

<b>Name of Policy</b>	<b>Determining Employee/Contractor Status Policy</b>
<b>Description of Policy</b>	
<input type="checkbox"/> New Policy	<input type="checkbox"/> Revision
<b>Description of Revision</b>	<i>Delete</i>  <i>Please type brief description of the deletion and specify information to be deleted</i>
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### Human Resources Directorate

<b>Policy and Revision Number</b>	
<b>Original Effective Date</b>	
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1	<b>BACKGROUND AND OVERVIEW</b> .....	1
2	<b>POLICY PURPOSE</b> .....	1
3	<b>POLICY PROVISIONS</b> .....	1
3.1	<b>Definitions</b> .....	1
3.2	<b>Policy Statement</b> .....	2
3.3	<b>Governing Principles</b> .....	2
3.4	<b>Obligations on the University</b> .....	2
4	<b>PROCEDURES FOR DETERMINING THE NATURE OF THE RELATIONSHIP</b> ....	4
4.1	<b>Determining the need for a service</b> .....	4
4.2	<b>Establishing employment status</b> .....	4
4.3	<b>Preparing the employment contract or contract for services</b> .....	5
4.4	<b>Processing the acceptance of offer</b> .....	5
5	<b>GRIEVANCES</b> .....	5
6	<b>REVIEW</b> .....	5
7	<b>FURTHER ASSISTANCE</b> .....	6
	<b>Attachment 1</b> .....	7
	<b>GUIDELINES FOR DETERMINING THE NATURE OF THE RELATIONSHIP</b> .....	7
	<b>Attachment 2</b> .....	9
	<b>INSTRUCTIONS FOR COMPLETING THE CHECKLIST</b> .....	9
	<b>Attachment 3</b> .....	11
	<b>CHECKLIST</b> .....	11

## 1 BACKGROUND AND OVERVIEW

The University regularly engages people and companies to provide a range of services on a temporary basis. In some circumstances, there may be some confusion as to whether the arrangement should be one of employer/employee or whether the person(s) may be engaged as an independent contractor(s).

The University has legislative compliance obligations prescribed under income tax, payroll tax, workers' compensation and superannuation legislation. The Australian Taxation Office and the respective Offices of State Revenue place the responsibility on the University to correctly process payments to 'employees' and 'consultants' and to remit the correct amount of Pay As You Go ("PAYG") withholding tax and payroll tax, as well as meeting superannuation, fringe benefits tax ("FBT") and worker compensation obligations.

Income tax and payroll tax legislation both provide broad definitions of 'salary and wages' and who is deemed to be an 'employee'. It is acknowledged that categorising the nature of contractual relationships can be complex. In general, remuneration for service can be subject to PAYG withholding (that is, the deduction of income tax at source), for Australian resident taxpayers. In many cases, external consultants are **deemed** to be employees and will be subject to PAYG withholding. This is especially true where external consultants operate under their own name and are not in a position to indemnify the University in circumstances of professional liability, workers compensation and public liability. **Of itself, an Australian Business Number (ABN) is not sufficient to determine independent contractor status.**

## 2 POLICY PURPOSE

The purpose of this policy is to outline the process to be followed in determining the nature of engagement, and the subsequent relationship between the University and external consultants (i.e. individuals, independent contractors, and/or service entities, such as a company or trust.)

The policy is designed to assist in determining the nature of a proposed engagement and whether subsequent payments made to external 'consultants' should be paid as employees through the University's payroll system, or whether they can be paid through accounts payable under normal purchasing processes, as independent contractors. Proper determination will ensure correct legal compliance.

The policy has been developed to ensure that the University meets its Federal and State legislative obligations so as to limit its exposure to penalties for misrepresentation, breach or non-compliance.

## 3 POLICY PROVISIONS

### 3.1 Definitions

**"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 a right of control over the employee's manner of doing the work, it is an employment contract, rather than one for services.

**"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.

**"Contract for Services"**: 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. Also known as a 'contract by performance'.

**"Deemed Employee":** means a person who the University contracts wholly or principally for the supply of their labour and who is unable to delegate responsibility to another person for the completion of the contract. Labour includes intellectual and artistic effort as well as physical effort.

