

# Engagement of Independent Contractors Policy

**The Engagement of Independent Contractors Policy is retired with effect 1 June 2021. Coverage of this topic is included in the revised [Procurement Policy](#) published on 31 May 2021.**

## Section 1 - Purpose and Context

(1) Western Sydney University regularly engages people and companies to provide a range of services on a temporary basis. In some circumstances it may not be clear whether the arrangement is one of employer/employee or whether the person(s) may be engaged as an independent contractor.

(2) This policy provides the principles and process for determining the nature of engagements, and the subsequent requirements placed upon the relevant individuals.

(3) The policy assists the University to meet its legal obligations and limit its exposure to penalties for misrepresentation and non-compliance.

(4) The policy applies to:

- a. all academic and administrative units within the University; and
- b. organisations that are fully owned entities of the University.

(5) The policy does not apply to:

- a. related organisations, such as student associations, clubs and societies, and student unions;
- b. engagements undertaken with service firms or labour hire firms.

(6) The policy should be read in conjunction with the [Procurement Policy](#), [External Work Policy](#), [Conflict of Interest Policy](#), [Additional Work Policy](#) and the [Recruitment and Selection Policy](#).

## Section 2 - Definitions

(7) For the purpose of this Policy:

- a. Contract for Services (also known as 'contract by performance') means a contractual arrangement by which one person or organisation agrees to provide workplace services to another. The contract is between two principals (a person or organisation) and neither is the employer of the other. The person providing the services is an independent contractor.
- b. Contract of Employment means a contract under which a person (the employee) is employed in return for some benefit or remuneration from the employer. As a general rule, if the contract gives the employer right of control over the employee's manner of doing the work, it is an employment contract rather than a contract for services.
- c. Contract of Service means a contract under which a person is engaged in the service of an employer to do such work as is contracted for and where the employer directs what is to be done.

- d. Deemed Employee means a person the University contracts wholly or principally for the supply of their labour and who is unable to delegate responsibility to another person to complete the contract. Labour includes intellectual, artistic and physical effort.
- e. Employee under the PAYG system means an employee at common law (which is a concept developed over time by Australian courts).
- f. Independent Contractor means a person who contracts to perform work for another person or organisation, but is not employed by that person or organisation. An independent contractor undertakes to produce a given result, and the agreed payment is payable when the contractual conditions have been fulfilled.
- g. Relevant Contract means, for the purposes of payroll tax, a contract in which a person supplies services for, or in relation to, work to another person in the course of carrying on a business. A relevant contract does not include a contract of service or a contract to provide services which meet the limited range of exemptions contained in payroll tax law.

## Section 3 - Policy Statement

(8) The University is committed to meeting its obligations in respect of:

- a. Pay-As-You-Go (PAYG Withholding) under the [Taxation Administration Act 1953 \(Cth\)](#);
- b. payroll tax on 'wages' paid to employees and certain contractors under the [Pay-Roll Tax Act 2007 \(NSW\)](#);
- c. workers compensation under the [Workers Compensation Act 1987 \(NSW\)](#);
- d. superannuation guarantee contributions under the [Superannuation Guarantee \(Administration\) Act 1992 \(Cth\)](#);
- e. fringe benefits tax under the [Fringe Benefits Tax Assessment Act 1986 \(Cth\)](#);
- f. the [Independent Contractors Act 2006](#) and [Independent Contractors Regulations 2007 \(Cth\)](#); and
- g. [Australian Taxation Office Taxation Ruling TR2005/16](#) Income Tax: Pay As You Go - withholding from payments to employees.

(9) The University can be subject to substantial financial penalties if it fails to meet these obligations.

(10) Wherever possible, the University will engage individuals as employees to ensure they are adequately covered for liability insurances and workers compensation purposes.

(11) The University will treat persons performing functions such as teaching, research, administration and other classes of work similar to those performed by existing University staff as employees for the purposes of income tax (PAYG), superannuation guarantee, FBT, payroll tax and workers compensation.

## Section 4 - Procedures

(12) Each School or Business Unit must apply the following procedures to implement the policy and must follow the normal appropriate University appointment or tender processes.

