

## CONTRACTING OUT SERVICES & INDEPENDENT CONTRACTORS

Clubs may determine that it isn't possible to carry out certain services in their Club, or that they need someone to undertake either a short term, ongoing, or "one off" specialist task. In these instances, a Club could consider contracting out this work to an independent contractor with the appropriate skills and time to undertake the services on their behalf.

For example, engaging a cleaning company to clean the Club premises, or for someone build a pergola on the Club premises.

Where a Club engages an independent contractor, the Club needs to be careful that the relationship is not of a nature that it could be interpreted as an employer/employee relationship. Should this occur, then a Club risks claims for underpayment of wages, leave, superannuation etc. Where a contract agreement is terminated, a Club could also risk unfair dismissal if the contractor can show the termination of the agreement was unfair, unjust or harsh.

### Contractor or Employee?

From 26 August 2024 changes made to the *Fair Work Act 2009* (Cth) reverted the test on whether someone was a contractor or employee back to the 'multi-factorial' approach. Briefly after two High Court decisions in 2022 that shifted focus primarily onto any written agreement, the current test again looks more at the day-to-day operations and nature of the overall relationship and examines various factors such as control, use of equipment, ability to sub-delegate etc. Control of work in particular is a major factor when it comes to assessing the relationship. Whilst the written agreement is certainly still referred to and relevant, it is not conclusive.

As such whilst a proper agreement still certainly needs to be in place and will be relevant and assist with explaining the relationships, clubs need to be much more aware of the day-to-day nature of any agreement as if challenged this will be looked at closely.

The table on the next page shows some of the considerations that will determine whether or not the engagement is one between "employee and employer", or an independent contractor relationship.

Table – Employee & Independent Contractor Differences

<b>Ability to Delegate or Sub-Contract</b>	Employees must complete their own work, while a contractor can delegate or subcontract (although a Club can look to include in an agreement that any subcontracting is only permitted with their consent).
<b>Control</b>	<p>The more control a Club exercises over someone undertaking work for them, the more indicative this is of an employer/employee relationship.</p> <p>Contractors often have a high level of control over their own work when they perform their services, how they do so etc.</p> <p>Employees in contrast have less control as to how and when they will do tasks and a Club can tell them exactly how to complete the services.</p>
<b>Exclusivity of Work</b>	<p>Employees will often work for the one employer or have restrictions on other businesses that they can work for.</p> <p>A contractor is free to undertake work for a number of different clients at the same time.</p>
<b>Expectation of Ongoing Work</b>	A contractor is usually only engaged for a specific task, while an employee usually has an expectation of ongoing work (unless they are on a casual or fixed-term contract)
<b>Financial Risk</b>	An employee does not possess any financial risk, this instead sits with their employer, while a contractor bares the risk of making profits or losses.
<b>Hours of Work</b>	<p>Employees will work standard set hours unless they are casual.</p> <p>A contractor works to complete a task and both parties agree on the hours that will be needed, or instead it will be for a set period of time or until a service/job is completed.</p>

<b>Insurance</b>	Employees are covered by their employers insurance while a contractor holds their own insurance.
<b>Intention of Parties</b>	<p>A contractor or employee/employer relationship will be shown in the agreement between the two parties which will show an intent to either create an employment relationship or a contractor agreement.</p> <p>A contractor agreement can also be shown by such things as the contractor providing an ABN and other factors as outlined in this table.</p>
<b>Leave</b>	Employees are entitled to leave or a loading in lieu (casuals) while a contractor doesn't receive paid leave entitlements.
<b>Super</b>	<p>Employees must be paid super, however, contractors will often pay their own super.</p> <p>Whilst a contractor generally pays their own super, there are circumstances when they are entitled to super contributions from the other party to the agreement. This is explained further on page 7.</p>
<b>Tax</b>	An employee has their income tax deducted by their employer, while a contractor will generally pay their own tax and GST.
<b>Tools and Equipment</b>	<p>Contractors often use their own tools and equipment, or a majority of their own tools and equipment, whereas an employee is more likely to be provided with these by the Club or receive a tool allowance.</p> <p>In a contract for service engagement however, arrangements can be made for a contractor to make use of the other party's tools and equipment but this should be in addition to any of the tools and equipment brought by the Contractor and not in lieu of.</p>

Clubs need to be aware that simply having an ABN and an independent contractor agreement is not sufficient by itself. Clubs must ensure that the contract clearly sets out factors that are indicative of an independent contractor relationship.