**"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, the agreed payment becoming payable when the contractual conditions have been fulfilled. In principle, an independent contractor may decide how to perform a task, although in practice, the extent of control exercised by the party for whom work is being done may be substantial.

### **3.2 Policy Statement**

The employment status of external consultants, will be determined, for the purposes of taxation, upon the completion of the Checklist which is found in Attachment 3 to this policy document.

The determination of employee or contractor status for taxation purposes will be made at the time of appointment by the delegated officer authorised to approve staff appointments in accordance with University Delegations (Staffing and/or Finance) as approved by Senate.

### **3.3 Governing Principles**

The University must ensure that the actions and decisions of individual organisational units do not breach its obligations under the relevant Federal and State legislation. Wherever possible the University will engage individuals as employees to ensure they are adequately covered for workers' compensation purposes.

Persons performing functions such as teaching, research, administration and other classes of work similar to those performed by existing University staff will be treated by the University as employees for the purpose of income tax, Superannuation Guarantee Charge (SGC), FBT, payroll tax and workers compensation.

The onus is on any individual or service entity who considers that they are exempt from a particular categorisation made by the University to present evidence of their exemption from the requirements in relation to PAYG withholding and SGC contributions to the University's satisfaction.

### **3.4 Obligations on the University**

The nature of the relationship, be it one of employee or contractor/consultant, gives rise to certain taxation and other related obligations.

Obligations may arise in respect of the following:

- Pay-As-You-Go withholding ("PAYG withholding") under the *Taxation Administration Act 1953*
- Superannuation Guarantee (SG) contributions under the *Superannuation Guarantee (Administration) Act 1992*
- FBT under the *Fringes Benefits Assessment Act 1986*
- Payroll tax on "wages" paid to employees and certain "contractors" under the relevant State and Territory legislation.
- Workers' Compensation entitlements under the relevant State and Territory legislation.

### 3.4.1 PAYG

PAYG withholding obligations will apply to the University in respect of various payments it makes. PAYG withholding is required (but is not limited to) the following payments:

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

It should be noted that “employee” under the PAYG system means an employee at common law.

The University in making such payments is required to withhold an amount from the payment it makes and remit that amount to the Australian Tax Office. Therefore, it is essential that the nature of the relationship, discussed in the context of this policy, is established and determined at the time of employment or engagement.

To make this determination, the attached guidelines and checklist (contained in Attachments 2 & 3) have been developed to help establish the common law status of the individual who is being employed or engaged. Also attached, in Attachment 1, is further discussion on the common law concept of employee and contractor.

Where a payment is made to an entity, such as a company, trust or partnership (rather than an individual) there should be no PAYG withholding requirement provided the entity supplies the University with an ABN and documentary evidence of incorporation, establishment of trust or registration of partnership.

Please follow the instructions as set out in Attachment 2 when completing the checklist.

### 3.4.2 Payroll Tax

Payroll tax is calculated on wages paid by an employer to its employees and is charged by all Australian States and Territories. The definition of wages is very broad and includes wages, salary, allowances, commissions, etc paid to employees but also payments made to certain independent contractors. The NSW legislation deems contractors to be employees where a “relevant contract” exists.

A relevant contract is one where 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 refer to a contract of service or a contract which provides services which meet a limited range of exemptions contained in the payroll tax law.

The exemptions from payroll tax include the following situations:

- Where services supplied are ancillary to the supply of goods under the contract;
- Where services supplied are not ordinarily required by the University and are provided by a person who ordinarily provides those services to the public generally;
- Where the services are ordinarily required for less than 180 calendar days in a financial year;
- Where the services are provided by one contractor for 90 working days or less in a financial year;
- Where the payments under the contract are above \$800,000 a year;
- Where the incorporated entity employs two or more persons to perform the work under the contract; and
- Where the Commissioner in the particular state is satisfied that the contractor ordinarily renders services of the type under the contract to the public generally.

Because the definition of “relevant contract” is wide, nominated supervisors will be required to complete Section D to determine if payroll tax is payable on any payment made to contractors.

### **3.4.3 Workers Compensation**

The University is liable to pay Workers’ Compensation premiums on payments made for essentially labour only services provided to the University under a contract for services.

