

HEALTH PROFESSIONAL CONTRACTOR AGREEMENTS

GENERAL COMMENTS IN RELATION TO CONTRACTOR ARRANGEMENTS

We recommend that all chiropractor and health professional contractors are engaged to provide services through a Pty Limited company so as (to the extent possible) to avoid any subsequent argument that the contractor was in fact an employee. It is unlawful under the Fair Work Act to enter into a sham contractor's agreement, including if the principal is found to have been reckless as to whether the contract was a true independent contractor's agreement. Therefore it is important that you are confident that the proposed contractor's arrangement agreement reflects a work/services arrangement. As Gray J stated in *Re Porter: re Transport Union of Australia*:

"Although the parties are free, as a matter of law, to choose the nature of the contract which they will make between themselves, their own characterisation of that contract will not be conclusive. A court will always look at all of the terms of the contract, to determine its true essence, and will not be bound by the express choice of the parties as to the label to be attached to it. As Mr Black put it in the present case, the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck."

The difference between an employee and an independent contractor is often described as that between a contract of service, made between employer and employee, and a contract for services, made between principal and independent contractor. Historically this distinction was based on control where employees may be told what to do and how to do it, whereas independent contractors tend to be told to produce an end result but reserve a level of self-control in carrying out the work and achieving that result. An alternative or additional basis on which to make the distinction was an organisation test which made an employer liable for acts performed by a worker who was an integrated part of the employer's business.

More recently the courts have moved away from the "control" and "organisation" tests, also considering the totality of the relationship between the parties. Through case law judges have given guidance on what factors should be considered to determine whether the relationship is one of employer and employee or principal and independent contractor. This is known as the indicia test. The essential nature of an indicia test is that no one factor will be decisive, some indicators will suggest classification as an employee whereas others will point to classification as an independent contractor. This will inevitably result in some uncertainty but at a level of generality the following have been considered relevant:

- Does the worker operate on their account or in the business of the payer?
- Is the substance of a contract to achieve a specified result?
- Can the work be work be delegated or subcontracted?
- Who bears the commercial risk and responsibilities for any poor workmanship or injury sustained in their performance work?

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- Does the contractor carry insurance and indemnity policies?
- Does the contractor supply their own equipment?
- Can the contractor perform work for other persons?
- Does the principal provide benefits such as annual, sick and long service leave.

As we have stated, it is our preference that any contracting arrangements be undertaken using a Pty Ltd structure. This greatly assists in avoiding the employee/contractor distinction, although we cannot guarantee it is fool proof. Another reason for this is the deeming provisions that apply to contractors under the applicable superannuation (Fed) and worker's compensation (State) laws such that contractors will in many instances be deemed to be employees for the purposes of superannuation obligations notwithstanding they provide the 'services' using an ABN. Put simply, if contractors are ABN holders, as distinct from a Pty Limited company, and paid under a contract that is wholly or principally for labour, the principal is liable for superannuation contributions even if the contractor has an ABN. Most ABN based contractors are either unaware of or choose to ignore the effect of the superannuation deeming provision. We have set out below the relevant ATO web site links.

<http://www.ato.gov.au/businesses/content.asp?doc=/content/19159.htm>

and:

[http://law.ato.gov.au/atolaw/view.htm?dbwidetocone=04%3AATO%20Rulings%20and%20Determinations%20\(Including%20GST%20Bulletins\)%3ABY%20Topic%3ASuperannuation%20Guarantee%20Charge%3A%23HB04950010000%23SGR%202005%2FD1%20\(Finalised\)%20-%20Superannuation%20guarantee%26c%20work%20arranged%20by%20intermediaries%3B](http://law.ato.gov.au/atolaw/view.htm?dbwidetocone=04%3AATO%20Rulings%20and%20Determinations%20(Including%20GST%20Bulletins)%3ABY%20Topic%3ASuperannuation%20Guarantee%20Charge%3A%23HB04950010000%23SGR%202005%2FD1%20(Finalised)%20-%20Superannuation%20guarantee%26c%20work%20arranged%20by%20intermediaries%3B)

In our experience the superannuation issue does not receive a lot of attention because the contractor does not wish to revisit any tax advantages that may have been obtained as a contractor or moreover because the parties choose to ignore the obligation. However there have been some noteworthy decisions of late in which former ABN contractors have successfully argued that they were in fact employees, which creates significant leave and super liabilities. The 'employee' argument is much harder to make if the contractor provides the services through an incorporated entity, such as a Pty Limited company.

There are other issues which must also be taken into account in engaging an independent contractor.

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The Independent Contractor's Act 2006 provides independent contractors with certain rights and remedies and facilitates Court review of independent contracts on the basis of fairness. Courts can make various orders including an order setting aside the whole or part of the contract, or an order varying the contract for instance to include specific terms such as in relation to termination or payments.

Additionally, as briefly touched on above, the Fair Work Act 2009 contains quite strong provisions in relation to sham independent contractor arrangements. We refer you specifically to Sections 357, 358 & 359 of the Fair Work Act. Amongst other things, these sections provide that you must not:

- represent to an individual that they are performing work under a contract for services as an independent contractor, when they are in essence working as an employee;
- dismiss or threaten to dismiss an employee in order to engage them as an independent contractor to perform the same, or substantially the same work.
Additionally, you must not make a false statement to such an employee that you know is false in order to persuade or influence them to perform the same or substantially the same work as an independent contractor.

There are significant penalties for breaching these provisions in the order of \$6,600 for individuals and \$33,000 for companies for each breach.

It is our view a contractor should never be engaged as an ABN holder, unless it is perfectly clear they are running their own business, under their own name, are not working under the principals name, advertise, and do, provide services under their own name to the world at large and generally provide their own equipment.

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