In terms of the factors outlined, “*control*” is the one that frequently arises in case law as being of critical importance, with contractors having more autonomy and seen to be running their own business. A contractor will often also be given a task, but then have a large deal of discretion in how the task is undertaken and meeting the requirements of any agreement.

This was again emphasised by the High Court in a case where a “contractor” was found to be an employee. One of the main determining factors in this decision was the fact the company exercised “great control”. The company could tell the “contractor” where to go and who to work for and the contractor must follow these directions or company could terminate the agreement.

Another key factor raised by the High Court is the provision of assets to a contractor, with the less assets provided the more indicative it is of a contractor relationship. Sometimes a Club may have certain assets they can make available to the contractor e.g. cleaning equipment; and a Club could allow these to be used. A contractor however should be providing most or all of the assets and equipment needed to undertake the services.

The High Court in this case also made it clear that how parties label themselves or their own understanding of the relationship is irrelevant.

When engaging an independent contractor, a Club should have both a clear written agreement and ensure that the relationship does not have the characteristics of an employer / employee arrangement. Failure to do so can create significant risks.

## Sham Contracting

Where the relationship between a “contractor” and a Club is disputed and it is found that the “contractor” is in fact an employee, then the Club is at risk of being found to have engaged in what is known as “sham contracting”.

Sham contracting is where an employer passes off what is an employment relationship as a contractor arrangement instead. Where this occurs, a Club could be liable for such things as unfair dismissal and underpayment claims.

As well as the above, under section 539 of the *Fair Work Act 2009* (Cth) a Club could also be liable for substantial penalties where they are found to knowingly have engaged in this behaviour. As of the 4 March 2024, this breach could result in 60 penalty units being imposed with each unit amounting to \$313, resulting in a total penalty of up to \$18,780.00.

In order to avoid sham contracting occurring, a Club needs to undertake due diligence when looking to hire a contractor and ensure that the relationship is not the same as that between an employer and employee. Clubs also need to ensure both parties are aware of the nature of the arrangement and that a clear agreement is entered into.

## Obligations to Independent Contractors

Unlike employees, there are a number of entitlements that are not applicable to an independent contractor such as minimum award rates and leave entitlements. An independent contractor is not covered by modern awards, enterprise agreements or the determinations set down by the Fair Work Commission. Instead their entitlements are mainly contained in any contract / agreement they enter into.

Despite this, a Club still has to be aware of certain protections that exist for contractors, a number of which are detailed below:

### Discrimination

Firstly, whilst a true independent contractor would not be entitled to unfair dismissal, they do have protections against discrimination. This means that a Club can't discriminate against a contractor on protected grounds which includes, age, sex, race and religion.

If a Club acts in a discriminatory manner towards an independent contractor then there are risks of claims being made to such places as the Human Rights Commission of Australia and if it progresses further, to the Federal Court where they are liable to pay compensation and penalties.

### Unfair Terms

An independent contractor or organisation will have rights under the *Independent Contractors Act 2006* (Cth) (**the Contractors Act**) where at least one of the parties is considered to be a 'constitutional corporation'. Under the Contractors Act, 'constitutional corporation' means a body that is incorporated under a Federal or State Act such as a proprietary limited corporation or an incorporated association and conducts trading or financial activities.

Under the Contractors Act, the term 'trading' means the giving of goods or services in exchange for payment and the provision of services for the purpose of earning revenue. This also does not need to form a large portion of an organisations activities and will still apply where all or most of the income is used for charitable purposes.

Under the Contractors Act, protection is given against unfair contracts. Section 9 of the Contractors Act sets out a number of "unfairness grounds" including:

- The contract is unfair;
- it is harsh or unconscionable;
- it is unjust;
- it is against the public interest;
- the contract is designed, or avoids provisions of State and Territory Industrial Laws;

- it provides remuneration at a rate that is, or is likely to be, less than the rate of remuneration for an employee performing similar work.

Should the Contractors Act apply then either party is entitled to apply to a court to have an agreement / contract revoked or varied on one of the above grounds.

