

JMC

JMC Pty Ltd v Commissioner of Taxation [2023] FCAFC 76

- Higher education provider JMC engaged Mr Harrison to deliver lectures and mark assessments.
- Contract gave JMC the right to monitor and supervise teaching. Mr Harrison paid an hourly rate.
- Delegation clause stated:

The Services provider may sub-contract or assign to another person or corporation the provision to the Academy of the teaching services required of her/him by this Agreement but must do so with the written consent of The Academy's representative.



JMC

- Held requirements for lesson plans were not prescriptive and a high degree of autonomy regarding teaching style was retained.
- Requirements for written approval did not amount to a sufficient limitation of the right to delegate:

A requirement for written consent does not, without more, rob a right to subcontract of its legal effect, especially when it is most likely to be implied that consent may only be refused in good faith and will not be unreasonably withheld.

- Mr Harrison was not an employee at common law or under the extended meaning.



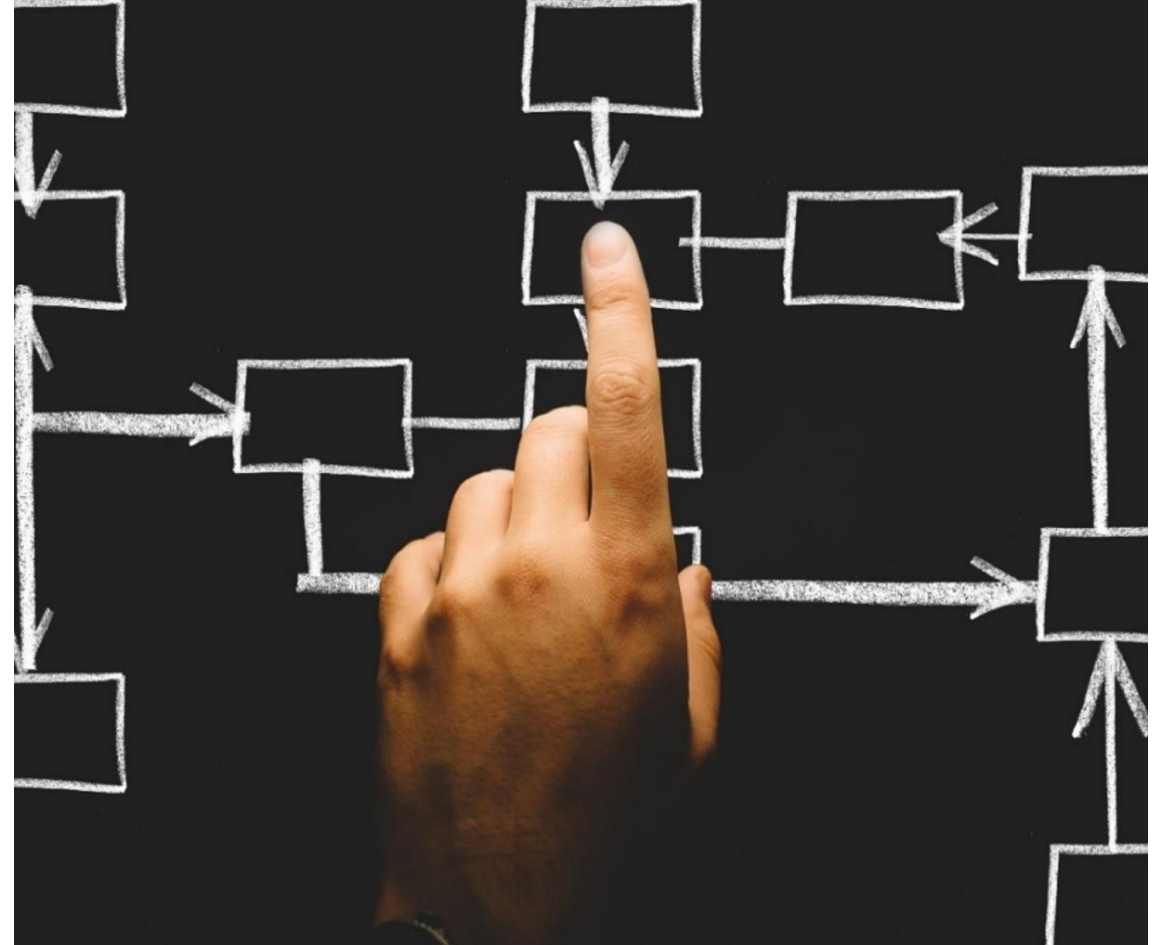
Jamsek No 3

Jamsek v ZG Operations Australia Pty Ltd (No 3) [2023] FCAFC 48

- Two truck drivers held by the High Court to be contractors lost a cross-appeal seeking superannuation.
- Court held s12(3) of the SGA Act only has application where the employee is a natural person as party to the contract, rather than in any other capacity (such as trustee of a personal service trust).
- Drivers were not parties in their individual capacities but rather in their capacity as partners.
- Contracts were also not wholly and principally ‘for’ labour as, amongst various reasons:
 - contracts were for the provision of labour and equipment (being the trucks). Labour component was not the principal benefit; and
 - the partnerships could delegate work with agreement.

