**RAs – common law employees or not?**

University Colleges Australia requested advice from Mr Peter McDonald, Tertiary Balance Pty Ltd, on whether Resident Assistants or equivalent (**RAs**) are common law employees (hereafter referred to as employees).

The background to this request is that in a survey of members on the subject of RAs undertaken by University Colleges Australia (**the Association**) undertaken from 2012 to 2013, 41.9 per cent of respondents answered *NO* when asked the question: *Do you regard your RAs as employees?*

The Association previously received written advice on this or a slightly broader issue, as it covered more than just the RAs, from the Sydney Office of law firm Clayton Utz on 23 November 1997 (Mr Joe Catanzariti and Ms Louise Clegg).

A fresh look at this issue is appropriate given:

* it has now been more than 16 years since the Clayton Utz advice was provided; and
* the percentage of respondents that do not regard their RAs as employees.

Since the Clayton Utz advice there have been some major changes in employment law and in the approach the Federal Commissioner of Taxation (**Commissioner**) takes when determining whether there is an employment relationship.

For convenience of Heads of Colleges (**Heads**) pages two to five of this letter provide a summary of the advice and for those that consider they may need to look more closely at their RA agreements the full advice is provided in the remainder of the letter.

Given the diversity of arrangements under which the 2,500 to 3,000 RAs within the sector are engaged by colleges there is no simple answer to the question of whether RAs are employees. The answer depends upon the facts of each case.

This advice is not legal advice and it is not a substitute for employment law or other professional advice in circumstances where a college remains uncertain as to whether its RAs are employees and what this means, or where a college has to deal with a sufficiently serious dispute with an RA that the matter might be heading to court or arbitration (which happens from time to time of course).

For the purposes of this advice RAs are taken to include residential advisors, residential assistants, resident mentors, senior residents with duties, senior resident students (**SRSs**) with duties, residential tutors, senior residential advisors or senior tutors in a university residential college or hall setting.

RAs are not taken to include senior staff in residence such as Heads, Deputy Heads, Deans, Chaplains or other Religious, Visiting Fellows, Proctors, Choir Masters or anything like that. Nor are they taken to include: (a) resident mentors who are students and who receive nil remuneration (whether monetary or otherwise) for their duties; or (b) members of the executive of the student residence club; or (c) tutors or other academic or pastoral support staff who are not in residence.

# **Summary of Advice**

In the course of preparing this advice RA agreements in many colleges have been reviewed. These agreements come in many forms, from simple informal half‐page statements of what is expected of and what benefits will be provided to the RAs, through to comprehensive contracts reviewed by a lawyer and that encompass an RA operations or duty manual which specifies in considerable detail the duties and code of conduct required.

Regardless of the level of formality in the agreement with the RAs it is generally the case throughout the sector that colleges depend greatly upon their RAs to achieve their pastoral and/or academic support objectives and for the orderly operation of the residences particularly after hours and often on weekends/holidays.

It is important colleges correctly classify their relationship with their RAs. If an RA is incorrectly classified as operating under an informal or domestic arrangement or as a subcontractor, rather than as an employee, then penalties and back taxes can apply. Furthermore the college could find itself in a position of not knowing what it is potentially liable for and what risks it is exposed to, in relation to the RAs and to others.

The agreements entered into with the RAs sometimes extend to more than just the duties, training, remuneration and tenure of the RAs and can cover various informal or ‘domestic’ matters as well as tenancy or occupancy or scholarship matters that are atypical of an employment relationship.

The relationship the RAs have with the college can be multi‐faceted. They can be a tenant or boarder or lodger of the college at the same time as they are an employee of the college. Similarly they can be in receipt of a scholarship or bursary at the same time as they are an employee.

Sometimes the multi‐faceted relationship between the RA and the college is all covered under a single written agreement. However it is not possible for the college to give the agreement a name (such as *RA Scholarship Agreement*) and to treat it as something other than an employment contract merely because the contract is not named as such and contains tenancy or occupancy or scholarship provisions as well as employment provisions.

Similarly it does not matter that a college may for example have a clause in its agreement with its RAs that expressly states the agreement is not an employment contract but is instead an informal arrangement not intended to create legal relations. The Commissioner or the courts can look past any clause to this effect and look to the underlying reality of the agreement notwithstanding that such a clause can in certain circumstances be used to overcome ambiguity as to the true nature of the relationship.

