

**Submission to**  
**Board of Taxation Post-Implementation Review of the**  
**Alienation of Personal Services Income Rules**



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Submitted by  
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## **APESMA Submission to Board of Taxation Post-Implementation Review of the Alienation of Personal Services Income Rules**

The Association of Professional Engineers, Scientists and Managers, Australia (APESMA) is an organisation registered under the Fair Work Act 2009 representing over 25,000 professionals including professional engineers, scientists, veterinarians, surveyors, architects, pharmacists, information technology professionals, managers and transport professionals throughout Australia. We are the only industrial association representing exclusively the industrial and professional interests of these groups.

The ABS's recently completed Contract Work and Labour Hire Survey found that over one million Australian workers are engaged as independent contractors. Of these, 15 per cent worked in the Professional, Scientific and Technical services industry, second only to the Construction industry. Professionals as an occupational group accounted for 19 per cent of male independent contractors and 32 per cent of female contractors. These figures confirm 2001 Productivity Commission data which estimated that around 10 per cent of self-employed contractors were professionals.

The significant number of contracting professionals and their relatively high representation in the Professional, Scientific and Technical services industry - confirmed again in these most recent figures - is the basis for APESMA providing services to more than 3,500 self-employed members through its special interest group Connect ([www.apesma.asn.au/connect](http://www.apesma.asn.au/connect)).

The APESMA Connect program offers independent contractor and consulting professionals:

- advice on managing the transition from employee to contractor;
- help with calculating appropriate hourly rates;
- access to discounted professional indemnity insurance;
- a business mentoring program which matches experienced self-employed professionals with those transitioning to self-employment;
- networking services; and
- a professional development scholarship to assist with expanding and updating skills in the absence of a sponsoring employer.

In addition to these services, Connect provides information and advice on how contracting and consulting professionals can comply with their taxation obligations under the Alienation of Personal Services (PSI) legislation.

The PSI legislation, introduced as an anti-avoidance measure, was intended to protect the integrity of the taxation system by preventing individuals who generate income from their personal services from reducing their liability to taxation by diverting income through a company, partnership or trust, and to limit and clarify the work-related deductions available to the individual and interposed entity. APESMA supports the policy intent of the PSI rules.

APESMA does however have some major concerns about the interface between taxation and industrial law, and believes the application of the PSI rules has led to a range of anomalous outcomes for independent contractors and consultants. APESMA is of the view that the PSI rules are complex and poorly understood, have unintended consequences of a substantive nature, do not take account of actual taxpayer circumstances and commercial practices, fail to provide certainty to taxpayers, and have serious inconsistencies with employment law.

In APESMA's 2009 survey of its contracting and consulting members, APESMA found that the PSI measures were seen as a major or significant problem by 47 per cent of respondents and a further 29 per cent saw it as a potential problem. This means that the PSI rules are a significant area of concern for up to 2,500 of our members.

This Submission will detail problems with the operation of the PSI rules and recommend reforms which might address some of the anomalies and unintended consequences affecting members.

## **1. Lack of alignment between status for industrial and taxation purposes for those working predominantly to one client**

Non-standard workers are characterised by heterogeneity and diversity - in terms of their relationship to the principal or client, the diversity of their client base, how they perceive themselves (as a business, a specialist consultant or a would-be employee), in their choice of business structure, size, the type of business engaged in, the industry sector in which they operate, in the products and services produced, in the processes and level of technology used, and the specific community and business environment in which they operate.

APESMA recognises, as recognised by the International Labour Organisation, that independent contractors are governed by commercial law, while employees are governed by industrial law. However, a 2004 study found that up to 400,000 workers classified by the (then) Government as independent contractors actually did all their work for one client (O'Connell 2004). For this segment of non-standard workers, PSI is a key issue because they earn more than 80 per cent of their income from a single client and may not structure their operations in such a way as to pass the Personal Services Business (PSB) tests - that is, they are considered neither businesses nor employees. This effectively places them at the intersection of commercial and industrial law. In its 2009 survey, APESMA found that 55 per cent of contractor respondents earned more than 80 per cent of their income from a single client.