Changes introduced on 26 August 2024 also now allow the Fair Work Commission to adjudicate on unfair terms.

An example of where a contractor could approach the Fair Work Commission is where they are being paid to undertake some building work and the rate they are paid is far lower than other contractors or employees receive for similar work. It may also be viewed as harsh or unjust where the terms are highly skewed in favour of one party and the other is deriving little benefit from the agreement.

When judging whether or not a contract / agreement is harsh or unfair, a Court or the Fair Work Commission can look at such things as:

- The relative strengths and bargaining positions of the parties or anyone acting on their behalf;
- whether there was any undue influence or pressure or unfair tactics used;
- whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and
- any other matter the Court may think is relevant.

While awards are not applicable to an independent contractor, Clubs need to enter into negotiations with them in good faith, particularly where the contractor isn't sophisticated and ensure they are not paying them an unreasonable amount or imposing harsh terms. Likewise however, a Club should also seek to protect themselves and ensure that the amount being paid isn't excessive and that they do not find themselves being the party deriving little protection and benefit.

### Adverse Action and Coercion

Under the *Fair Work Act 2009* (Cth), an independent contractor is protected from adverse action being taken against them for a protected reason.

In terms of what adverse action against an independent contractor means, this includes:

- terminating an agreement / contract with them;
- injuring the independent contractor in relation to the terms and conditions of an agreement / contract;
- altering the position of the independent contractor to the independent contractor's prejudice;
- refusing to make use of, or agree to make use of, services offered by the independent contractor; or
- refusing to supply, or agree to supply, goods or services to the independent contractor.

The protected reasons for which a Club is not allowed to take adverse action are:

- the independent contractor has a workplace right;
- the independent contractor has or has not used a workplace right;

- the independent contractor propose or does not propose to use a workplace right;
- the independent contractor does or does not belong to a trade union; or
- the independent contractor engages or does not engage in industrial activity.

Examples of where an adverse action claim could be made by an independent contractor includes where a Club takes adverse action against the contractor because:

- they make a complaint or enquiry about workplace safety;
- of a protected attribute such as their gender, sexuality, age etc.;
- they question the terms of their agreement and that they believe there has been a breach of the *Independent Contractors Act 2006* e.g. being paid less than someone performing similar work.

An independent contractor is also protected from coercion. This is where the other party to the contract uses force or threats to make the other party agree to do or not do something. An example would be forcing a contractor into doing something that breaches WHS laws and then threaten them that the Club will never contract them again if they don't do this.

### Breach of Contract

An independent contractor can also seek damages and enforcement where there has been a breach of contract. A Club however, can also claim a breach of contract where the breach has occurred as a result of the independent contractor.

A breach of contract will occur where one or both of the parties fail to perform their obligations. This could be a failure to meet certain timeframes, a lack of payment being made, or the services that were required not being provided.

Where a breach has occurred, the aggrieved party can seek things such as:

- resolving the issues between each other;
- termination of the contract;
- damages to be paid by the party that has breached; and
- specific performance of the contract (meaning a court orders a party to perform their obligations under a contract).

The above are not mutually exclusive and often multiple things can be sought in the same claim e.g. damages and termination.

Clubs needs to carefully look at the terms of a contract and ensure that they are achievable and clear, as not doing so could risk a breach of contract occurring.

Clubs should also give consideration to introducing a dispute resolution clause, so that where issues arise, they can seek to resolve them in a clear and often more informal process in the first instance. Going to court for a breach of contract is consuming both in terms of time and money.

## Superannuation

Generally speaking, an independent contractor is not entitled to be paid super by a Club. This is however, not always the case and a contractor could be entitled to super payments, as under superannuation legislation the definition given for an employee is broad.

An independent contractor may be entitled to super where:

- they are paid more than \$450 before tax in a calendar month
- they are being paid mainly for their labour (more than half the dollar value of the contract is for their labour)
- they are being paid for their personal labour and skills (that is payment is not dependent on achieving a specified result)
- they perform the contract work and can't delegate it to someone else

Clubs should seek advice on this from their accountant when they are unsure of this and can also find more information here: [ATO - When do you have to pay super for contractors](#).

