



Finance and Administrative Services Branch
Taxation Compliance Unit
Business Policies and Procedures

Document Number: <Doc. No.>
Version: 0.5, 3 August 2004
Document Author: Rob Barr

Contents

TAXATION COMPLIANCE POLICIES	4
Board Members and Withholding Tax	4
Board Members Considered as Employees or Office Holders.	4
Ad hoc Board Members require separate assessment	5
Reimbursement of Board Members Expenses	7
DHS Compliance	7
Payments	8
Accounts.....	8

Revision History

Version No.	Date	Details of change	Author
0.1	4/4/2004	Original Draft	Keith Harkin
0.2	5/5/2004	Revised	Tan Pham
0.3	23/6/2004	Revised	Tan Pham
0.4	7/7/2004	Revised	Tan Pham
0.5	3/8/2004	Revised	Rob Barr

Taxation Compliance Policies

Board Members and Withholding Tax

DHS pays sitting fees and allowances to non-VPS staff sitting on DHS Boards and committees.

For the purposes of this policy, the term Board Members includes persons who attend various advisory committees and receive remuneration or compensation.

Under the PAYG system, certain payments made to individuals are subject to withholding provisions. This means that DHS needs to withhold an amount from each payment made to an individual who satisfies specific criteria. Commonly this applies to individuals who are 'employees' and it can also apply to individuals who are not employees but considered 'Office Holders'. Board Members can also be paid under a contract *for services* whereby, in certain circumstances, the withholding provisions will not apply.

Purpose

The purpose of this policy is designed to ensure that:

- DHS complies with the ATO requirements in respect of payments to Board Members
- Relevant staff are made aware of these requirements and appropriate procedures for treatment of these payments.

Policy relates to divisions and regions

This policy is relevant to particular staff in Divisions and Regions who act as contacts for the various Boards / Committees.

Legislation and standards

Tax Administration Act (TAA) 1953

- Schedule 1, part 2-5
- Taxation Ruling: TR 2002/21
- Taxation Ruling: TR 2000/14
- PAYG Withholding Bulletin No.1 taxing of allowances for the 2000/01 and future income years.
- Deloitte's advice to DHS dated 1 July 2004

Policy statement

Board Members Considered as Employees or Office Holders.

Part 2-5 in Schedule 1 to the Tax Administration Act (TAA) sets out the PAYG withholding provisions. They have effect in relation to payments made on or after 1 July 2000.

Section 12-35 of the TAA states: "An entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee (whether of that or another entity)".

“Section 12-45 in Schedule 1 to the TAA imposes an obligation on the paying entity to withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as:

- (a) A Member of an Australian legislature;
- (b) A person who holds, or performs the duties of, an appointment, office or position under the Constitution or an Australian law;
- (c) A Member of the Defence Force, or of a police force of the Commonwealth, a State or a Territory; or
- (d) A person who is otherwise in the service of the Commonwealth, a State or a Territory; or
- (e) A Member of a local governing body to which subsection 12-45 (3) in Schedule 1 to the TAA applies”.

In addition, Paragraph 12-45 (1) (b) and (d) impacts on payments made to Board Members within DHS.

In these instances, payments to Board Members are classed as “payments made to office holders”.

In both instances (ie. where a Board Member is deemed to be an employee and where a Board Member is deemed to be an office holder) DHS is required under the new tax system to withhold an amount from the payment. The Department must withhold an amount as determined by the Commissioner’s withholding schedules and procedures:

- The amount withheld will generally be determined by the Member’s marginal tax rate plus the Medicare levy.
- If the Board Member nominates to not claim the tax free threshold, then withholding will be at the top marginal rate of 48.5% on the whole payment.
- Where the Member does not provide DHS with a Tax File Number (“TFN”), the amount withheld will be an amount equal to 48.5% of the total payment.

Board Members are usually employed because of their particular knowledge and skills. They have a specified tenure and cannot delegate their work to anyone else, such Board Members should be considered as employees. They should be paid through DHS payroll and receive a payment summary (formerly group certificate) at the end of the financial year. Board Members should be remunerated as individuals regardless of any entity they own or are associated with.

Ad hoc Board Members require separate assessment

Depending on their circumstances, Ad Hoc Board Members may be assessed as a Common Law Employee or Independent Contractor.

Paragraph 24 of the TR 2002/21 states that 'Members of ad hoc advisory committees are not regarded as office holders by virtue of their Membership of such committees’.

Paragraphs 99 to 101 of the TR 2002/21 define ad hoc members as members who are appointed without tenure of appointment. There are no duties, power or functions, which attach to the position itself. Ad hoc advisory committees’ functions or duties are not in the nature of the functions or duties which would be exercisable by a statutory or common law office holder.

Payments made to these Members are not considered to fall within the scope of section 12-45 in Schedule 1 of the Tax Administration Act (TAA) 1953 – withholding tax on board members. Therefore, no withholding tax on such payments is required.

In paragraph 127 of TR 2002/21, Judge Mahoney JA distinguished two types of individuals to be in the service of the Crown, namely office holders and common law employees of the Crown. Ad hoc board members are neither employees of the Crown nor office holders.