Workers Compensation premiums are calculated on rateable remuneration. This includes: contract payments for essentially labour only services and payment to contractors who are or who supply deemed workers, including contractors who are companies.

### **3.4.4 Superannuation Guarantee Levy**

The University is required, under the *Superannuation Guarantee (Administration) Act 1992* (“the superannuation guarantee legislation”), to contribute towards the superannuation of some contractors.

Under the superannuation guarantee legislation, an employee includes a person engaged under a contract that is wholly or principally for labour. This means that a contractor (the party to the contract) can be considered to be an employee under the superannuation guarantee legislation. 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.

The superannuation guarantee legislation does not apply when a contract is made with someone other than the person who will provide labour. For example, there is no obligation under the superannuation guarantee legislation if the contract is with a company or partnership.’ Furthermore, if the contract stipulates that the individual is to be paid to produce a result (eg. a lump sum payment following completion of the contracted service.), no SGC is payable. A payment of less than \$450 is also exempt.

## **4 PROCEDURES FOR DETERMINING THE NATURE OF THE RELATIONSHIP**

The procedures outlined below should be applied by nominated supervisors to clarify, validate and justify an employment status decision. Note: the normal appropriate University appointment or tender processes should be followed in conjunction with these procedures.

### **4.1 Determining the need for a service**

A decision is made by the delegated officer to employ or engage the services of an individual or service entity.

### **4.2 Establishing employment status**

The process to determine whether an individual must be engaged as an employee or a contractor is set out in [Attachments 1 to 3](#).

**Attachment 1** sets out a discussion of the concept of common law employee. You should read this attachment as a background to completing the checklist contained in [Attachment 3](#).

You should keep in mind that the obligations in respect of the various taxes and payments may, however, extend beyond common law employees to also include contractors in some situations. This extended concept of employee is explained further in the body of this policy document for each relevant obligation.

**Attachment 2** sets out the steps that you need to follow and provides guidance on how to complete the checklist contained in [Attachment 3](#).

**Attachment 3** contains the checklist. The individual, appropriate representative of the service entity or delegated officer is required to accurately complete the checklist.

The Manager/Head of School establishes the status using the checklist and forwards the completed checklist and other relevant documentation to the Director/Executive Dean for approval of an offer of employment or the engagement of a contractor.

If the recommendation is approved, the delegated officer returns the documentation to the Manager/Head of School for processing. If the recommendation is not approved, the delegated officer discusses the matter with the Manager/Head of School.

#### **4.3 Preparing the employment contract or contract for services**

For **deemed academic employees**, Human Resources forwards the authorised offer of employment to the employee, in line with established processes for employing regular and sessional academic staff.

For **deemed general staff employees**, on receipt of the approved documentation from the supervisor, Human Resources authorises and forwards an offer of employment to the employee in line with established processes for employing general staff.

For **independent contractors**, the Manager/Head of School submits a letter of engagement and contract for services to the Director/Executive Dean for authorisation. The Director/Executive Dean then forwards the signed and authorised contract for services to the contractor.

It is the responsibility of the Manager/Head of School to retain copies of the authorised checklist and offer/engagement documentation on file.

#### **4.4 Processing the acceptance of offer**

For deemed employees payment for hours worked will be processed when the following documentation has been completed and submitted to Human Resources:

- a signed casual general staff or academic staff offer of employment
- a copy of the checklist authorised by the Director/Executive Dean
- a General Staff time payment record signed by the delegated officer

For independent contractors:

- the contractor submits invoices for services as agreed in the contract for services
- invoices are authorised by the delegated officer for payment
- a copy of the authorised Contractor checklist is submitted with contractor's first invoice for payment
- all authorised invoices are submitted to Accounts Payable and processed through the general ledger for payment in accordance with University procedures.

### **5 GRIEVANCES**

Any grievance arising from the application of this policy shall be referred to the relevant Executive Planning Group member, and will be managed in accordance with the University's Grievance Management Policy.

### **6 REVIEW**

The University will develop a process for reviewing the effectiveness of this policy. Where applicable, the review will take account of necessary changes to other relevant University policies and procedures. Suggestions for improvements to the policy may be forwarded to the Director, Human Resources, or to the Director of Finance.