There is no single test to determine whether there is an employment relationship. It used to be that the extent to which there was a right to exercise control over the (purported) employee was the primary determinant of whether there was an employment relationship, but that is no longer the case.

Australian courts apply a multi‐factor test to determine whether there is an employment relationship. The leading Australian case on this test is the High Court case of *Hollis v Vabu Pty Ltd* [2001] HCA 44 (**Vabu case**) which amongst other things affirmed the correctness of the multi‐factor approach the court laid down earlier in *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1 (**Stevens case**). Application of the test is not mechanistic.

The Commissioner has issued guidance on the application of this test in Taxation Ruling 2005/16 (**TR 2005/16**) which replaced the earlier Taxation Ruling TR 2000/14.

Relevant factors within the multi‐factor test include but are not limited to:

* the way in which the entity exercises control over the individual’s work;
* the extent to which payment depends upon results;
* the extent of the individual’s powers to delegate;
* the amount of risk borne by the individual; and
* to what extent the individual provides their own tools and equipment and pays business expenses.

A factor that works against any conclusion that the relationship with the RA is anything other than an employment relationship is that the college often has the right (whether invoked or not) to exercise a relatively high degree of control over the RAs, such as requiring attendance during O‐week or at formal dinners.

Further, the Head invariably has the power to dismiss an RA for misconduct notwithstanding that some Heads to a degree hide behind an assertion that their power is in practice a more limited power of not offering the role to the RA in the following academic year if there are concerns about the behaviour or performance of the RA.

The RAs are paid or provided with remuneration to perform a number of varied duties rather than to achieve a specified result. The absence of a results based contract is suggestive of an employment relationship.

Other factors that suggest there is an employment relationship are that RAs are ordinarily required to report any expected absences (on their duty roster), they are not ordinarily permitted to delegate their duties to another person (absent consent of college) and they do not generally bear any commercial risk for the work performed.

RAs tend not to provide their own equipment and the duty RA contact cell phone or tutorial room equipment or other equipment used is invariably owned by the college – which is also suggestive of an employment relationship.

The submission of a Tax File Number form (**NAT 3092**) signed both by the college and by the RA is either an acknowledgment that there is an employment relationship or alternatively could lead to an inference the RAs are employees.

There have been at least five cases over the past 28 years where the Commissioner has considered the question of whether the RAs were employees. These were all private binding ruling (**PBR**) requests and accordingly the decisions in those cases may not be relied upon by other than the taxpayer that made the request in each case.

To my knowledge the most recent PBR request where the Commissioner ruled there was no employment relationship with the RAs was for University of Southern Queensland (**USQ**) and it was issued on 21 December 1999 – before the Vabu case and before TR 2005/15.

Previous to the 1999 USQ case the Commissioner ruled on 20 November 1986 (ref: A2515/1) there was no employment relationship between the University of New England (**UNE**) colleges and its RAs but there was also a ruling on 21 December 1992 finding an employment relationship between The Women’s College at The University of Sydney (**USYD**) and its RAs.

For both of the PBR requests that were made on this issue after the Vabu case (PBR numbers 43626 and 49610 as issued in August 2004 and February 2005 respectively ‐ applicant names suppressed) the Commissioner ruled the RAs were employees.

After reviewing the relevant public rulings and court authorities and reading the facts and reasons for decision of the two PBR cases issued in 2004 and 2005 in particular, my view is that the vast majority of the RA arrangements in the sector would these days be considered by the Commissioner to be employment relationships.

If there is an employment relationship with the RAs in a particular college a number of consequences will generally follow (this is not an exhaustive list):

