

## **Policy Redesign Project**

*All policies and procedures are being reviewed as part of this project. This document is pending review, but remains in effect until the review is carried out.*

## **Independent Contractors - Guidelines**

- Establishment:** Council, 23 April 2009
- Last Amended:** Vice-President (Corporate Services), 8 September 2016
- Nature of Amendment:** Edit and restructure without substantive change to content
- Date Last Reviewed:**
- Responsible Officer:** Director, People and Culture

### **1. Policy/Procedures supported by these Guidelines**

- **Independent Contractors Policy (revised)**
- **Independent Contractors Procedures (new)**

### **2. Establishing the Correct Relationship**

Making the right choice between engaging an independent contractor and an employee is important, if significant reputational and financial risk to the University is to be avoided. Various legislation has expanded the definition of an employee to include individuals contracted primarily for labour, so that Superannuation Guarantee charges and other tax liabilities can be incurred in relation to these contractors.

Sensible application of these guidelines for service between an independent contractor arrangement (contract for services) and an employment contract (contract of service) should assist staff to manage and minimise potential risk to the University from entering into an incorrect arrangement.

Where the University enters into a contractual arrangement with an entity other than an individual (such as a company, labour hire agency, or external organisation), through which an individual's services are supplied, the arrangement would not give rise to an employment contract between the University and the individual. However, contracting directly with an individual (sole trader) who operates a business under an ABN might still give rise to an employment relationship, even if not specifically intended, hence the need to take careful account of all characteristics of the relationship.

#### **2.1 The General Position**

As a general rule, an individual operating as an independent contractor will operate independently of the University and will be engaged for the provision of a specific deliverable. They would not be expected to

undertake work that is normally undertaken by employees in association with core activities and they would generally advertise and offer their services to a range of other organisations, operating as a business with an ABN.

## 2.2 An ABN Provides No Guarantee

While an ABN is essential to entering into an independent contractor arrangement, it does not necessarily indicate, or in any way guarantee, an independent contractor relationship is appropriate.

## 2.3 The Balanced Approach

Table 1 summarises the generally accepted characteristics that distinguish an individual worker as an independent contractor (contract for services) rather than an employee (contract of service). A balanced consideration of all characteristics of individual cases will usually point to one or the other type of engagement.

**Table 1 Comparison of Characteristics of Independent Contractor Vs Employee**

Independent Contractor	Employee
<p><b>1. Results based</b> - Operates independently of the core activities of the University and will be engaged for the provision of a specific agreed deliverable. Work is not provided in the same way as it would by an employee. <i>EXAMPLES: a contractor is engaged to cut down and safely remove a tree from the University premises, an administrative or management related project, or a specialised service not able to be performed by existing staff.</i></p>	<p>Performs <b>work that is normally undertaken in association with core activities</b> of the University. <i>EXAMPLE: Where teaching services provided by an individual form part of the core activities associated with a topic (eg normal lectures and tutorials for which the University provides set rates of pay in accordance with its Enterprise Agreement) an employment relationship is appropriate, and payment must be made through the payroll system, with associated tax deducted, superannuation guarantee (if applicable) and payment of payroll tax.</i></p>
<p><b>2. Freedom to delegate</b> work to employees of the contractor or to other competent persons <i>It is advisable that the Services Agreement provides for unfettered freedom to delegate.</i></p>	<p>Employee may have some power to delegate certain duties to other employees in the University, but they have <b>no inherent right to delegate their work to others</b> (eg outside the organisation).</p>
<p><b>3. High degree of flexibility in relation to how and when work is to be performed</b>, even if the contract contains specific terms regarding the use of materials and methods of performance</p>	<p>Employee <b>accepts direction from the University</b> in relation to the manner in which work is to be performed and the times and locations at which work is to be performed. <i>In the above example it would be difficult to demonstrate that the individual has discretion as to when and how to perform the work, where lectures and tutorials are pre-scheduled as part of normal topic offerings.</i></p>
<p><b>4. Fee negotiated in advance and payment upon completion</b> of the agreed deliverables. A fee should not be based upon University set rates of pay (ie casual hourly rates or similar). Progress payments may be applicable for longer projects.</p>	<p><b>Paid on a regular and systematic basis</b> for the work (eg weekly, fortnightly, monthly). The University is paying the individual for the supply of their labour, in order to contribute to the achievement of results for the University.</p>
<p><b>5. Use their own materials, tools and equipment</b> and normally responsible for all ancillary expenses (eg travel and communication expenses)</p>	<p><b>University provides the employee with the necessary materials and equipment.</b> Any use of the employee's own equipment or materials is compensated by an allowance or reimbursement.</p>