APESMA's view is that the PSI measures do not sufficiently accommodate the complexity of arrangements of those in non-standard work. Most notably, in cases where genuine self-employed contractors earn more than 80 per cent of their income from a single client, there has been no attempt to link the status of workers for industrial and income tax purposes. Where a contractor or consultant is subject to the PSI rules, the individual is taxed as an employee but this does not create an employment relationship, nor does it entitle the taxpayer to any of the rights or benefits normally associated with employment.

The ATO would suggest that if contractors such as these do not satisfy the PSI tests, they fall into the category of taxpayer the measures were designed to cover. In actuality, those denied PSB status by the ATO experience twofold disadvantage as their status is repudiated at both the level of PSB and employee - they suffer in effect a double whammy. In moving across to contractor arrangements, professionals forgo income security, lose access to employment entitlements and must cover expenses such as accident insurance, professional indemnity insurance and provide for leave and superannuation themselves. At the same time, under the PSI rules they can be denied the right to claim legitimate deductions for the additional expenses they incur and the risk and income insecurity they experience.

## 2. Lack of certainty around compliance obligations and PSB status

APESMA has a major concern about the uncertainty the current PSI rules create around employee/contractor status.

The following comments are evidence of the uncertainty and confusion created by the measures:

**Table 1 - Comments on uncertainty**

From my perspective as a small contractor, the changes are like a sword hanging over your head. If you self-assess wrongly, you may end up with huge back tax issues.
I have been a contractor running my personal services micro-business through my company for the last 20 years. Let me give you a real life example of how I could fail the 80/20 test one year, pass it the next and possibly fail it the next. My first contract was as an on-site construction manager on a building project which ran for 12 months from September (tax year 1) to August the following year (tax year 2). I was contracted for 10 months i.e. 83% in tax year 1 and would have failed the 80% income test. My second project with a different head contractor ran for 10 months from October (tax year 2) to January the following year (tax year 3). I was contracted for 9 months i.e. 75% in tax year 2 and would have passed 80% income test, but if I had taken a 10 month or longer contract in tax year 3, would have failed the 80% income test in tax year 3. A series of fail, pass, fail results. I was also contracted to the (name of organisation withheld) for 3 years and certainly would have failed the test.
If we are deemed to be employees then we are entitled to all conditions that apply to employees. We can't be deemed to be an employee on the one hand and not on the other.
The rules are very vague on the issue - the ATO seems to be contradicting the Treasurer, and most accountants seem to be confused.
It is all a bit confusing. The needs of small consultancy businesses which tend to have one major client at a time should be taken into account.
They have no idea how precarious contracting is. Last year was a good one for me, the year before I could not get anything - not for the whole year. You need to be able to average it out ...
Another fundamental point which has not been aired to date is the issue of each tax year status compliance. Do we assume that say in the 2000-01 tax year with two clients and two people working for one of the clients, a business would pass the test for that tax year. Say at 28th June 2001 both clients have no requirement for ongoing work for the business. Now let us assume that on 1 July 2001 no work is on the horizon for both people in the business. In the middle of July 2001 one person obtains a client which could entail 6-12 months work. Does the business then review the forward position and deem itself to be not a business, clients would not engage a 'non-business entity', or does the previous tax year status continue, and for how long? The latest interpretation from Costello and Howard on contractor responsibility to rectify errors as being one of the test questions does not cover engineering feasibility studies which may carry on for 6-12 months with no outcome and the project may end up a non-viable proposition. In this case the contractor or anyone else involved has no responsibility for the ultimate outcome.

These comments indicate that many contractors and consultants are confused by the rules and that the uncertainty and income insecurity of contracting are compounded by the uncertainty created by the PSI measures around PSB status.