### Part A - Establishing Employment Status

(13) The relevant delegated School or Business Unit head will consider the indicative factors in the Guidelines below to determine the employment status of external parties who are to undertake work for the University, for the purposes of taxation, at or before the time of employment or engagement.

(14) That a contractor has an ABN is not determinative of whether they are an employee or a contractor. A contractor who has an ABN and carries on a business in their own right may be an employee when performing work for another person. If clarification is required please contact the Accountant, Tax and Insurance.

(15) The onus is on any individual or service entity who considers they are exempt from a particular categorisation to present evidence to the University's satisfaction of their exemption from the requirements of PAYG withholding and Superannuation Guarantee contributions.

## **Part B - Obligations**

### **Employees**

(16) Where an individual is assessed as an "employee":

- a. the University will pay for the provision of services through the payroll into a nominated bank account;
- b. the individual will be subject to the deduction of PAYG withholding following normal employment processes; and
- c. the following obligations/payments will apply and will be addressed through the payroll system:
  - i. superannuation guarantee;
  - ii. workers compensation; and
  - iii. payroll tax.

(17) The University will pay a staff member, for any work they undertake in accordance with the [Additional Work Policy](#), through the payroll system, including where the staff member has their own ABN or business entity.

### **Contractors**

#### **Contract for Services**

(18) Where an individual is assessed as a "contractor", the School or Business Unit head will prepare a letter of engagement and contract for services using the standard template (available on the Office of General Counsel's webpage ) and submit it to the relevant Director or Dean to authorise.

(19) A School or Business Unit must seek advice from the Office of General Counsel to make variations to the standard template.

(20) The Director/Dean will forward the signed and authorised contract for services to the contractor.

(21) The independent contractor must:

- a. complete a Sub-contractors Statement and submit it to the School or Business Unit prior to commencing the agreed services; and
- b. provide certificates of currency for liability insurances and workers compensation/accident insurance policies to the School/Unit as directed to commence and maintain their engagement with the University.

(22) Where the School or Business Unit is not clear whether the engagement is a contract for service, the School or Business Unit will forward the following to the Finance Office, attention of the Accountant, Tax and Insurance who will assess if any obligations arise in relation to Payroll Tax, Workers Compensation and the Superannuation Guarantee levy:

- a. a completed Independent Contractor Evaluation Checklist and Declaration
- b. a copy of the Sub-contractors Statement if engaging a partnership or company;
- c. evidence of relevant insurance;
- d. a copy of the letter of engagement; and
- e. a copy of the contract for services.

## Payments to Contractors

(23) The contractor must submit:

- a. tax invoices for services as agreed in the contract for services; and
- b. a copy of the Independent Contractor Evaluation Checklist and Declaration with the contractor's first tax invoice for payment.

(24) The delegated officer will authorise tax invoices for payment.

(25) The School or Business Unit will submit all authorised tax invoices to Accounts Payable, Finance Office invoices@westernsydney.edu.au for payment through the general ledger.

## Part C - Grievances

(26) Any grievances arising from the application of this policy must be referred to the Vice-President, Finance and Resources.

# Section 5 - Guidelines

## Assessing the Nature of the Relationship

(27) The relationship between an employer and an employee is a contractual one (a contract of service). The relationship between an independent contractor/consultant and the principal (the University) is a contract for services. In general, 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.

(28) To determine whether, on balance, a person is to be treated as an employee or independent contractor, the School or Business Unit should examine the conditions that apply to the engagement in the table below.

Table 1: Factors to determine whether a worker is an employee or an independent contractor.

