

To: CSO Committee

For discussion purposes only. Not legal advice.

Brief background

1. Generally, entities are only obliged to withhold amounts under the PAYG¹ withholding system on payments made to “employees”.
2. “Employee” for the purposes of the tax law is defined in court cases. There is no legislative definition.
3. The not-for-profits register indicates that “AA Service Council for Western Australia” (i.e. “AA”) is registered as a charity, with FBT, GST and income tax exemptions. It is also endorsed with DGR² status.
4. AA must withhold PAYG amounts from payments it makes to its **employees**. It would also need to make contributions of superannuation guarantee charge (“SGC”) amounts.³
5. If a person is not an employee, AA will not be required to withhold PAYG amounts on payments to him or her, nor make SGC contributions.

Employees

6. **Generally**, a relationship of employment would require:
 - (a) AA and the person to intend to create a legally binding arrangement;
 - (b) a commitment by the person to perform work for AA; and
 - (c) a promise that the person would get something in return (this does not necessarily need to be money).
7. Broadly, a volunteer has no legally enforceable right to receive payments – i.e. they would not be able to sue for the honorarium or *ex gratia* payment in a court, for example. Similarly, there would be no legally enforceable obligation to provide their services to AA.
8. If AA said “we’re not giving out the honorariums from last week”, what would happen? Would the employee be able to demand it? Are they legally entitled to it?
9. Or would they just stop volunteering? Can the arrangement end at any time, at the election of either the volunteer or AA?
10. The answers to these questions should determine the issue.

¹ i.e. “Pay-As-You-Go”, which is the amount that employers are required to withhold from payments of wages to employees and pay to the ATO.

² i.e. deductible gift recipient.

³ i.e. the mandatory super contributions that employers are required to make – at 9.5% of ordinary time earnings.

11. Though not essential, going forward it may help if the duties attached to the position are set out in writing. The agreement could contain an acknowledgement from both parties that the person is a volunteer and not an employee, which is an indication that they did not intend for a legal relationship of employment to arise.

Whether payments to volunteers are assessable

12. Whether the payments are assessable to the volunteer is a separate issue.
13. If the amount is recurrent, regular, expected, and assists the volunteer with their day to day costs of living, it's likely that it will be assessable in their hands.
14. This doesn't mean that AA is required to withhold amounts from it. Rather, the volunteer would be required to include it in their tax return for the year, and would pay tax that way.
15. Simple reimbursements of expenses are very unlikely to be assessable, however.

Options for getting the arrangement "rubber stamped" by the ATO

16. As a general rule, it is inadvisable to contact a "front line" taxation officer with a query or to obtain certainty on a position. This is because:
 - (a) the "front line" officers are generally not as technically proficient as those "higher up" the chain, and if it is anything but a straight-forward query you may receive incorrect information (it happens regularly); and
 - (b) in any event, you are not able to rely on their view. If they advised something over the telephone and that position was followed in the tax return, there is still nothing to stop the ATO from disagreeing and later imposing tax and penalties and interest. Verbal "low level" advice is not binding on the ATO.
17. Additionally, it is generally understood by the tax community that one of the ATO's mandates is to raise revenue. If they believe they have "a good argument" that there is more tax to pay, they will take that line.
18. Based on the above, the Committee may take the view that the position is sufficiently certain that contacting the ATO is not required.
19. If reassurance is required, however, this can be obtained by requesting a *Private Binding Ruling* ("**PBR**") which is a formal request on a particular set of facts. A PBR:
 - (a) allows the taxpayer to forward their arguments and set out the law in the most favourable light;
 - (b) is decided by a tax officer "higher up" the chain; and
 - (c) is binding on the ATO.
20. There is no lodgement fee to lodge an application for a PBR. It is not essential to have professional advice (i.e. anyone can fill out the form and request a PBR) but practically speaking,

taxpayers would be well advised to seek help, because a PBR is the taxpayer's best chance to put their argument forward. If the ATO adopt an unfavourable position in the PBR, it is possible to object but things become more difficult.

21. As a general comment, the Committee should know that tax law is a complicated area, and the ATO does not necessarily have the "final say" in it. ATO staff do their best to apply their interpretation to "grey" areas, just as taxpayers and their advisors do. Naturally enough, where there is a "grey area" the ATO will often take the position most favourable to them, just as a taxpayer would. This is expected. It does not, however, mean that they are right.
22. Whether someone is an employee or not is sometimes difficult to answer. There are numerous court cases on it. It is very unlikely that a frontline taxation officer would be able to answer it to the Committee's satisfaction.