### 3. Failure to provide for the reality and complexity of commercial arrangements

APESMA holds the view that the PSI measures fail to take account of actual taxpayer circumstances and the diversity and complexity of the commercial arrangements they have in place. This failure penalises, in particular, two groups within APESMA's membership - consulting professionals offering business services and Information Technology (IT) contractors.

#### (a) Professionals offering business services

The problems for professionals offering business services are evident in these member comments:

**Table 2 - Comments on the 80/20 rule**

I feel that I'm being penalised only because my work takes about two and a half years to complete, whereas if I was doing nine month projects, I'd be fine. Seems a bit arbitrary to me.
The APSI arrangements are unfair. The reason that I have been caught up in this situation is that I have provided a service to my client that was well received, effective, reasonably priced and timely. Consequently the client 'demanded' more and more of my services to the point where almost 100 per cent of my company income was derived from this single client.
The legislation may adversely affect those legitimately working for themselves who have many tens of thousands of dollars tied up in hardware and software. These individuals may well have only one client, however they are not employees by any stretch of the imagination. They do work using their own equipment, are under no direct supervision, have to provide their own working environment (most work from home), have to provide all consumables, have separate phone/fax/email facilities, all at their own expense. Essentially they are given a task and it is up to them how they do it, when they do it and who they use to get the job done. It is these individuals I feel for as they are running businesses, but because they get more than 80% of their income from a single source, they get caught in the net.
I am a contract engineer (manufacturing) and I move around every year or so. My contract generally runs for more than one year as my clients frequently continue to offer jobs when one project finishes because they like my performance. The tax rule will force me to reject new contracts from my existing client if I have been with them for more than say 10 months, and forces me to look for another job elsewhere. Recently, I got a job with (name of organisation withheld) to help with their \$500 million project, which may run for 3 years. The tax regulation will consider me as an (withheld) employee but I am a true contract engineer.
The Rulings do not take into account annual and seasonal variations in demand.
Allowance should be made for projects in excess of one year. A Professional Engineer may take a project through from planning to the completion of construction as a Project Manager or Project Engineer.
To look at these sorts of issues in one year time frames is absolutely absurd.
The 12 months rule seems to be too arbitrary. The solution is some sort of averaging.
I have had to reduce the number of hours that I provided service to the client in order to attempt to diversify my client base and source of company income. (Company name withheld) would gladly utilise every hour that I have available and continues to request further services.
It is a VERY simple view of what the contract industry is about, and it will have a harmful effect on the Australian economy.
I think the whole outlook ... is very narrow and simplified. In the real world life just isn't that simple.

Such comments indicate that in spite of receiving more than 80 per cent of their income from a single source in an income year, these individuals are genuine contractors who enjoy neither the income security nor employment benefits accorded employees. The contractors and consultants were forced in some instances to refuse work they would have otherwise accepted so they could diversify their income sources - solely because of the PSI measures.

**(b) IT contractors**

The results test and the unrelated clients test are particularly problematic for IT contractors. For these professionals, the failure of the PSI measures to provide a basis for recognising their legitimate PSB status, even where the industry custom and practice provisions of the legislation are accessed, has serious consequences.

These comments set out some of the difficulties experienced by IT contractors in relation to the PSI rules.

**Table 4 - IT contractors comments on the results test**

Much of the work we do is less defined than engineering tasks (such as designing a bridge). It is more in the nature of providing expert business/commercial advice, e.g. advice re intellectual property, electricity market advice, etc., which is not rectifiable (very hard to provide if the advice is right or wrong) (IT contractor).
We enter into contracts for payment for our services on a daily rate basis rather than for a tendered amount to complete a defined task (IT contractor).
These new Rulings fail to deal with the reality of the contract market, particularly in the IT area.
Whether the contract defines a specific tasks depends on what sort of contractor you are e.g. a software writer may provide a program but what result can a system administrator point to satisfy the test?
I could not meet the Results test as I get paid for hours performed not results. I am usually required to use the client's premises and hardware and software, and I have to attend during normal business hours as that is when the rest of the team that I work with is in attendance. I cannot delegate since I have been contracted based on my own experience and qualifications, and I am not liable to correct mistakes.
Producing a result could be a problem depending on definition. Through my company I am running a program for a Government department. The result will be satisfactorily completing the program which will probably occur on award of the last contract, although there will probably be some ongoing involvement through construction and commissioning.