## **7 FURTHER ASSISTANCE**

Assistance regarding this policy may be obtained from the relevant Human Resources Consultant (for employment issues) or the Finance office (for contractor payment issues).

## GUIDELINES FOR DETERMINING THE NATURE OF THE RELATIONSHIP

### Assessing the nature of the relationship

The relationship between an employer and an employee is a contractual one. It is referred to as a **contract of service**. This is contrasted with the independent contractor/consultant/principal relationship, which is a **contract for services**. The difference is essentially that 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.

Generally, an employee of an organisation bears little **exposure to risk** of the costs or commercial losses. An employee is not likely to expend gross income or contribute assets in deriving the income. In examining the risk to determine the independence of the contract, the higher degree to which a person is exposed to a commercial loss, the more likely they are to be regarded as an independent contractor.

The general rules, which have been developed in law, for determining when a worker is an employee or independent contractor/consultant, are fairly easy to state. However, the application of these rules to a factual situation can sometimes prove difficult. It is only with a detailed examination of the facts relating to each engagement that the relationship can be adequately determined. Examination of the conditions applicable to the engagement can assist in establishing the nature of the relationship. Generally, the following factors can be used as indicators in determining each case:

- Who has the right to exercise overall control of the manner of performing the task?
- Has a company or individual been hired to perform the task? If the worker is unavailable (i.e. through illness), is a replacement provided? If so, who provides this?
- What is the nature of the task and the unique degree of skill required? What level of freedom of action and degree of autonomy is given?
- Who has the authority to hire or fire, and is there a right to suspend or dismiss the person engaged?
- Has the individual the right to delegate the function? Can the person himself or herself employ others to perform the work?
- What is the basis and manner of payment?
- (Although this is a circular question) Is income tax withheld by the payer?
- Who provides materials, consumables and equipment?
- Are there regular or defined hours of work or is there an explicit timetable?
- Is there a regular place of work provided at the employer's premises?
- What is the expressed intention of the parties in the way the contract is worded?
- Who bears the risks and exposure?
- Was a position of 'employee' advertised or was there a tender for the provision of a service?
- What was the original basis of the engagement?

While the various features have been identified, and acknowledged by the courts, as indicators of the nature of the relationship – individual features are only a guide. It is necessary in each case to examine all the terms of the arrangement to determine whether, on balance, the relationship is that of an employee or an independent contractor.

### **Factors in determining an employee or a contractor relationship**

The following factors will assist in qualifying a relationship.

<b>Indicative Criteria</b>		<b>Employee</b>	<b>Contractor</b>
1	Is the work performed on a continuing basis and at the direction of the University?	Y	N
2	Is the work performed at the University's premises?	Y	N
3	Are the required equipment and materials provided by the University?	Y	N
4	Are office space, telephone, power and other facilities provided by the University?	Y	N
5	Is control exercised by the University over the manner in which the work is to be performed?	Y	N
6	Can unlimited delegation take place?	N	Y
7	Is the University responsible for scheduling the work?	Y	N
8	Is payment based on, or fixed by the time actually worked? (Hourly, daily or piece rates)	Y	N
9	Is the work an integral part of the operation of the University, or ancillary to it?	Y	N
10	Are invoices to be submitted by the person performing the work?	N	Y
11	Does the University have responsibility for losses occasioned by poor workmanship or negligence?	Y	N
12	Is cover required for workers' compensation?	Y	N
13	Has the person the opportunity to profit or lose from sound or unsound management in the performance of the work?	N	Y
14	Is the substance of the contract to achieve a specified result?	N	Y
15	Is the service provided by an individual who normally carries on a business or professional practice rendering similar services to the public?	N	Y

## INSTRUCTIONS FOR COMPLETING THE CHECKLIST

Please complete the questions contained in the checklist below. Once you have completed the checklist, it must be authorised by the delegated officer (Director/Dean).

### Step 1

Please complete Section A to determine whether the individual is a common law employee.