PAYG Withholding

- The term 'employee' is not defined in the *Taxation Administration Act 1953* (Cth).
- Has its ordinary meaning (common law meaning as set out by the High Court in *Jamsek and Personnel Contracting*).



PCG 2023/2: ATO Compliance Approach

Very Low Risk Criterion

There is **evidence** that **both parties intended** for the worker to be classified in the same way, either as an employee or contractor.

There is a **comprehensive written agreement** that governs the relationship.

There is evidence that both parties **understood** what the worker's classification meant, and what the tax and superannuation consequences of that classification.

The performance of the arrangement has **not significantly deviated** from the contractual rights and obligations agreed to.

The party relying on the Practical Compliance Guideline is **meeting the correct tax and superannuation obligations** that arise for their intended classification, and reporting appropriately.

The party relying on the Practical Compliance Guideline **obtained specific advice** confirming the classification was correct.

An engaging business relying on the Practical Compliance Guideline also **obtained specific advice** confirming the application of the extended meaning of employee under the SGAA, and **communicated this outcome** to the worker.

Compliance Resources

Risk Zone	Proactive Case Selection by ATO	Unpaid Superannuation Query
Very Low	No further compliance resources applied.	
Low	No further compliance resources applied.	Compliance resources applied to test whether worker meets extended definition.
Medium	Compliance resources applied to test whether the worker is an employee under the ordinary or extended definition (or both) but will be given lower priority than high risk arrangements.	
High	<p>Compliance resources applied to test whether the worker is an employee under the ordinary meaning or the extended definition (or both).</p> <p>Highest priority resourcing. Engaging entities may be subject to higher penalties if they failed to correctly classify workers.</p>	

Payroll Tax on Payments to Contractors

Payroll Tax – Rates Snapshot

Jurisdiction	Payroll Tax Threshold	Tax Rate	Other
ACT	\$2,000,000	6.85%	
NSW	\$1,200,000	5.45%	
NT	\$1,500,000	5.5%	
QLD	\$1,300,000	4.75% - 4.95% <i>[1% discount if Regional]</i>	Payroll > \$10m – extra 0.25% Payroll > \$100m – extra 0.75%
SA	\$1,500,000	4.95%	<i>Phase-in between \$1.5M and \$1.7M</i>
TAS	\$1,250,000	4% - 6.1%	
VIC	\$900,000	4.85% <i>[Regional Rate – 1.2125%]</i>	Payroll > \$10m – extra 1% Payroll > \$100m – extra 2% <i>Threshold phase out where Payroll > \$3m</i> <i>No Threshold if Payroll > \$5m</i>
WA	\$1,000,000	5.5%	<i>No Threshold if Payroll > \$7.5m</i>

Grouping

Jurisdiction	Payroll Tax Threshold	Tax Rate	Maximum Value of Threshold (per annum)
ACT	\$2,000,000	6.85%	\$137,000
NSW	\$1,200,000	5.45%	\$65,400
NT	\$1,500,000	5.5%	\$82,500
QLD	\$1,300,000	4.75% - 4.95% <i>[1% discount if Regional]</i>	\$64,350
SA	\$1,500,000	4.95%	\$74,250
TAS	\$1,250,000	4% - 6.1%	\$76,250
VIC	\$900,000	4.85% <i>[Regional Rate – 1.2125%]</i>	\$43,650
WA	\$1,000,000	5.5%	\$55,000

Grouping

How can entities be grouped?

- **Related Corporations:** Section 50 of the Corporations Act 2001
- **Common Employees:** Where one business employs at least one employee employed by another entity
- **Common Control:** >50% interest in different entities
- **Tracing:** Tracing of interests in corporations
- **Subsuming:** larger groups formed from small groups

No minimum level of ownership or control required in order to form a group.

Rules are broad – cover ‘set of persons’ and associates.

Every member of the group is jointly and severally liable.

