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FACT SHEET

Employee or Independent Contractor

The *Independent Contractors Act 2006* in conjunction with the *Fair Work Act 2009* (the 'Act') protects the individual rights, freedoms and entitlements of independent contractors.

A distinction has been drawn at common law between 'employees' and 'independent contractors'. In essence, an employee is employed by an employer on a contract of service (an employment contract), and an independent contractor is engaged by a Principal on a contract for service.

While legislation does not define who is or who is not an independent contractor, definitions and distinctions have been established at common law by case law precedents.

The creation of a commercial Agreement which identifies a person as an independent contractor, as opposed to being an employee, does not automatically confirm the respective parties' legal obligations – the arrangements in the execution of the Agreement must be appropriate and be able to stand up to the legal tests that can be applied, as referred to below.

An Employer's or Principal's respective legal obligations towards employees and independent contractors are distinctly different in areas including, but not limited to: industrial law, workplace health and safety law, superannuation and taxation. Failure to meet these legal obligations may result in penalties under the relevant legislation. It is therefore important to ensure the correct arrangements are in place, and are documented clearly.

There are a number of indicators, established at common law, which may assist in identifying whether a person is an employee or an independent contractor:

EMPLOYEES:

- Perform work under the direction of their employer, on an ongoing basis;
- Are paid regularly (for example weekly, fortnightly or monthly);
- Are entitled to receive paid leave such as annual, personal/carer's and long service leave;
- Have income tax deducted from wages by their employer;
- Are entitled to have superannuation contributions paid into a nominated superannuation fund by their employer;
- Generally work standard or set hours; and
- Bear no financial risk (this is the responsibility of the employer).

INDEPENDENT CONTRACTORS:

- Have control in the way they carry out the work and have the expertise to do so;
- Are contracted for a set period of time or to undertake a set task or project;
- Use their own tools and equipment;
- Generally submit an invoice for work completed or are paid at the end of the project;
- Pay their own superannuation and tax, including GST;
- Own their own business and generally will be able to negotiate their own fees and working arrangements, including what hours to work to complete the job;

- Do not receive paid leave;
- Bear the risk of making a profit or loss on each job; and
- Generally have their own insurance.

LEGAL TESTS

Courts will apply a number of tests to cases where the distinction between an employee and an independent contractor needs to be made. An overview of the main two tests, being the Control Test and the Multi-Factor Test, is provided below.

1. CONTROL TEST

In many cases it is still appropriate to apply the control test in the first instance because it remains the most indicative guide to whether a person is contracting independently or serving as an employee.

This test involves assessing a range of criteria that are focussed on the 'control' an Employer has over the person and their tasks, and includes:

- The lawful authority to control how tasks are performed;
- The extent the employer controls the hours of work;
- The nature of payment;
- Whether the person has control over the delegation of the work;
- Whether equipment, plant or materials are provided for;
- Whether the work is ongoing or only for a specific task; and
- Whether tax deductions or superannuation contributions are made.

Where the employer maintains full control over these aspects of the relationship it will be indicative, however not conclusive, that the person is an employee. This is due to the fact that independent contractors are responsible for a finished product or a determined outcome - the manner in which the product or outcome is achieved is generally up to the independent contractor, unless specific requirements were agreed to in the initial services contract.

In the widely referred to case of *Stevens v Brodribb Sawmilling Company (1986)* it was found that Stevens was an independent contractor, not an employee of Brodribb Sawmilling Company. This result was determined by a number of factors including: Stevens provided and maintained his own equipment, he set his own hours of work, and the manner in which he received payments, which was not in the form of fixed salary or wages, but in amounts determined by reference to the volume of timber he delivered.

2. MULTI-FACTOR TEST

The Explanatory Memorandum to the *Independent Contractors Act 2006* confirms that the courts have generally adopted a multi-factor test to determine whether a person is an employee or independent contractor. No single issue concerning control, economic independence (whether the worker is dependent on the hirer for an income) or the description of the relationship (what was recorded in the written contract) will be determinative. However, courts will place greater weight on some matters, in particular on the right to control the manner in which the work is performed.

In *Hollis v Vabu Pty Ltd (2001)* it was found that the relationship between Vabu Pty Ltd and the bicycle courier was that of employer and employee. The court looked at the totality of the employment relationship in reaching this finding: Vabu set the rates of remuneration of its bicycle couriers and there was no scope for negotiation of those rates, Vabu allocated the work with no scope for bidding for individual jobs by the riders, Vabu assumed all responsibility as to the direction, training, discipline and attire of its bicycle couriers, and Vabu provided its bicycle couriers with numerous items of equipment, which remained Vabu's property. The court took into account all of the above circumstances and it was concluded that the bicycle courier was an employee of Vabu.