Factors to Consider	Employee	Contractor
Control over Work	The University has an implied right under industrial law to direct and control the work of an employee. The employee works in the business of the employer and the employer is free to manage their business as they see fit	The University has a right to specify how the contracted services are to be performed under the terms of the contract, otherwise the contractor is free to exercise their own discretion.
Independence	An employee performs work for the University in accordance with an employment contract.	A contractor performs services as specified in a contract with the University and provides additional services only by agreement.
Payment	Payment is often based on the period of time worked, but an employee can also work on 'piece rates' or commission.	Payment is dependent on the successful completion or milestone achievements of the contract services.
Commercial Risks	An employee generally bears no legal risks in respect of the work. As the employee works in the business of the University, the University is legally responsible for any work performed by the employee.	A contractor bears legal risk in respect of the work. They have the potential to make a profit or loss, and must remedy any defective work at their own expense.
Ability to Delegate	An employee performs the work personally and generally cannot subcontract the work to someone else.	Unless otherwise specified in the contract, a contractor can subcontract or delegate the work.

Tools and Equipment	The University, except when specifically agreed otherwise, usually provides tools and equipment.	Generally, a contractor provides their own tools and equipment.
Manner of Performance	An employee performs work at the request of the University and the work is an integral part of the business of the University.	A contractor maintains a degree of discretion as to how the work is performed, although there may be requirements with materials used and method of performance. Although work of a contractor is done for the University's business, it is not integrated into it.
Place of Performance	An employee usually performs work on the University's premises.	A Contractor can perform the work anywhere.
Hours of Work	An employee works set hours usually determined by the University.	A contractor sets their own hours.
Expenses	Generally an employee is reimbursed for expenses in the course of performing their work.	A contractor generally meets their own expenses.
Appointment	Generally an employee is recruited through an advertisement by the University.	A contractor is likely to advertise their services to the public at large.
Termination	The University reserves the right to dismiss an employee.	The University may only terminate a contract without penalty if the contractor has not met the conditions of the contract. The contract contains terms dealing with breaches by either party.

## Obligations under Legislation

### PAYG

(29) PAYG withholding obligations apply to the University in respect of various payments it makes, including:

- a. payment of salary, wages, commission, bonuses or allowances it makes to an individual as an employee.
- b. payments for a supply where the payee does not provide an Australian Business Number (ABN).

(30) The University is required to withhold an amount from the payment it makes and remit that amount to the [Australian Tax Office](#).

(31) Where a determination has been made that an arrangement is one of independent contractor/principal and the entity/individual supplies the University with a valid ABN and documentary evidence of incorporation, establishment of trust or registration of partnership, there will be no PAYG withholding.

### Payroll Tax

(32) Payroll tax is calculated on wages paid by an employer to its "employees" and is charged by all states and territories. The definition of wages is very broad and includes wages, salary, allowances, commissions and benefits etc paid to employees. Under NSW legislation, independent contractors are deemed to be employees where a "relevant contract" exists.

(33) The exemptions from payroll tax include where:

- a. services supplied are ancillary to the supply of goods under the contract;
- b. services supplied are not ordinarily required by the University and are provided by a person who ordinarily provides those services to the public generally;
- c. services are ordinarily required for less than 180 calendar days in a financial year;
- d. services are provided by one contractor for 90 working days or less in a financial year;

- e. the incorporated entity employs two or more persons to perform the work under the contract; and
- f. the Payroll Tax Commissioner is satisfied the contractor ordinarily renders services of the type under the contract to the public generally. The contractor will need to provide evidence of the Commissioner's determination to the University.

### **Workers Compensation**

(34) The University is liable to pay Workers Compensation premiums on payments made for principally labour only services provided to the University under a contract for services based on rateable remuneration. This includes contract payments for principally labour only services and payment to contractors who are or who supply deemed workers. Contractors that are companies are included.

### **Superannuation Guarantee Levy**

(35) The University is required, under the [Superannuation Guarantee \(Administration\) Act 1992 \(Cth\)](#) ("the superannuation guarantee legislation"), to contribute towards the superannuation of a person engaged under a contract that is wholly or principally for labour unless the contract is made with someone other than the person who will provide labour, such as a company or partnership. This means a contractor (the party to the contract) can be considered to be an employee under the superannuation guarantee legislation.

(36) A contract is principally for labour if more than 50% of the value of the contract is for the person's labour. Even if a contractor quotes an ABN, they may be considered an employee for the purposes of the superannuation guarantee legislation.

## Status and Details

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