5.8 ENGAGING CONTRACTORS VERSUS EMPLOYEES

INTRODUCTION
The University engages a variety of workers to perform services and tasks including administration, teaching, research and trade related activities etc. These workers are engaged in a variety of modes ranging from full-time work, to casual work on a "needs" basis to being engaged to complete a specific project over a defined period. In each case, UTS takes reasonable steps to ensure that it establishes the correct legal relationship with the workers it engages. This guide is intended to assist in deciding whether a worker should be engaged as an employee or as a contractor. That decision will then determine the documentation that is required.

Whether a worker is categorised as an employee or contractor, the University will have legal obligations which may include superannuation, workers' compensation insurance, payroll tax and industrial, equal opportunity and occupational health and safety legislation. Identifying and then ensuring these obligations are met is the responsibility of UTS.

The Income Tax Assessment Act provides that it is an offence for an employer to fail to make income tax deductions from the salary or wages paid by an employer to an employee. Australian taxation and superannuation legislation also defines which contractors will also be considered as 'employees' for superannuation, PAYG and payroll tax.

It is necessary for UTS to correctly determine whether payments should be made to an 'employee' through a contract of service or to a 'contractor' for the provision of specified services. In many situations the circumstances may not be clear and often a balance of a number of factors will determine whether the worker is to be engaged as an employee or contractor. Incorrectly engaging a worker leaves UTS vulnerable to prosecution and fines by the ATO. Ultimately, it is the right of UTS to make an offer of work to an individual, specifying the nature of the working relationship. It is then up to the worker to accept or decline the offer.

CRITERIA
When considering whether to engage a worker as a contractor or employee a number of questions are relevant.

Is it an employer and employee relationship?
Who controls how, where, when and who is to carry out the work? Is the individual that performs work substantially subject to the control and direction of the person for whom the work is done? An independent contractor performs work but is not subject to the order and control of the person for whom the work is carried out.

Is the worker integrated into the organisation or business?
Is the worker performing services as part of a business on his/her own account or is the work part of the organisation to which the service is being supplied?
The following questions should be asked before deciding whether to engage a worker as an employee or contractor:

- Does UTS have the ultimate right of control to direct how work is done by the worker?
- Is UTS the sole procurer of the worker’s services?
- Does the worker use tools and equipment owned by UTS?
- Are the hours of work set or flexible only within set guidelines?
- Does the worker only take leave or rearrange hours of work when she/he has UTS permission?
- Is remuneration paid periodically rather than upon job completion?
- Are payments contemplated for overtime, public holidays, sickness etc?
- Does the basis of dismissal correspond with that of an employment contract?
- Does the worker need consent to delegate the work?
- Is the worker forbidden to engage his/her own employees to do the work she/he is performing for UTS?
- Was the initial intent to have an employer/employee relationship?

As a guide, answering **YES** to several of these questions would generally indicate that the worker is an employee.

**Does the law deem the worker to be an employee?**

UTS will have to pay employer superannuation contributions if it;

- engages an individual as a sole trader (not through a company, Pty Ltd ), and
- pays the individual more than $450 a month, and
- the individual is aged between 18 and 69 years, and
- the contract is wholly or principally for labour.

This is the case even if the contractor quotes an Australian business number (ABN).

Such contractors are considered to be UTS employees for **Superannuation Guarantee** purposes. Generally, a contract is considered to be principally for labour if more than half of the value of the contract is for the person’s labour, which may include: physical labour, mental effort, or artistic effort.

In addition, in some cases, a worker who appears to be a contractor will be deemed at law to be an employee for PAYG, payroll and/or workers compensation purposes. In such cases, UTS will be liable for the associated payments. These additional costs will be borne by the faculty or administrative centre entering into the contract.

UTS’ decision to employ a worker as a contractor for any work other than as a trade contractor must be supported by the **Contractor versus Employee Decision Tool** at [http://www.fsu.uts.edu.au/tax/index.html](http://www.fsu.uts.edu.au/tax/index.html).

**ENGAGING CASUAL TEACHERS**

Casual teaching is a typical issue where the employee versus contractor issue has arisen at UTS. In most cases, casual academics will be regarded as employees and income tax instalments must be deducted. In addition, as employees these professionals are entitled to award salaries and conditions, non-contributory superannuation payments and are covered by legislation pertaining to employees such as equal employment and occupational health and safety legislation.