Paragraph 148 states “ The PAYG withholding treatment of payments made to ad hoc advisory committee members will be dependent upon the contract of engagement between the payer and payee – that is, whether it is a contract *of service* or contract *for service*.” Where there is a contract *of service*, withholding will be required under section 12-35 in Schedule 1 to the TAA. Where there is a contract *for service* (independent contractor), withholding is not required.

Ad hoc Board Members are required to be further assessed for their status under Common Law as an employee or independent contractor.

Refer to the test below as a guide to assess whether an ad hoc board member who provides an ABN and claims to be a contractor is actually a contractor, or otherwise is deemed to be an employee under Common Law.

DHS has been advised by Deloitte to apply the following tests:

Factors that should be considered in assessing whether a Board member is a common law employee are:

Features of Relationship	Employee - Contract of Service	Independent contractor - Contract for Services
Lawful authority to command	Under a contract of service, the payer usually has the right to direct the manner of performance. Of course, where the nature of the work involves the professional skill or judgment of the worker, the degree of control over the manner of performance is diminished. What is important is the lawful authority to command that rests with the payer.	The hallmark of a contract for services is said to be that the contract is one for a given result. The contractor works to achieve the result in terms of the contract. The contractor works on his/her own account.
How is the work performed?	Tasks are performed at the request of the employer.	An independent contractor enters into a contract for a specific task or series of tasks. The contractor maintains a high level of discretion and flexibility as to how the work is to be performed. However, the contract may contain precise terms as to materials used and methods of performance and still be one for services.

Delegation	An employee has no inherent right to delegate tasks to another. However, there may be a power to delegate some duties to other employees.	An independent contractor may delegate all or some of the tasks to another person, and may employ other persons.
-------------------	---	--

Example of Independent Contractor – Contract *for* services

If DHS engages a medical practitioner to act as an advisory committee member for a registration board, and the medical practitioner is considered to be a contractor (i.e. in a contract *for* services), the relationship between DHS and the medical practitioner would need to exhibit most of the following characteristics:

- The medical practitioner is engaged as an advisory committee member for a predetermined period and for a specified result (e.g. until the medical board releases its findings in relation to certain hospitals and certain medical procedures). This is also specifically stated in the contract between DHS and the medical practitioner.
- The medical practitioner is allowed to engage a colleague to undertake research on his/her behalf so that the medical practitioner can consequently present his/her findings to the medical board.
- The medical practitioner is not required to work a certain number of hours, however he/she is required to complete certain tasks by a specified time.
- Apart from the specific tasks as detailed in the contract for service, the medical practitioner is not required to participate or undertake any employment related duties (i.e. account for time spent during working hours by completing a timesheet), and DHS does not have the authority to command that the medical practitioner attends DHS work place in order to complete/accomplish the specified tasks.

In circumstances where Board members do not demonstrate the above characteristics, DHS will consider such members as common law employees – Contract *of* Services. The fact that the members carry on a medical practice does not necessarily mean that the role he/she performs on the committee is part of his/her practice. That is, he/she can still be a common law employee.

Reimbursement of Board Members Expenses

ATO's PAYG Withholding Bulletin No.1 2000/01 exempts reimbursement of actual expenses from PAYG withholding. Reimbursement of actual travelling, meals and other agreed expenses incurred by a Board Member will therefore not be subject to PAYG withholding.

DHS Compliance

To comply with its Tax obligations, DHS must obtain from the Board Member:

- Where the Board Member is to be treated as employee/office holder:
 - A Tax File Number (TFN);
 - An Employment Declaration.
- Where the Board Member is to be treated as providing a contract *for* service:
 - ABN of Board Member;
 - Confirmation of GST registration (where a Board Member issues a Tax Invoice).

Payments

Salary, bonuses and certain salary-type allowances:

- Should be made through the Department's payroll system;
- Will be reflected on Payment Summaries (Group Certificates) for inclusion in Board Members' tax returns.

Reimbursements of actual expenses and payments of contracts for service:

- Will be paid through the accounts payable system or EC4P.

Accounts

The following accounts should be used, as appropriate, for each Board Member status:

- 80101 Salaries & Allowances [TFN provided]
- 86092 Non DHS Personnel Board Member & Sessional Fees – Non GST [ABN provided]
- 86135 GST-Non DHS Personnel Board Member & Sessional Fees [ABN provided, GST registered]

Responsibilities

Relevant Executive Directors and Regional Directors are responsible for:

- Ensuring Board Members are aware that payments made to them in the form of sitting fees may result in them being treated as providing contract *of* service (employees) or contract *for* services and the tax implications.
- Ensuring, in conjunction with Human Resources Branch, and where appropriate, that Board Members in receipt of salary and salary-type allowances complete appropriate forms and declarations (eg. Tax File Number Declaration).
- Ensuring, where appropriate that Board Members supply an ABN.

Related policies

Common Law Employee / Contractor

Ownership

The Manager Taxation (tan.pham@dhs.vic.gov.au) is responsible for ensuring that this policy is accurate and reviewed in accordance with the review date specified.

Date of policy: 3 August 2004

Review date: August 2005

Policy authorisation

Tan Pham, Manager Taxation is the authoriser of this policy.

Flow chart