## Work Health and Safety

Any Club that has at least one paid employee will be bound by applicable WHS legislation, which in South Australia is the *Work Health and Safety Act 2012 (SA)* (**WHS Act**). Should the WHS Act apply, then independent contractors will also be covered by these laws as the term “worker” is broad and includes contractors.

Under the WHS Act, a Club has an obligation to protect the health and safety of its workers and patrons as much as possible and needs to do this through the elimination, isolation, controlling or substitution of risks.

While purely volunteer run Clubs will not be bound by the WHS Act, a Club will still have obligations under common law to ensure the health and safety of contractors and others who enter their premises and not doing so will result in potential civil claims being made.

## What should be in an agreement?

Depending on the nature and cost of the services, sometimes a Club may just need a basic agreement with a set of terms and conditions, along with an invoice for the contractor to proceed with undertaking the work.

In other instances where the work is more expensive, complex and/or ongoing, a Club should consider having a more detailed agreement in place. When looking to enter into an agreement to engage an independent contractor, or when looking into any terms and conditions provided, a Club needs to look out for things such as:

- **Services Offered** – Any agreement with an independent contractor should clearly define the details of the services being offered and where these services will be undertaken. Clubs should not insist on excessive control as to how these

services are undertaken.

- **Assets and Equipment** – The Agreement should specify that the contractor is expected to bring their own assets and equipment, as far as possible, to undertake the work. A Club can also allow them to use their own assets and equipment, however, as discussed previously, Clubs should not provide too many assets to the contractor..
- **Confidentiality** – If the contractor will have access to private information, a Club should have a clause in the agreement specifying that all private information of the Club needs to be kept confidential.
- **Term of Contract** – Will there be a set term for the contract and if so for how long? Will it be operative from a set date or from when the contract is signed and will it just end once the service is provided or on a set date?
- **Termination** – A Club should always ensure that an independent contractor agreement specifies when termination will be allowed and how. Will there be a set amount of time that can be given to terminate for any reason with notice and will this be one way or both ways?
- **Payment** – What will be the cost for the work? Is it a one off payment or is it in instalments, based on the amount of time they are engaged etc.
- **Dispute Resolution** – What will occur if a dispute occurs? Is there a set process that a Club wants to have in place so as to lower the risk of any dispute resulting in court action taking place?
- **Insurance** – What insurance requirements do you need the contractor to have in order to lessen risk should an issue occur as a result of the contractor's negligence? e.g. public liability and professional indemnity insurance.
- **Indemnities** – An indemnity is where a party agrees to legally exempt another party from any liability they may have. What indemnities will the Club seek from the contractor in order to limit their liabilities? e.g. where a contractors (or their employees, sub-contractor or agent) acts or omission makes the Club potentially liable for a claim.
- **Intellectual Property** – Will there be the potential for any intellectual property to be generated in providing of the services e.g. designs and trademarks and will the Club seek to keep ownership of any of these created in the providing of these services or will it be with whoever creates it?
- **Sub-contracting** – If sub-contracting is allowed, a Club should still include a clause requiring their consent, so they know who the intended sub-contractor is and agree or disagree accordingly.

## Templates

A *General Independent Contractor Agreement* template is available for an ongoing service. For one off or limited services however, a Club may not find this type of Agreement necessary and instead consider any documentation, correspondence and invoice they receive from a contractor as sufficient e.g. if a Club gets an electrician in to fix a light fitting.

As well as this, more specific templates and associated information for certain contracting agreements are available in the Agreement Templates section:

- *Catering Agreement*
- *Cleaner Agreement*
- *Greenkeeping Agreement* (also suitable for a groundsperson and curator)

## Schedules, Appendixes and Annexures

With Agreements, sometimes it may be necessary to add further information or attachments separate to the body of the Agreement. When doing so, these can be referred to as a schedule, an appendix or an annexure. Whilst there isn't a great deal of difference between all three, and they are essentially all "attachments", each can be described as:

- Appendix – A supplementary document that is part of the Agreement and of importance to the Agreement as a whole.
- Annexure – Something additional and separate that is attached to a document e.g. a report and can be altered without needing to agree to change the whole Agreement.
- Schedule – Often a written list or inventory and gives more of a detailed showing of something that is referred to in an Agreement.