* vicarious liability of the college for the negligent actions of the RA or any other actions of the RA that contravene federal or state anti‐discrimination and antiharassment laws inclusive of sexual harassment laws although note that vicarious liability can sometimes extend to cover more than just employees;
* terms are implied in common law into the RAs contract inclusive of but not limited to the duty of care required of the college (towards the RA);
* requirement to comply with the ATO Pay As You Go (**PAYG**) scheme – withholding tax must be withheld from payments to the RAs and payment summaries issued;
* requirement to make superannuation guarantee contributions (**SGC**) at the required percentage (currently 9.25 per cent) on the RAs earnings if above the $450 threshold per month although note that more than just employees can be captured in the superannuation net;
* potential liability for Fringe Benefits Tax (**FBT**) for any accommodation related fringe benefits provided to the RA and with potentially adverse ramifications for the RA arising from an FBT line entry on the RA payment summary including but not limited to any RA: o Youth Allowance/Rent Assistance benefits. o Super co‐contribution entitlements, o HECS/HELP repayments, and o Medicare Levy surcharge;
* entitlement to WorkCover inclusive of probable requirement for the college to pay WorkCover premium on any part of the RAs remuneration that relates to fee reductions although note that more than just employees can be captured in the WorkCover net subject to the particular state/territory legislation;
* potential liability for state payroll tax on the RAs remuneration if the college is above (universities themselves are invariably above) the relevant payroll tax threshold for their state/territory although note that more than just employees can be captured in the payroll tax net and further note it is rare for affiliated residential colleges to be subject to payroll tax;
* potential entitlement to a range of minimum standards and protections under the *Fair Work Act 2009* (Cth) inclusive of minimum wages and employment conditions and access to the anti‐bullying, unfair dismissal and dispute resolution provisions;

The view expressed here that RAs are these days rarely capable of being characterized as anything other than employees does not necessarily mean that the most appropriate way of remunerating the RAs is solely via the payroll. However that is not the subject of this advice.

The potential or actual application of the Fair Work Act to the employment terms of RAs will be a worrisome development for many colleges, particularly given the special ‘around the clock’ nature of the duties and the fact that the RAs live 24/7 embedded within the same college communities they serve and provide leadership to in their roles as RAs.

# **Detailed Advice**

In what follows a more detailed explanation is given of the application of the various parts of the multi‐factor test to determine whether there is an employment relationship with RAs.

Suggested source documents to use to apply these tests (these documents may also be relevant in the event of a tax audit if the employment status of the RAs becomes an issue) are as follows:

* the written agreement(s) the college has with its RAs (this is the primary document);
* any advertisements the college may have run or bulletins posted within college advertising the availability of RA positions and inviting applications;
* any training manuals or materials provided to the RAs during P‐week;
* any RA operations or duty manual provided to the RAs;
* college organization chart showing reporting lines;
* correspondence and emails between the Head or the Deputy or the Dean or whoever it is that supervises the RAs and the RAs, on the day to day instructions to or feedback from the RAs;
* any minutes of meetings with the RAs;
* the college Residents Handbook;
* emergency procedures to be followed such as evacuation in the event of a fire or major accident or medical emergency involving a resident, member of staff or visitor;  security procedures;  RA duty rosters;
* tutorial rosters; and
* daily incident logs.

# Control Test

Paragraphs 26, 29 and 30 of TR 2005/16 state in the relevant parts:

***26.*** *.. A common law employee is told not only what work is to be done, but how and where it is to be done. .. the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it.*

..

1. *While control is important, it is not the sole indicator of whether or not a relationship is one of employment.*

..

1. *.. even though the modern approach to defining the contractual relationship is to have regard to the totality of the relationship between the parties, control is still the most important factor to be considered.*

In the 2004 case of PBR number 43626 the facts on the control issue were that:

* neither the Head nor any other employee of the College exercised much if any day to day control or supervision over the way in which the RAs performed their duties, with the notable exception being that the College would intervene if the RA failed to have regard for the College’s duty of care to members of the College community;
* the College exercised some limited control over when the RAs would perform certain duties;
* the work of the RAs was largely self‐regulated and College did not conduct weekly meetings to identify issues and provide direction and guidance to the RAs;
* the RAs had discretion on which formal dinners they would attend (attendance at a minimum number of these dinners was required) and on which duty rosters they would sign up for (with a minimum number of rosters required);
* the RAs were required to keep a list of which students attended the tutorials they conducted; and
* the RAs were required to advise the College of any absences.

The Commissioner’s view on the control test outcome when applied to the above facts was that:

*While these [facts] may indicate a low level of actual supervision, there is evidence of actual control as well as the College’s right to control. This tends to indicate that the relationship is more likely to be an employment relationship.*

Where the Head has the right to terminate the services of the RA if there is an unfavourable assessment of the RAs performance (this was the case in the 2005 case of PBR number 49610) then this tends to indicate a higher level of accountability which in turn is more indicative of an employment relationship.