<p><b>6. Bear any risk associated with their work</b> and will be responsible for rectifying any faulty or defective work without further payment. Accordingly, an independent contractor is expected to have appropriate insurance.</p> <p><i>In examining the level and type of insurance that an independent contractor has, the University may need to assess the risk of engaging an individual, particularly where insufficient coverage may leave the University itself more open to risk. The level of actual risk may of course depend upon the nature of the service being provided.</i></p>	<p><b>Commercial risk is borne by the University</b> in respect of work performed by the individual. The organisation also takes responsibility for loss associated with faulty or defective work by the individual.</p>
<p><b>7. Free to advertise and provide services to other businesses and organisations</b> and to accept and refuse work accordingly</p>	<p>Publicly identified as being part of the University (eg having an internal email account, having a staff identification card, being formally identified in corporate publications, wearing uniform)</p>

As a guide, should five or more of the independent contractor characteristics from Table 1, be clearly present, including 1 (Results Based) and 2 (Freedom to Delegate), it might be reasonable to conclude that an independent contractor relationship will be appropriate. If less than four of these characteristics appear to be present, the intended relationship might be more indicative of an employment contract. Advice should be sought from HR Client Services if an independent contractor engagement is still preferred.

### 3. Risks of Improper Engagement

#### 3.1 Superannuation Guarantee

A key risk to the University of engaging individuals as independent contractors is that they may be capable of being deemed as employees for the purposes of the Superannuation Guarantee (SG), even if they appear to meet the common law test for independent contractors. This can occur when a contract with an individual is principally for the “provision of labour”, as opposed to the “production of a result”, but also where the individual is unable to delegate some, or all, of the work to others.

Penalties may apply to the University where it is found to be in breach of the SG requirement. Additionally, the University may be found to owe superannuation contributions to individuals who have been engaged on an understanding that they are independent contractors.

A carefully constructed [Independent Contractor Services Agreement](#) will significantly assist in reducing the above risk, particularly where the “result” or “deliverable” is clearly described and the Agreement provides the contractor with the freedom to delegate work.

#### 3.2 Payroll Tax

Under certain conditions and in accordance with tax legislation, the University is subject to provide payroll tax in relation to individuals and some companies operating as independent contractors (ie an individual operating a business with an ABN and in some cases, a company with an ACN). This will be so even where the individual (or company) is considered at common law to be an independent contractor.

Where an independent contractor is deemed under the Superannuation Guarantee legislation to be an “employee” for the purposes of SG, payroll tax will also be payable upon the University’s superannuation contributions made on behalf of the individual.

#### 3.3 Employee Entitlements

Over the years our courts have been asked to make determinations on a number of cases concerning the fundamental question of whether a contract is one of employment or an independent contractor arrangement. One party or the other would usually need to initiate proceedings in order for such a determination to be made.

However, it remains that if a so-called ‘independent contractor’ was found through legal examination to be an ‘employee’, that individual may have rightful claim to a significant number of entitlements and benefits accruing to employees of an organisation and not enjoyed under an independent contractor relationship.

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These include a range of leave entitlements, salary and allowance conditions, workers compensation coverage and in some instances, access to unfair dismissal provisions in industrial legislation.

#### **4. Further information**

Advice may be sought from HR Client Services, in relation to interpretation of the information contained in these guidelines and how it may be used to assist in establishing the correct relationship.