The outcomes of the above two cases continue to be referred to as case precedents.

CONTRACTOR DECISION TOOL

The Commonwealth Government's *Contractor Decision Tool* assists Employers/Principals and employees/contactors to determine whether an individual arrangement is an employee or independent contractor arrangement.

The decision tool assists persons to work through 16 questions which are based on the various indicators mentioned above, and are reflective of the considerations applied by courts.

By working through the Tool's questions, a report will be generated to advise what, on the basis of the information provided and the considerations mentioned in this Fact Sheet, the likely arrangement for the situation.

Questions for an Employer/Principal include:

- “Do you (being the person completing the questions) have the right to direct the way in which the worker's tasks are performed?”
- Do you bear the commercial risk and responsibility for the work performed by the worker?
- Do you set the worker's hours of work, or can the worker set their own hours of work?
- Is the worker paid remuneration based on the period of time worked or only when the worker completes tasks?
- Do you pay for or reimburse the worker's expenses in conducting their work?
- Did you find the worker by advertising a position?
- Can you suspend or dismiss the worker?
- Can the worker delegate or subcontract their work to other persons if they wish?
- Do you expect the worker's work with you to continue for an agreed period of time (either indefinitely (even if terminable on notice) or for an agreed term)?
- Does the worker carry on business on their own account and independently of your business?
- Do you have the right to the exclusive services of the worker”?

The Tool may be accessed via: <https://www.business.gov.au/Info/Plan-and-Start/Start-your-business/Independent-contractors/Independent-contractors-decision-tool>

SHAM CONTRACTING ARRANGEMENTS

Section 357 of the Act prohibits sham arrangements. This occurs where an employer attempts to disguise an employment relationship as an independent contracting arrangement, usually for the purposes of avoiding employee entitlements.

Under the sham contracting provisions, a person cannot:

- Intentionally disguise an individual's employment or offer of employment, as a contracting arrangement;
- Dismiss or threaten to dismiss an individual for the sole or dominant purpose of re-engaging the individual as an independent contractor; or
- Make a knowingly false statement for the purpose of persuading an individual to become a contractor.

The Act provides significant penalties for breaches of these provisions. A court may impose a penalty for each breach up to a maximum amount of \$54,000 (as from 31 July 2015) for corporations, or the employer may face an underpayment of wages or an Unfair Dismissal claim due to a contractor actually being an employee who accrues entitlements and who has a right to not be terminated unfairly.

Although each individual case will be different and must be decided on its own facts, employers should be aware of the distinctions between an independent contractor and an employee, having regard to the information in this Fact Sheet and legal advice in relation to their specific arrangement.

GENERAL PROTECTIONS

Under the Act, section Chapter 3, Part 3-1 deals with the concept of general protections. The objects of the part are:

- “To protect a person’s workplace rights;
- To protect a person’s freedom of association by ensuring a person is:
 - free to be, or not be, a member of an industrial association;
 - free to be, or not be, represented by an industrial association; and
 - free to participate, or not participate in lawful industrial activities.
- To protect a person from workplace discrimination; and
- To provide a person with effective relief whether they have been discriminated against, victimised or otherwise adversely affected as a result of a contravention of Part 3-1”.

As well as employers and employees, sections of Part 3-1 apply to independent contractors and their principals. That is, they also have an entitlement to limited workplace rights and both parties are protected from adverse action by any person in relation to the decision to exercise or potentially exercise their rights under these provisions.

The following table is a copy of the independent contractors’ provisions at section 342 of the Act:

	Adverse Action is taken by ...	if ...
3	a person (the principal) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) terminates the contract; or (b) injures the independent contractor in relation to the terms and conditions of the contract; or (c) alters the position of the independent contractor to the independent contractor’s prejudice; or (d) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (e) refuses to supply, or agree to supply, goods or services to the independent contractor.
4	a person (the principal) proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) refuses to engage the independent contractor; or (b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or (c) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (d) refuses to supply, or agree to supply, goods or services to the independent contractor.
6	an independent contractor against a person who has entered into a contract for services with the independent contractor	the independent contractor: (a) ceases work under the contract; or (b) takes industrial action against the person.

Refer: QHA’s General Protections Fact Sheet

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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