In **rare circumstances** it is possible that casual lecturing may be provided by professionals who can legitimately be regarded as contractors, with payment being made upon the presentation of invoices and no income tax deducted. These workers would be employed by businesses whose primary activity is to provide educational services and who advertise and provide these educational services to other
organisations. These businesses often provide a range of educational services to UTS including casual teaching, curriculum development, workshops, conferences, educational databases etc. In some cases, these companies employ several workers who will perform the work in question at UTS. The businesses would also use their own office facilities and ensure that their employees were appropriately covered by workers’ compensation insurance and any necessary professional indemnity insurance, that they were meeting any payroll tax, superannuation and training responsibilities and were observing any relevant industrial awards and legislation.

**ROLES AND RESPONSIBILITIES**

**Documentation**

To ensure that the correct relationship is established between UTS and its workers, faculties and administrative areas engaging contractors will be responsible for completing the appropriate documentation. A flowchart outlining the process for engaging a contractor is available at [http://www.hru.uts.edu.au/docs/recruitment/Engage_cont.pdf](http://www.hru.uts.edu.au/docs/recruitment/Engage_cont.pdf)

Once it has been decided that a contractor will be engaged the following steps must be completed.

1. Complete and save a copy of the outcome of the [Contractor versus Employee Decision Tool](http://www.fsu.uts.edu.au/tax/index.html). This must be completed before a contractor is engaged for any purpose (other than as trade contractor). FSU who will determine any liability for payroll, PAYG tax or superannuation according to ATO guidelines.

2. A written contract that outlines the responsibilities of both parties must be signed by an authorised staff member with delegated financial authority. See Delegations at [http://www.gsu.uts.edu.au/delegations/index.html](http://www.gsu.uts.edu.au/delegations/index.html) This is essential if a worker is engaged as a contractor.

**Entering into a Contract**

If the worker is deemed to be a contractor, then a contract must be signed between UTS and the contractor prior to any work being undertaken. It is important that the conditions under which a contractor is engaged are not identical to those of UTS employees and the contract should distinguish the differences.

To determine the type of contactor entity you are engaging you can search the Australian Business Number register, ABN Lookup at [www.abr.gov.au](http://www.abr.gov.au). Confirm whether the contractor is registered as an individual sole trader or company.

UTS Legal provides contract templates for both companies and individual sole traders that ensure all details of the contractor’s and the University’s responsibilities are outlined. UTS Legal can also help to review, negotiate or draft contracts. If the contractor provides their own contract, that document should be reviewed by UTS Legal before it is signed.

Obtain evidence that the contractor has;

- “right to work” in Australia for the period of any contract,
- a certificate of currency from the contractor’s insurer, and
- a subcontractor’s statement in respect of workers’ compensation, payroll tax and remuneration in line with requirements under the Workers Compensation Act (NSW) or
- personal accident and illness insurance or income protection insurance if the contractor is a sole trader.

Send a copy of the outcome of the [Contractor vs Employee Decision Tool](http://www.fsu.uts.edu.au/tax/index.html), along with the signed contract and all other documentation and invoices to Financial Services Unit.
RELATED UTS AND OTHER RELEVANT DOCUMENTATION

Engaging a contractor or consultant – HRU website  

Engaging a contractor – process flowchart  

The Contractor versus Employee Decision Tool  

UTS Procurement Policy and Directives  
http://www.gsu.uts.edu.au/policies/procurement.html


WHERE TO GET HELP

If you are unsure as to whether a worker should be engaged as an employee or contractor, advice should be sought from FSU or HRU before any work commences or a contract is signed.

CONTACTS

FSU - Tax liabilities - email tax@uts.edu.au

FSU Contacts  
http://www.fsu.uts.edu.au/insurance/contacts/

UTS Legal – Contracts  

HRU  
http://www.hru.uts.edu.au/services/services.html

APPROVALS

| EFFECTIVE DATE | 1 Nov 2010 |
| REVIEW DATE | 1 Nov 2015 |
| ACCOUNTABLE OFFICER | Director, Human Resources Unit |
| CURRENT INCUMBENT | Jennifer Gilmore |
| IMPLEMENTATION OFFICER | Workplace Relations & Policy Specialist, HRU |
| CURRENT INCUMBENT | Virginia Thomas |
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REVISION/MODIFICATION HISTORY

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<th>Current title</th>
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<td>23/12/95</td>
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<td>5.8 Employees vs Contractors guidelines</td>
<td>Administrative update</td>
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<td>18/11/10</td>
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<td>5.8 Engaging Contractors vs Employees</td>
<td>Merged 5.8 and 5.9 How UTS pays and engages external providers. Updated to align with legislative requirements and new process.</td>
<td>Approved 1/11/2010</td>
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