

Understanding Independent Contractors

Introduction

Farmers often engage contractors on the farm to help them out in busy times or to do jobs they are unable to do.

In this resource, independent contractors are those people who come on to your farm to perform work such as hay making or silage making as opposed to the various professionals and trades people who come to your property such as electricians, vets and AI technicians. The arrangements under which these people provide a service to you are usually clear cut and well understood.

This document deals with the people who may be engaged on the farm where their status as an employee or contractor may be unclear.

Many farmers believe that hiring someone as a contractor means that they don't have to worry about the various laws which apply to employment. This is not always the case.

Before engaging a person to perform work, it is essential to determine whether they are an independent contractor or an employee at common law. The distinction is important as the law imposes different rights and obligations on those who engage independent contractors and those who engage employees. An employer is required by law to provide benefits such as annual leave, personal leave and long service leave whereas there is no such obligation on the principal in a contract to provide these benefits to an independent contractor.

The common law defines an independent contractor as a person who works under a commercial contract or a *contract for services*. The independent contractor can operate as an individual or through a partnership, company or trust.

An employee is defined as a person who works under an employment contract or a *contract of service*. A company or partnership cannot be an employee.

So how do you decide if the person you are engaging is a contractor?

Sometimes it will be easy to work out, for instance in the case of a contractor who provides a crop spraying service in the district. At other times it may not be so clear, for instance if your neighbour comes in and does some tractor work for you.

If the person can be truly be defined as an independent contractor and not an employee, the industrial laws relating to various employment entitlements and unfair dismissal rights will not apply.

Remember that whilst a person may be classed as an independent contractor at common law, some laws, such as workers compensation and superannuation laws, deem the contractor to be an employee. These laws are taken to apply to the engagement of the contractor regardless of their status at common law.

The TOTALITY test

Over time the courts have developed a test which uses a number of questions to help to decide if a person is an employee or an independent contractor. This test is called the "totality test".

The totality test looks at these questions to assess whether a person can be said to be running their own business and working for that business and with control over the running of the business or whether they are they in reality working for the business of the person who is engaging them.

No one question determines the totality test. Rather, the test weighs up the answers to all of the questions to decide if *on balance* the relationship is one of independent contracting or employment.

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The following questions should be asked:

- Is the person doing similar work for other people?
- Does the person advertise their services to the public?
- Can the person employ others to help out with the work or do they have to do it personally?
- Does the person have invoicing systems, standard terms of trade, insurance, debt collecting systems, appropriate financial records etc which businesses commonly use?
- Does the work lead to an ability to make a profit or is the work the same as an employee would do for wages?
- Was the contract price negotiated commercially?
- Does payment depend on the person providing a satisfactory result?
- Does the person bear the risk for poor performance?
- Does the person use their own assets tools and equipment to do the work?
- Does the person have the right to decide how and when the work is done?
- Does the person represent the work as part of their own business?
- Is the person providing the work financially independent from the other business?
- Does the person benefit from goodwill?
- Has the person agreed to provide a particular outcome or result and when the result has been achieved will they leave?
- Is the work the type of work that other people do as part of a business as opposed to employment? In other words could a person working as a casual or part-time employee for a number of employers just as easily do the work?

Some of these questions may not be relevant in the particular case.

No single question determines whether the relationship is one of employment or independent contracting and some of the questions may not be relevant in a particular case.

The important thing is to weigh up as many of the questions as are relevant to make a decision as to whether the person is doing the work as part of their own business or for the business of the person who engages them.

If the answer to the majority of the questions is 'yes' then the relationship will more than likely be one of independent contracting.

If the answer to the majority of the questions is 'no' then the relationship will more than likely be an employment relationship and the person should be engaged as an employee under an employment contract or a workplace agreement.

The following questions are also sometimes used to help to decide the totality test.

However, be careful of giving these questions too much weight, as they do not necessarily make a person an independent contractor if in reality the person is not running their own business.

- Is the person paid on the basis of invoices not wages?
- Does the person pay their own tax?

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- Does the person have an ABN?
- Does the person pay their own accident and public liability insurance?

Remember that calling the working relationship independent contracting when it is in reality an employment relationship does not in itself make it an independent contract.

Obligations under other laws

Once you have determined that the person is an independent contractor at common law you need to consider the obligations under other laws which may apply to the contract.

Some laws deem independent contractors to be employees and impose obligations regardless of the person's status under common law.

These laws all have their own tests, which may be different to the 'control test' at common law. Other laws use parts only of the 'control test', to determine if the working relationship will be taken to be employment rather than an independent contracting arrangement.

Before engaging a person to work as an independent contractor consideration should be given to how the following legislation applies to your situation:

- superannuation guarantee legislation;
- workers compensation legislation;
- The Personal Services Income Test under the Income Tax Assessment Act may also be relevant.

A template of a common law independent contract designed to ensure these issues are addressed is provided in the *Engagement and Reward* section at www.thepeopleindairy.org.au. You can take this template to your legal adviser.

Superannuation

The federal Superannuation Guarantee legislation requires all employers to make superannuation contributions, for all employees.