Smeaton Grange Holdings Pty Ltd v Chief Comr of State Revenue [2016] NSWSC 1594 – strategic broad group (including



Grouping

Degrouping?

- **Not a self-assessment.**
- Commissioner must be satisfied that:
 - Business is '**independently of**' a business carried on by any other member of the group; and
 - Business is '**not connected with**' the carrying on of a business carried on by any other member of the group.
- **Key relevant factors:**
 - the level of trade between the businesses (inter group transactions);
 - the sharing of resources between the businesses
 - common management of the businesses
 - common financial arrangements between the businesses
 - any other relevant factor



Is it Subject to Payroll Tax?

- Wages paid/payable from employer to an employee (*common law test – same principles as PAYG/Super*)
- Payments to **certain** contractors
- Employment agencies (contract under which an ‘employment agent’ procures the services of another person (worker) for a client of the employment agent).



Payroll Tax on Contractors

Relevant Contracts

Relevant Contract – contract under where:

- person engaged by a business to supply services for or in relation to a performance of work;
- person has supplied a business services of persons for or in relation to the performance of work; and
- person is engaged by a business to perform works on goods that are resupplied to the business.

(1) ...amounts paid or payable by an employer during a financial year for or in relation to the performance of work relating to a relevant contract ... are taken to be wages paid or payable during that financial year.



Recent Cases

- *Homefront Nursing Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWCATAD 145
- *Commissioner of State Revenue (Vic) v The Optical Superstore Pty Ltd* [2019] VSCA 197
- *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWCATAD 259
- *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 390.



Homefront Nursing

- HN engaged GPs to provide medical services at medical centres operated by HN.
- Bulk billing payments – were directed to HN’s account for convenience (collecting mechanism). Bulk billing amounts paid by HN to GPs were not 'in relation to' the 'relevant contract' for payroll tax purposes.
- Private fees (non bulk billing) – paid directly to HN for services performed by the GP under the 'relevant contract' between Homefront Nursing and the GP. Payments were 'in relation to' the 'relevant contract' for payroll tax purposes. Supreme Court: dismissed Commissioner’s appeal.
- Vic Court of Appeal – ordinary meaning of ‘payment’ embraced a payment of money to a person beneficially entitled to that money.

Optical Superstore

- Patients consulted by optometrist (OS owned consulting rooms)
- Patients paid optometrist fees (Medicare + patient fees) to OS.
- OS held money on 'express trust' for the optometrists.
- Optometrists – paid based on hourly rate * number of hours performed (**not** the actual fees collected), less 'occupancy fees'.
- Tribunal: agreements were 'relevant contracts', but payments from OS to optometrists were not 'paid or payable for or in relation to the performance of work relating to a relevant contract' (because held in express trust).
- Supreme Court: dismissed Commissioner's appeal.
- Vic Court of Appeal – ordinary meaning of 'payment' embraced a payment of money to a person beneficially entitled to that money.

Thomas and Naaz

- T&N provided doctors with rooms, admin/medical support, and collection of fees on behalf of doctors.
- Patients paid medical centres (not the doctor directly).
- Flow of funds – funds paid to T&N. T&N then pay 70% of consult fees to the doctor (the rest – service fees).
- Contracting agreement had a number of issues (employee like commitments)
- Clear relationship between services and payments to the doctors.
- GPs supplied services to the medical centre (in addition to services supplied to patients).
- Declined to follow *Homefront Nursing*.
- Payments were “for or in relation to the performance of work relating to” the agreements.

Loan Market Group

- LMG had agreements with mortgage brokers.
- Brokers applied for loans using LMG systems.
- If loan approved – lender paid commission to LMG.
- LMG paid commission (less fees owed by broker) to the broker.
- Held – brokers provided services **to** LMG (e.g. conduct their business under policies, branding and procedures of LMG).
- Held – commissions considered taxable wages.
- Held – ***trailing commissions*** not taxable wages if the broker agreement had been terminated.

Exemptions

- Relevant Contractor provisions – NOT engaged if no payment from intermediary (e.g. medical practice) to contractor. See example 12 and 13 (Queensland Revenue Office - Public Ruling PTAQ000.6.3).
- Subject to exemptions:
 - services provided <90 days or less in the financial year;
 - contractor engages others;
 - provision of labour is ancillary to supply of materials or equipment;
 - services provided are of a type not ordinarily required by the business;
 - services are of a type ordinarily required by the business for <180 days in a financial year; and
 - contractor ordinarily provides services to the public.

Any Questions?

Thank you

Please complete your evaluation form

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