A 2004 Administrative Appeals Tribunal Australia (AATA) judgement noted that results-based payments were not custom and practice in the IT industry (2004, *AATA 720 2004 56 ATR 1162*) and the latest AATA judgement on PSI for IT contractors has confirmed the problems with satisfying the results test for IT contractors. In *Taneja v ATO (AATA, Ref No: 2007/5830-5833, Walker DP and Frost M, 11 February 2009)* the AATA rejected an IT contractor's claim that when industry custom and practice was taken into account, they satisfied the results test conditions set out in 87-18(a), (b) and (c) and was therefore a Personal Services Business.

The custom and practice provisions set out in subsection 87-18(4) state that "regard is to be had to whether it is the custom or practice (a) for the personal services income from the work to be for producing a result, (b) for the entity to be required to supply the plant and equipment or tools of trade

needed to perform the work, and (c) for the entity to be liable for the cost of rectifying any defect in the work performed as the case requires. The AATA found that the custom and practice provisions could only be applied where the first condition of the results test was satisfied; in line with IT industry custom and practice, the contracts for service with Taneja's clients were not structured around results, and the AATA refused PSB status on this basis.

Industry custom and practice also creates problems with the unrelated clients test for IT contractors. These professionals often operate through labour hire agencies - engaged by clients they themselves or the agency have secured - but these clients are not recognised as clients for the purposes of the unrelated clients test, nor is obtaining work through an agency recognised as offering services to the public for the purposes of this test. This means the unrelated clients test fails to provide for even the most basic commercial reality for IT contractors.

The Taneja judgement confirmed the particular difficulties experienced by IT contractors in relation to the results test. Industry custom and practice for IT contractors is that they are likely to be engaged and paid on an hourly basis with their contracts setting out the scope of work to be performed rather than results to be achieved, making the first condition of the results test difficult to satisfy. IT contractors also often use the IT equipment of the client and it is difficult to put the case that this equipment is incidental to rather than necessary for completion of the work required as needed to satisfy the second condition of the results test. Contract documentation for IT professionals seldom hold the contractor to high levels of liability because of the large number of contingencies unrelated to the contractor which may contribute to defects in the work which would limit their liability at common law, meaning the third condition of the results test is also problematic. IT contracts for service also very often provide for rollover of the contract at the discretion of a client and subsequently periods of engagement which extend beyond 12 months. In addition, where engaged through a labour hire firm, the unrelated clients test in its current form fails to provide a basis for reflecting the IT contractor's legitimate contractor/PSB status.

The implications for IT contractors are that if a PSB Determination is requested by an IT contractor who is operating in line with industry custom and practice as set out above - either through an agency or directly with a client - the ATO is unlikely to find the results test or unrelated clients test satisfied and PSB status established on either of these bases. With the employment and business premises tests similarly irrelevant, IT contractors almost unavoidably fail the PSB tests while having none of the entitlements or protections available to employees.

In these ways, the PSI measures do not provide for the complexity of contracting professionals' actual circumstances and commercial practices. Longer-term infrastructure projects, contract renewals and industry custom and practice can mean genuine contractors and consultants are denied access to a range of legitimate deductions while still experiencing the income insecurity which characterises their work arrangements.

#### **4. Narrow and discretionary interpretation of PSB status by ATO**

APESMA holds the view that the ATO is assessing PSI status narrowly in two areas; firstly the unusual circumstances provisions set out in Part 2-42 of the Income Tax Assessment Act 1997 (ITAA), and secondly, their interpretation of commercial contract provisions.

