
Glossary

The following abbreviations and acronyms are used throughout these explanatory materials.

<i>Abbreviation</i>	<i>Definition</i>
Australian Business Number	ABN
Commissioner of Taxation	Commissioner
<i>Income Tax Assessment Act 1997</i>	ITAA 1997
Pay-As-You-Go	PAYG

Chapter 1

Non-compliant payments

Outline of chapter

1.1 Schedule # to the Exposure Draft removes the ability of taxpayers to deduct certain payments if the associated withholding obligations have not been complied with. This will provide a greater incentive for employers and entities engaging contractors to comply with their withholding obligations.

Context of amendments

1.2 Under the Pay-As-You-Go (PAYG) Withholding system, employers must withhold an amount from certain payments for work and services (Subdivision 12-B in Schedule 1 to the *Taxation Administration Act 1953*). This includes payments for employees' wages (section 12-35), payments to directors (section 12-40), payments made to religious practitioners (section 12-47) and payments made by labour hire firms (section 12-60).

1.3 An entity must withhold an amount from a payment it makes to another entity for a supply where the payee has not quoted its Australian Business Number (ABN) (section 12-190, the 'no ABN withholding rule').

1.4 Under section 14-5, an entity must pay an amount to the Commissioner of Taxation (the Commissioner) if it provides a non-cash benefit that — had the benefit been paid as cash — would have been subject to withholding. This does not impose a withholding obligation as such, although the provider of the benefit may seek to recover the equivalent amount as a debt (section 14-15).

1.5 Entities must pay withheld amounts and amounts relating to non-cash benefits to the Commissioner (section 16-70). Noncompliance is a strict liability offence subject to a penalty of up to 10 penalty units or administrative penalties equal to the value of the withholding amount (sections 16-25 and 16-30).

1.6 An entity that must pay an amount to the Commissioner (including a nil amount) must also notify the Commissioner (section 16-150). In addition, from 1 July 2018 some withholding payments made by 'substantial employers' must be reported under the Single Touch Payroll system that is reflected in Division 389. Section 389-5 mandates same-day reporting for wages, director fees and payments to religious practitioners. That section does not apply to

payments under labour hire arrangements but those payments may be reported voluntarily under section 389-15.

1.7 Making a report under section 389-5 or 389-15 relieves the employer of the obligation to report under section 16-150 (section 389-20). The transition to Single Touch Payroll began on 1 July 2018 for employers with 20 or more employees, and for smaller employers will begin from 1 July 2019.

1.8 Businesses are generally entitled to claim a general deduction in relation to payments to employees and suppliers (section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997)).

Summary of new law

1.9 To encourage voluntary compliance with these withholding obligations, deductions will be denied for the payments to which the withholding obligations relate if the obligations to withhold and to notify the Commissioner are not complied with at all.

1.10 This implements recommendation 7.5 of the Black Economy Taskforce Final Report.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The deduction (if any) will not be available if the entity making the payment has failed to comply with its obligations in relation to the payment to withhold and to notify the Commissioner.	An employer is generally entitled to a deduction for the payment of salary and wages.
	A company may deduct directors' fees paid to directors.
	An entity may be able to deduct a payment to a religious practitioner in certain circumstances.
	A labour hire business may deduct payments it makes to individuals employed through its labour hire agreements.
	An entity may be able to deduct an amount it pays to another entity for a supply it receives from the other entity.

Detailed explanation of new law

- 1.11 A deduction is not allowed in relation to a payment:
- of salary, wages, commissions, bonuses or allowances to an employee;
 - of directors' fees;
 - to a religious practitioner;
 - under a labour hire arrangement; or
 - for a supply of services — excluding supplies of goods and supplies of real property — where the payee has not quoted its ABN

if the PAYG Withholding regime applied to the payment, and the payer did not withhold the amount from the payment as required or did not notify the Commissioner when required under section 16-150 (or section 389-5). *[Schedule #, item 1, subsection 26-105(1) of the ITAA 1997]*

1.12 This amendment is intended to create a financial disincentive to businesses making payments to those operating in the black economy by disallowing deductions that would normally be available. The disincentive created by denying the deduction will complement existing penalties for failures to withhold amounts under the PAYG system.

1.13 The deduction is only denied where no amount has been withheld at all or no notification is made to the Commissioner. Withholding an incorrect amount will not affect the entitlement to a deduction. Similarly, notifying an incorrect amount will not affect the entitlement to a deduction. *[Schedule #, item 1, paragraph 26-105(1)(b) of the ITAA 1997]*

1.14 Provided an amount is withheld and a notification is made, there is an opportunity to correct any remaining contraventions in respect of the amount or the payment of the amount. Total failures to withhold represent the most significant risk to government revenue and are targeted by this amendment.