While no one factor alone will determine the status of an individual as a common law employee or contractor, in the event you have ticked more “**yes**” than “**no**” boxes it is likely this indicates that the individual is an **EMPLOYEE**. You should refer to this guide for further discussion. Payment for the provision of services in this relationship will be paid through the **PAYROLL** into a nominated bank account. As an employee the individual will be subject to the deduction of **PAYG tax withholding** following normal employment processes.

You do not need to proceed further in the checklist as the following obligations/payments will apply:

- Superannuation Guarantee Charge (SGC);
- Fringe Benefits Tax (FBT);
- Workers’ compensation; and
- Payroll tax.

If you have ticked more “**no**” boxes, the individual may meet the definition of independent contractor for tax purposes. You will however need to complete Sections B to E to consider further obligations that may arise.

Go to Step 2.

### Step 2

#### **Complete Section B**

If you answered “**yes**” to Question 11 and Question 11A, there should be no PAYG withholding, FBT or SGC implications for the University and the individual may be engaged as a contractor subject to approval by the delegated officer. The contractor must provide an Australian Business Number (“ABN”). Any payments for services in this relationship will be paid through **ACCOUNTS PAYABLE** in the **FINANCE DEPARTMENT**.

Now go **Step 4** to determine whether a payroll tax liability exists.

If you answered “**no**” to Question 11 or Question 11A, you need to **refer** to the guide contained in Attachment 1.

To engage the individual as a contractor you will need to obtain approval from the relevant senior officer in the line who has the financial delegation to approve the contract.

You must now go to Step 3 and complete Section C to determine whether the University has any obligations to SGC contributions.

### Step 3

#### **Complete Section C.**

If you answered “**yes**” to any of the questions, Question 12, 12A, 12B or 12C no employer SGC contributions are payable on behalf of the individual. However, if you answered “**no**” to

each of the questions Question 12, 12A, 12B and 12C, the University will be required to make contributions on behalf of the individual.

If SGC contributions are payable, the person engaging the contractor needs to ensure that details of the individuals' superannuation fund are forwarded to Finance. Unless an individual nominates an alternative Fund, UniSuper will be the default Fund. (The Choice of Superannuation Fund Form is obtainable from the UniSuper Web site <http://www.unisuper.com.au/resources/forms.cfm>). If an individual nominates an alternative Fund, similar details to that required for UniSuper will need to be provided.

If superannuation is payable, the person engaging the contractor should consider doing so on a gross basis. This means that the contractor would be advised that the contract fee of say \$1,000 per week would mean that the contractor would receive a payment of \$917.43 and the University would make a contribution of \$82.57 (9% of \$917.43) to a superannuation fund.

Go to Step 4.

#### **Step 4**

##### **Complete Section D**

If the answer to Question 13 is “no”, the contract will not be a contract for service and will not be subject to payroll tax.

If the answer to Question 13 is “yes”, the contract will be a contract for service. Payments under the contract will be subject to payroll tax UNLESS an exemption applies to the contract. Now complete Questions 14 to 19.

The questions set out in Questions 14 to 19 relate to the exemptions. If the answer to any one of those questions is “yes”, then the contract for service is exempt and payments under the contract will not be subject to payroll tax.

Go to Step 5.

#### **Step 5**

##### **Complete Section E**

If the answer to Question 20 is “yes,” the individual will be a deemed worker for the purposes of workers compensation.

Checklist completed by: ..... Date ...../...../.....  
(signature Manager/Head of School)

Print name.....

Employment of staff member     Engagement of Contractor (tick one only)

Approved by: ..... Date ...../...../.....  
(signature Director/Executive Dean)

Print name.....

**CHECKLIST**

Please complete the questions contained in the checklist below. Once you have completed the checklist, it must be authorised by the delegated officer (Director/Executive Dean).