##### **(a) Unusual circumstances**

In a decision handed down by the AATA in 2002 (*AATA 1121, Re Creaton Pty Ltd and FCT*) a contractor successfully argued that a less restrictive approach should be taken by the ATO in determining “unusual circumstances” in relation to the 80/20 rule.

Creaton, a contract consultancy providing services in the form of management and administration of engineering assets in buildings, was contracted to a single client, the Fire Code Reform Centre (FCRC) for a period of seven years between 1994 and 2001. Creaton sought exemption from the 80/20 rule on the grounds that unusual circumstances applied. The AATA agreed that Creaton should be excluded from having to satisfy the PSB tests on the basis that they could demonstrate unrelated clients in the seven income years prior to being engaged by the FCRC.

Another case (*AATA 934, Re The Engineering Company and FCT 2007 3360, Frost M, 21 October 2008*) tested the unusual circumstances provisions of the PSI rules in relation to the employment test and the unrelated clients test. The AATA found that the resignation of a long-term employee of the taxpayer did satisfy the unusual circumstances provisions in relation to the employment test (the taxpayer would have had an employee/s but for unusual circumstances). The judgement also suggested that where a contractor loses a long-term client, or a long-term employee resigns and takes a client with them, this could well be grounds for satisfying the unusual circumstances provisions of the unrelated clients test (the taxpayer would have had unrelated clients but for unusual circumstances).

These judgements were significant to APESMA and its members in that they recognised that the ATO’s narrow assessment of the 80/20 rule, the employment test and the unrelated clients test did not provide for the diversity of “unusual circumstances” in a complex specialised business environment.

##### **(b) Commercial contract interpretation**

In applying the PSI rules and assessing commercial contracts, the ATO has classified a range of contract clauses “determining” and “indicative” - that is where a determining contract clause appears (or does not appear) in a contract document, the ATO will - solely on this basis - reject PSB status and refuse to issue a PSB Determination. Where clauses (or their omission) are regarded as indicative, the contractor will not necessarily fail to be regarded as a PSB, but the ATO suggests that they will be regarded as strong indicators.

APESMA is concerned that applying the PSI rules in this way effectively puts ATO officers in a position of assessing the substance of contractor/employee arrangements against the Hollis v Vabu judgement (*Hollis v Vabu Pty Ltd (2001) 106 IR 80*) when assessing PSB status. APESMA holds the view that ATO officers may not have the experience or training to make judgements of this kind. In particular, we have found that clauses ostensibly regarded as indicators by the ATO - such as inclusion of a mutual termination clause, a rollover clause or payment on an hourly rate - are often assessed as if they are determining factors - that is, inclusion of any one of these clauses will automatically result in a denial of PSB status rather than an assessment being made on the basis of an informed and complex understanding of the policy intent of the three conditions of the results test, and the substance of arrangements overall.

This highlights the two major problems with the ATO's interpretation of commercial contracts - the lack of transparency around their decision-making, and their discretion to assess the determining and indicative clauses without appropriate experience and training.

This table sets out, to the best of our knowledge - based on analysis of the grounds for ATO denial of PSB status for a number of APESMA members - the ATO's criteria for assessing contract provisions.

**Table 5 - Determining or indicative factors for establishing contractor status**

	<i>Features of the terms of engagement and payment structure</i>	<i>Determining or indicative factor</i>	<i>To be considered a contractor, answer should be:</i>
1	Does the contract set out the result to be achieved rather than the scope of work or typical tasks to be performed?	Determining	Yes
2	Is payment based on specified outcomes or results set out under the contract?	Determining	Yes
3	Is payment conditional upon achieving these outcomes rather than for work performed?	Determining	Yes
4	Does the contract state that you have a high level of discretion and flexibility as to how the work is performed?	Indicator	Yes
5	Does the contract state that you have the right to subcontract the work?	Indicator	Yes
6	Does the contract state that you will provide all necessary tools and equipment required taking into account industry custom and practice and convenience?	Determining	Yes
7	Where the client provides tools and equipment, are they incidental rather than necessary to the achievement of the result or outcome taking into account industry custom and practice and convenience?	Indicator	Yes
8	Does the contract state that you are liable for the cost of rectifying any defects in the work performed?	Determining	Yes
9	Does the contract state that you will carry PI and PL insurance?	Indicator	Yes
10	If a daily/hourly rate or progress payments are specified in the contract, is payment tied to		