# ‘Results’ Contracts

Where a payee has been contracted to achieve a specified result, the payee is more likely to be an independent contractor rather than an employee.

Paragraphs 35 and 36 of TR 2005/16 state in the relevant parts:

1. *Where the substance of a contract is to achieve a specified result, there is a strong (but not conclusive) indication that the contract is one for services. ..*
2. *.. Satisfactory completion of the specified services is the ‘result’ for which the parties have bargained.*

The Commissioner’s view on the ‘results’ contracts test outcome when applied to the facts of the 2004 case of PBR number 43626 was that:

*In the present case, the RAs are remunerated via the discounted meals and accommodation for the performance of a number of varied duties. They are not remunerated on the basis of completion of specific tasks. The substance of the Terms and Conditions documents is not to achieve any specific result.*

*We would not regard the present contract as a 'results' contract, and accordingly this would tend to indicate that it is a contract of employment.*

# Power to delegate

Paragraphs 41 – 43 of TR 2005/16 indicate that where a payee has the power to delegate work under the contract, it is more likely to indicate that the payee has been engaged as a contractor rather than an employee. In circumstances where an employee swaps shifts with another employee this is not true delegation because the first employee is not paying the second employee.

The Commissioner’s view on the power to delegate test outcome when applied to the facts of the 2004 case of PBR number 43626 was that:

*The College has indicated that the RAs are able to swap shifts with other RAs without prior reference to the College. This is not regarded as an unlimited ability to delegate. Swapping shifts merely means that the RAs are still performing the contracted work, but at a different time.*

*There is no evidence to suggest that the RAs have an ability to delegate their work under the contract and this is indicative of an employment contract.*

# Risk

Paragraph 44 of TR 2005/16 provides that where a worker bears little or no risk of the costs arising out of injury or defect in carrying out the work, the worker is more likely to be an employee. The greater the degree of risk of commercial loss or commercial profit, the more likely that the worker is an independent contractor.

The Commissioner’s view on the risk test outcome when applied to the facts of the 2004 case of PBR number 43626 was that:

*There is no evidence that the RAs bear any commercial risk for the work performed. The College advises that their public liability insurance covers any negligent acts on the part of the RAs which result in a claim against the College by a third party. Terms and Conditions do not indicate any requirement for the RAs to maintain their own professional indemnity insurance or work cover.*

*The fact that the RAs are not covered by the College's workers compensation policy does not necessarily show that the RAs bear any commercial risk under the contract.*

*.. On the issue of risk, the contract tends to reflect an employment contract.*

# Provision of tools and equipment

Paragraphs 45 – 50 of TR 2005/16 indicate that where an individual provides and maintains a significant amount of tools and equipment for the job and covers the payment of business expenses then this is an indicator of a contractor relationship.

In circumstances where few tools are required to do the job this fact will not by itself lead to the conclusion that the individual is engaged as an employee.

An employee, unlike an independent contractor, is often reimbursed for expenses incurred in the course of employment, including for the use of their own assets such as a car.

In the 2004 case of PBR number 43626 the facts on the tools issue were that:

* the College provides the RAs with (when on duty): o a mobile phone and o rooms and equipment for conducting tutorials (eg whiteboards, whiteboard markers, chalk);
* the RAs provide their own materials such as textbooks (for tutorials); and
* the College provides minor reimbursements for the purchase of university course notes for the conduct of tutorials.

The Commissioner’s view on the tools test outcome when applied to the above facts was that it was indicative of an employment contract.

# Other indicators

Paragraph 51 of TR 2005/16 provides (in part) that the following other things where present tend to indicate there is an employment relationship:

* the right to suspend or dismiss the person engaged;
* the right to the exclusive services of the person engaged;
* the provision of benefits such as annual, sick and long service leave;
* the provision of other benefits prescribed under an award for employees; and
* the requirement for the worker to wear a company uniform.

The fact that a contract does not contain provisions for annual and sick leave will not, in itself, be an indicator of a principal/independent contractor relationship.

In the 2004 case of PBR number 43626 the facts on the other indicators issue were that:

* the Head reserved the right to terminate RAs in certain circumstances; and
* the College did not provide the RAs with any of: o annual, sick or long service leave, o superannuation contributions, or o benefits under an industrial award for employees.

The Commissioner’s view on the other indicators test outcome when applied to the above facts was there was a mix of conditions of engagement similar to an employee (right to terminate), but also some that are not (no leave benefits).