**Section A**

1.	Does the University exercise control of (or have the right to control) the manner in which work is performed, and where and when it is done?	Yes <input type="checkbox"/> No <input type="checkbox"/>
2.	Is the contractor engaged to provide ongoing services (vis-à-vis being engaged to perform a specific task for an agreed amount of money)?	Yes <input type="checkbox"/> No <input type="checkbox"/>
3.	Does the individual have their own insurance cover for workers compensation, public liability, professional indemnity and personal sickness and accident?	Yes <input type="checkbox"/> No <input type="checkbox"/>
4.	Is the individual obliged to personally carry out the work, and not able to delegate the performance of the work to anyone else?	Yes <input type="checkbox"/> No <input type="checkbox"/>
5.	Will the individual be paid and/or afforded conditions similar to an employee in accordance with award and/or agreement conditions?	Yes <input type="checkbox"/> No <input type="checkbox"/>
6.	Will the University bear responsibility and financial liability for any negligence or substandard work during the individual's engagement with the University (vis-à-vis the individual bearing the risk themselves)?	Yes <input type="checkbox"/> No <input type="checkbox"/>
7.	Will the University provide the individual with relevant tools, equipment, office/work space and accessories to allow the individual to carry out the work?	Yes <input type="checkbox"/> No <input type="checkbox"/>
8.	Will the University expect to have exclusive right to the labour services of the individual during the hours committed to the University's contract?	Yes <input type="checkbox"/> No <input type="checkbox"/>
9.	Will the calculation and payment of the labour services to the individual generally be paid on: a time basis; a fixed salary; or wages paid at regular intervals?	Yes <input type="checkbox"/> No <input type="checkbox"/>
10.	Will the individual be performing tasks that could be performed by a University employee?	Yes <input type="checkbox"/> No <input type="checkbox"/>

**Section B**

11	Will the University be entering into a contract with an entity such as a company, partnership or trust (vis-a-vis entering into a contract with an individual)?	Yes <input type="checkbox"/> No <input type="checkbox"/>
11A.	Have you sighted or taken a copy of the company's Certificate of Incorporation, the partnership agreement or trust deed?	Yes <input type="checkbox"/> No <input type="checkbox"/>

If you answered “**yes**” to Question 11 and 11A, you do not need to complete Section C, please **go to Section D**.

If you answered “**no**” to Question 11 or Question 11A, you need to **complete the questions contained in Section C** of this checklist.

You must now **complete Section C.**

**Section C**

12.	Is less than 50% of the value of the contract for the person's labour?	Yes <input type="checkbox"/> No <input type="checkbox"/>
12A.	Is the individual paid to produce a result? (eg. A lump sum payment following completion of the contracted service.)	Yes <input type="checkbox"/> No <input type="checkbox"/>
12B.	Is the individual contracted to receive a payment of less than \$450?	Yes <input type="checkbox"/> No <input type="checkbox"/>
12C.	Is the individual able to delegate the contractual work to another individual?	Yes <input type="checkbox"/> No <input type="checkbox"/>

You must now **complete Section D.**

**Section D**

13.	Is the individual or entity being contracted principally to provide labour? That is, are they engaged under a contract for service?	Yes <input type="checkbox"/> No <input type="checkbox"/>
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If the answer to Question 13 is "**yes**", please complete Questions 14 to 19 below.

14.	Is the supply of services by the person merely ancillary to the supply of goods by that person?	Yes <input type="checkbox"/> No <input type="checkbox"/>
15.	Are the services of a kind that are ordinarily required by the University for less than 180 days in the financial year (by the individual AND any other employee/contractors performing similar services)?  For example, if the University contracted with an air-conditioning mechanic for 5 months to fix the air-conditioning, that contract would be exempt.	Yes <input type="checkbox"/> No <input type="checkbox"/>
16.	Are the services provided to the University by the contractor on no more than 90 days in aggregate in the financial year?	Yes <input type="checkbox"/> No <input type="checkbox"/>
17.	Is the payment made under the contract of an amount of \$800,000 or more per annum?	Yes <input type="checkbox"/> No <input type="checkbox"/>
18.	Are the services rendered by a person who ordinarily renders services of that kind to the public generally?	Yes <input type="checkbox"/> No <input type="checkbox"/>
19.	Are the services provided by the contracting entity performed by 2 or more persons?	Yes <input type="checkbox"/> No <input type="checkbox"/>

**Section E**

20.	Does the provision of labour by the individual to the University represent a significant proportion of the individual's work (ie a major part of the individual's total work) and not merely incidental (that is, a small part of the individual's total work)?	Yes <input type="checkbox"/> No <input type="checkbox"/>
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