	achievement of milestones or results set out within the terms of engagement and reimbursed if outcomes are not achieved?	Indicator	Yes
11	Does the contract contain provision for leave entitlements, expenses or any other disbursements or work-related outgoings?	Indicator (Determining?)	No
12	Can the contract be terminated without or with limited penalty?	Determining	No
13	Does the contract contain a termination clause?	Indicator (Determining?)	No
14	If the contract is for a specified period, is there provision for the contract to be rolled over?	Indicator (Determining?)	No
15	Are you exposed to the commercial risk of making a loss under the performance of the contract?	Determining	Yes
16	Are services offered to the public?	Determining	Yes - via website, print advertising, etc.

The current situation is that ATO officers - not the AATA, not a Court or industrial tribunal but the ATO - are interpreting contracts for service to determine the substance of contractors' business status. We contend that in many instances the judgements being made by the ATO are questionable but remain unchallenged because of contractors' reluctance to take the matters to the AATA due to time away from the business, the cost of an AATA application and consultation with a taxation lawyer, and the long lead time of seeking an ATO Determination..

## 5. Recommendations

This Submission has detailed some of the unintended consequences and anomalies of the PSI measures on contracting and consulting professionals. APESMA is of the view that the PSI measures have penalised a range of genuine contractors and in many cases imposed uncertainty and commercial disadvantage.

With an increasing proportion of the highly skilled workforce of the next decade expected to operate through contracting arrangements, the PSI rules as they stand are likely to be a significant obstacle to creating a highly skilled flexible project-based workforce with the capability to disperse specialist skills across industry as we emerge from the global financial crisis into the future.

APESMA therefore recommends the following amendments:

- 1. To reduce complexity and provide certainty, provide for self-assessment against all tests (alongside better defined tests and unusual circumstances provisions - see Recommendations 3 and 4) and limit anti-avoidance liability**

### ***Recommendation 1 - self-assessment across tests***

Allow self-assessment across all the existing tests and continue with compliance audit program.

### ***Recommendation 2 - limit liability under Part IVA of the ITAA***

Liability under the ITAA anti-avoidance provisions should be limited in cases where taxpayers can demonstrate a genuine basis for self-assessment against the tests.

**2. To take account of the diversity and reality of commercial arrangements in small and micro-business, extend unusual circumstances provisions and review unrelated clients test**

***Recommendation 3 - define unusual circumstances provisions***

Expand self-assessment tests to include an unusual circumstances provisions (formerly this was only part of the PSB Determination process) to further define unusual circumstances and provide for discretionary application by the taxpayer and discretionary assessment by the ATO.

Define “unusual circumstances” (currently in the explanatory memorandum)