Overall, in both the 2004 case of PBR number 43626 and the 2005 case of PBR number 49610, the Commissioner ruled that the application of the multi‐factor test led to the conclusion that the RAs were employees.

# Provision of training

Although provision of training did not come up as an issue in either of PBR 43626 or 49610, there is an implication in paragraph 48 of TR 2005/16 that where the worker does not pay for training given to enable the worker to do the job (but it is instead paid for by the payer) then this is more indicative of an employment contract.

The resources provided by colleges and halls for the RAs extend to more than just remuneration and accommodation and generally include a week’s professional development/training via ‘P‐week’ in the week prior to ‘O‐week’ as well as other personal development and leadership opportunities for the RAs during the academic year. This would tend to be an indicator of an employment contract.

This is not to suggest there would be any merit in charging RAs for attendance at P‐week.

# More on consequences that may arise if an employment relationship exists with the RAs

There is more to note on one or more of the consequences noted earlier at page 5 of this advice, if an employment relationship with the RAs is found to exist.

Where a college has provided remuneration to the RAs that was in a form that should have been reported under the PAYG and/or the FBT system and was not, the college may be required to issue payment summaries to the RAs (with copies to the ATO) going back for some years and may be required to file amended NAT 7885 *PAYG payment summary* forms and amended FBT returns with the ATO for the relevant years.

Benefits provided to the RAs either in cash or in kind (such as via fee reductions) are potentially reportable via the PAYG system on the NAT 0046 *PAYG payment summary – individual non‐business* form on any or all of the *tax withheld*, *gross payments* or *reportable fringe benefits amounts* labels. In kind or fringe benefits are potentially reportable under the FBT system.

Where current or past RAs are provided with new or amended payment summaries for work performed in prior years there can be unintended and adverse financial or taxation or government benefits consequences for the RA. For example RAs could face a requirement to pay additional income tax and general interest charge to the ATO and/or face retrospective loss of or reduction in things such as Youth Allowance or Rent Assistance with requirement to repay Centrelink.

Where the remuneration arrangements colleges have with their RAs are captured by the FBT system the college is well advised to timely (in advance) issue the RAs with ATO publication NAT 2836: *Reportable fringe benefits – facts for employees*. This ATO publication, which is available from the ATO web site (see below), describes the many consequences employees can face when there is an FBT line entry on the payment summary issued to them by their employer.

If a college has mischaracterized its relationship with its RAs and if, as a consequence, the RAs are found to have been in receipt of fringe benefits and are then perhaps subject to reduced government benefits the RAs may well have grounds for a legitimate grievance with the college, particularly in circumstances where the college did not provide the RAs with a copy of ATO publication NAT 2836 before the RAs entered into the arrangement.

There have been cases in the sector where Centrelink has taken aggressive steps to recover past benefits (in excess of $30,000 in one particular case) provided to RAs in circumstances where a college has been required to issue the RA with amended payment summaries showing reportable fringe benefits amounts.

# Closing discussion

Following the High Court Vabu case, the Commissioner’s subsequent release of TR 2005/16 and the adverse outcomes under both of PBR numbers 43626 or 49610, the chances of colleges prevailing in the argument that their RAs are not employees appear limited notwithstanding that every case must be assessed on its own facts.

One possible exception to the proposition that RAs are generally employees is the case of undergraduate mentors who are provided with very limited remuneration or benefits (for example, less than $1,000 or equivalent in kind per annum) relative to the level of activity undertaken by them. Arguably, some of the mentor cases are better viewed as volunteers (as distinct from employees) who receive a minor stipend in recognition of the support and guidance they provide to younger students.

Aside from this possible exception, the application of the multi‐factor test more generally throughout the sector typically provides too few indicators the RAs are anything other than employees.

If colleges apply the multi‐factor test in their own particular circumstances and still form the view their RAs are not employees, it is recommended they seek to confirm that view either by way of professional advice or alternatively by putting the matter to the Commissioner for a private binding ruling.



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end note: Colleges and universities that are named in this written advice have previously consented to the use of their PBR or appeals outcomes in the public domain for purposes such as this advice. As at 3 April 2014 edited copies of PBR numbers 43626 and 49610 were both available on the ATO website at www.ato.gov.au under the section for the Register of private binding rulings.