1.15 A deduction is also denied in relation to a non-cash benefit provided in lieu of a cash payment referred to in paragraph 1.11. *[Schedule #, item 1, subsection 26-105(2) of the ITAA 1997]*

1.16 The amendments do not apply to an obligation to withhold a nil amount from a payment, or to report a nil amount. *[Schedule #, item 1, subsection 26-105(3) of the ITAA 1997]*

Exception where ABN quoted by employee

1.17 The Government recognises there are situations where an employer honestly believes their employees are acting as contractors —

and has complied with the no ABN withholding rule that would apply in that scenario — but this position is not upheld by the Commissioner. The amendments do not deny a deduction in such situations.

1.18 An employer that makes a payment to an employee they believe to be a contractor is not denied a deduction if, had the employer been correct in characterising the employee as a contractor, the employer would not have been required to withhold. The amendments mirror the relevant provisions of section 12-190 to determine if this is the case. [*Schedule #, item 1, subsections 26-105(4) and (5) of the ITAA 1997*]

Example 1.1 Incorrectly classified employee payments

Super Express Deliveries Pty Ltd carries on a business as a bicycle courier service. Super Express Deliveries has engaged around 30 bicycle couriers to enable it to fulfil orders from its customers.

Super Express Deliveries set the rates of remuneration of its bicycle couriers and there was no scope for negotiation of those rates. Requirements such as insurance and deductions from pay were imposed by Super Express Deliveries on the bicycle couriers without opportunity for negotiation.

Super Express Deliveries allocated orders to couriers with no scope for bidding for individual jobs by the riders.

Super Express Deliveries assumed all responsibility for the direction, training, discipline and attire of its bicycle couriers. Super Express Deliveries provided its bicycle couriers with numerous items of equipment that remained its property, although bicycle couriers were required to provide their own bicycles. The bicycle couriers were required to wear Super Express Deliveries uniforms when performing deliveries.

Super Express Deliveries seeks legal advice about the engagement of the bicycle couriers. The advice concluded the bicycle couriers were independent contractors and were not employees. It placed significant emphasis on the couriers' use of their own bicycles. To this end, Super Express Deliveries required each of its bicycle couriers to obtain an ABN and provide it to the company. Super Express Deliveries concluded that it did not have to withhold any amounts from the payments it made to couriers.

The Commissioner conducts an audit of Super Express Deliveries and decides that the bicycle couriers are employees of Super Express Deliveries. After considering the Commissioner's reasons and legal authorities, Super Express Deliveries does not dispute this conclusion and agrees to begin fulfilling its withholding obligations on this basis.

The deduction available to Super Express Deliveries for its previous payments to bicycle couriers is not affected by its failure to withhold.

Super Express Deliveries is still subject to penalties for its failure to withhold.

1.19 The deduction is also retained if the taxpayer has purported to withhold under section 12-190 when the payment was in fact made to an employee. The Commissioner can apply the amount withheld under the wrong provision as if it were withheld under the correct provision.

1.20 However, if the payer would have been subject to withholding under section 12-190 (for example because the employee did not quote an ABN), and the payer failed to withhold or notify, the deduction is in fact denied because of the failure to withhold or notify under the correct withholding provision: section 12-35.

Exception for voluntary notification

1.21 A deduction that would otherwise be denied under these amendments is restored (in the original income year) if the taxpayer voluntarily notifies the Commissioner of their mistake before the Commissioner commences an audit or other compliance activity. This encourages taxpayers to come forward and reduces the administrative burden on the Commissioner. *[Schedule #, item 1, subsections 26-105(6) and (7), and paragraph 26-105(8)(a) of the ITAA 1997]*

1.22 In addition, the Commissioner may publically request that entities make disclosures about particular matters before a particular date. To be a voluntary disclosure, the notification must be made prior to that date if the notification relates to the same matter as nominated in the Commissioner's statement. *[Schedule #, item 1, paragraph 26-105(8)(b) of the ITAA 1997]*

Example 1.2 Voluntary notification

Caleb carries on a business as a mechanic. Caleb does not have any employees until he hires an apprentice, Bianca, in May 2020.

Caleb is not aware that he must withhold an amount from Bianca's wages and pay it to the Commissioner.

Caleb visits his accountant in September 2020 to prepare his 2019-20 income tax return. He mentions his expenditure to pay Bianca's wages. Caleb's accountant advises Caleb he should have been withholding from the wage payments.

Caleb notifies the Commissioner of his mistake and enters into an arrangement to pay the Commissioner the penalties associated with his failure to withhold. However, he is entitled to claim the deduction for the cost of Bianca's wages in his 2019-20 income tax return.

Application provisions

1.23 The amendments commence on the first day of the quarter following Royal Assent. *[Section 2 of the Exposure Draft]*

1.24 The amendments apply to income years commencing on or after 1 July 2019. *[Schedule #, item 2]*