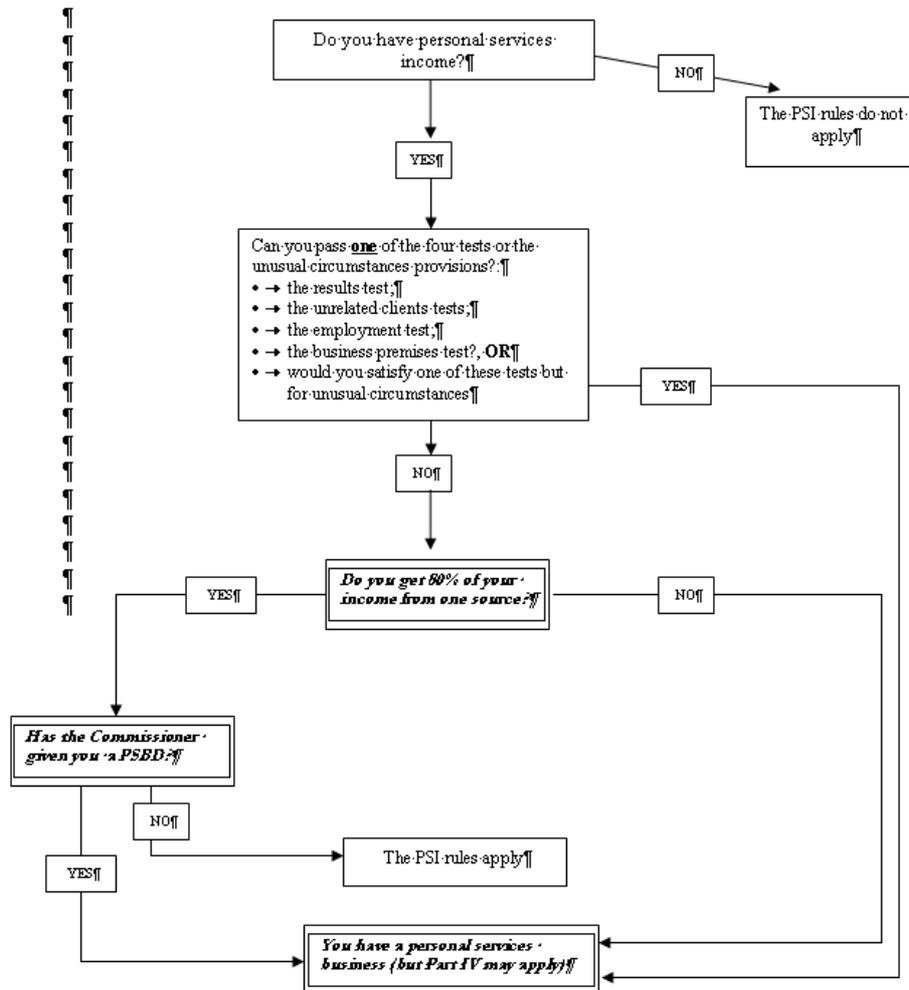
*Unusual circumstances apply when the taxpayer can demonstrate that they would have satisfied at least one of the results test, the unrelated clients test, the employment test or business premises test for the entire income year but for unusual circumstances.*

*This includes circumstances where:*

- (a) services are only provided to one client in the relevant income year but the unrelated clients test was met in prior years and there is a reasonable expectation it will be met in later years up to a maximum period of seven years [in line with Creaton judgement];*
- (b) services are provided to one client in the relevant income year because a contract is rolled over or renewed to take account of duration or timing of a related project, a new project or changed circumstances but the individual cannot demonstrate multiple previous clients [to take account of the commercial reality that contracting professionals may work to one client due to involvement in a longer-term project, due to external or unforeseen circumstances, or because their client wished to re-engage them on another project but the contractor is not in a position to demonstrate previous multiple clients]; or*
- (c) services are provided to one client in the relevant income year due to the departure of a long-term client or employee [in line with Engineering Company judgement]; or*
- (d) an individual is unable to satisfy one of the tests because he or she has only been deriving PSI from the premises for part of the relevant income year [part of existing unusual circumstances provisions], or*
- (e) services are provided only to one client in the relevant income year due to the commencement of the business and there is reasonable expectation that one of the tests will be met in later years [part of existing unusual circumstances provisions]; or*
- (f) services are provided to only one client due to other individual or commercial circumstances, industry custom and practice, convenience or other relevant circumstances [to take account of the diversity of commercial arrangements contracting professionals may have in place which are not covered by sub-clauses (a) to (e)].*

Only when an individual does not satisfy one of the tests, or unusual circumstances provisions, would they be required to apply for a Personal Services Business Determination.

The process allowing for self-assessment across all four tests and the unusual circumstances provisions would operate as follows:



**Recommendation 4 - Revise the unrelated client test to recognise clients obtained via an agency and redefine offering services to public to include clients obtained through an agency**

When assessing against the unrelated clients test (and item 16 of the contract clauses set out in Table 5 in section 4(b)), recognise clients obtained via a recruitment agency or labour hire firm as unrelated clients. This method of obtaining clients is a legitimate way of offering services to the public where there is a genuine tripartite relationship between a client, contractor and labour hire firm, and, in conjunction with revised unusual circumstances provisions, accommodates IT industry custom and practice. Registering with a labour hire firm should also be recognised as a legitimate way of offering services to the public.

**3. To provide certainty around commercial arrangements, clarify contract clauses by which PSB status will be assessed and clauses which will not threaten PSB status**

***Recommendation 5 - Clarify and define contract clauses which will determine and indicate PSB status against results test***

In assessing contract clauses, the following clauses should be the key bases of assessment in relation to the results test:

- Does the contract set out the result/s to be achieved in some form taking into account industry custom and practice, convenience and any other relevant circumstances?
- Does the contract state that the individual will provide all or most tools and equipment required to achieve the result/s taking into account industry custom and practice, convenience and any other relevant circumstances?
- Does the contract state that the individual is liable for the cost of rectifying any defects in the work taking into account industry custom and practice, convenience and any other relevant circumstances?

These conditions should be applied broadly and considered indicators when assessing the totality of the arrangements for PSB purposes. Failure to satisfy any of these conditions should not of itself determine PSB status.

The inclusion of these clauses should not threaten PSB status:

- Provision for disbursements;
- The inclusion of a mutual termination clause;
- The inclusion of a rollover clause;
- Payment by hourly or daily rates where results to be achieved are set out in the contract terms.

In addition:

- Carrying PI insurance will be sufficient to indicate that the individual is liable for the cost of rectifying any defects in their work.
- There should be no specific requirement to state in the contract terms that payment is subject to achievement of results and repaid if result is not achieved. This is an area already regulated by commercial law.

**4. To remove disincentive attached to applying for a PSB Determination, remove cost penalty**

***Recommendation 6 - Remove penalty for appealing ATO refusal to issue PSB Determination***

While it is not desirable to remove the discretionary power of ATO officers deciding PSB status, because of the complexity of commercial arrangements and limited training and experience of ATO officers, these decisions should be able to be challenged with limited financial penalty.

In acknowledgement of time away from the business, and cost involved in seeking advice from a tax lawyer, APESMA therefore recommends that the Alienation of Personal Services Income legislation be added to Schedule 3 of

the *Administrative Appeals Tribunal Regulations 1976* so that if a taxpayer appeals an ATO refusal to issue a PSB Determination, the AATA application fee of \$682 will be waived.

**5. To provide a basis for public consultation on effectiveness of PSI measures and improve transparency, responsiveness and accountability of ATO, require publication of relevant figures**

***Recommendation 7***

Require public accountability and transparency from the ATO on how many contracting arrangements it rejects, the basis of the rejections, how many audits it carries out on personal services contractors, the duration of audits and the duration of the PSB Determination process, the cost of compliance audits in relation to the recovered unpaid tax, and the annual amount of unpaid tax collected via the measures.

**6. Summary**

APESMA believes that making these changes will address non-compliance in the key areas arising out of the anomalies created by the PSI rules. While it will not ultimately address the lack of alignment between industrial and taxation law, implementation of these recommendations will go a long way to reducing the complexity of the rules, ameliorating the worst of the unintended consequences, reducing the uncertainty and frustration which the current rules create, and recognising and accommodating the complexity and diversity of the commercial arrangements of contracting professionals including custom and practice for particular industry segments and the contracting practices of those at the intersection of commercial and industrial law.

**7. Submission preparation**

This Submission was prepared by Dr. Kim Rickard, Executive Officer, Connect - APESMA's special interest group for independent contractors and consultants.

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