Under this legislation, some independent contractors are taken to be employees and the contract principal (the farmer) is therefore required to pay superannuation contributions, regardless of whether the common law 'control test' has been met.

If *all three* of the following criteria apply to the contractor then the contractor will be regarded as an employee for superannuation laws:

- the *person* is paid *wholly or principally for their labour and skills* (the contract can be for labour and supply of materials or goods but the superannuation laws will apply if the labour component is the main part of the contract);
- the person is required by the contract to perform the work personally and *cannot delegate* the task to other workers, and
- the person is *not paid to produce a result*.

If the independent contractor trades as a company, a trust or partnership, the contract will *not* be regarded as a contract for a *person's labour or skills* under the superannuation laws and there will be no liability for superannuation payments.

If the test applies to the person you have engaged, you must pay superannuation contributions at the applicable rate of the *labour* component of the contract to a complying superannuation fund.

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The penalties for breach of superannuation requirements are severe and professional advice should be obtained if you have any doubts about whether the law applies.

What about the contractor's employees and superannuation?

Where a contractor employs workers to do the contract work, it can be difficult to decide whether you or the contractor will be taken to be the employer and therefore liable for superannuation contributions. It is suggested that to avoid possible penalties you insist that the contractor notify the relevant superannuation fund that the contributions for these employees are *on your behalf* as well as on the contractor's behalf. It does not cost the contractor any more and protects you.

Workers compensation

Workers compensation is the responsibility of state and territory governments. Every state and territory has its own legislation which has different rules as to who is responsible to take out insurance cover for workers compensation.

The responsibility for workers compensation depends upon how the term 'worker' is defined by the relevant state or territory legislation.

In some cases this will mean that a contractor which meets the common law 'control test' will nevertheless be regarded as a 'worker' (or employee) and the contract principal (the farmer) as an employer and therefore responsible and liable under workers compensation laws.

Details of when state and territory workers compensation obligations could apply to farmers employing independent contractors for farm work are covered in the following sections. This summary only gives detail of how the laws apply to farmers employing contractors for farm work.

These laws may change.

The following is correct at the time of printing.

Farmers should confirm, with their state or territory workers compensation authority, that there have been no changes to this legislation before entering into any contracts.

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New South Wales

In NSW contractors are said to be 'workers', and workers compensation obligations will apply, if *all three* of the following apply:

- the contract is for work of more than \$10 in value; and
- the person does not carry out a trade or business in their own name or under a business or firm name; and
- the person does not subcontract the work or employ other workers.

'Rural work' in NSW

In NSW some contractors doing 'rural work' are also classed as 'workers'.

'Rural work' is defined to mean only these types of work:

- construction or demolition of fences or yards;
- clearing land of stumps or logs;
- sugar cane cutting and work transporting sugar cane to mills; and
- other types of work involving the supply of timber.
- Contractors in these areas of rural work will be classed as 'workers', even if they employ workers, if they do some of the work themselves and the farmer engaging them will be responsible under workers compensation laws.

Queensland

In Queensland the following tests are used to determine if a contractor will be classed as a 'worker' and therefore if workers compensation obligations will apply.

Test one

Contractors are taken to be 'workers' unless they meet *all three* of the following criteria:

- the contractor is paid to achieve a specified result or outcome; and
- the contractor provides all of the plant, tools and equipment needed for the job; and
- the contractor is liable under the contract to rectify defects.

Test two

If the contractor has a '*personal services determination*' under the Income Tax Assessment Act 1997 they will not be regarded as a 'worker' even if they do not meet all three criteria in test one.

Test three

If a contractor does not fall within the definitions at tests one and two, the contractor will still be classed as a 'worker' if the following apply:

- the work is not part of a trade or business carried on by the contractor individually or by partnership; and
- the contractor does not subcontract the work; or
- the contractor does not employ a worker; or
- the contractor employs a worker but performs some of the work personally.

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Note: The following people are specifically *excluded* and will not be classed as 'workers' in Queensland:

- company directors who work as an employee of the company;
- trustees of a trust who work as an employee of a trust; and
- partners who work as an employee of a partnership.

Share farmers in Queensland

In Queensland, share farmers are classed as 'workers' under workers compensation laws if *both* of the following apply:

- they do not provide and use farm machinery; and
- they are not entitled to more than one-third of the proceeds under the share farming agreement.

Victoria

In Victoria there are two tests which are used to decide if contractors will be classed as 'workers' under workers compensation laws.

Test one

Contractors are classed as 'workers' if the contractor is a natural person (as opposed to a company) and:

- the work is not part of a trade or business regularly carried on (see below for what is meant by carrying on a business) by them under their name or a business name; and
- the person either performs all of the work; or
- subcontracts or employs workers for some of the work and performs the rest of the work personally.

Note: If the contract is with a partnership and one or more of the partners do the work, the contractor will be classed as a 'worker' under workers compensation laws.

What is meant by 'carrying on a business?'

The 'Indicative Test' is used to help to decide if a contractor has been *carrying on a business*. The test takes a number of variables and weights them according to a scale to show the general practice of the contractor in a given financial year.

The test is very complex and contract principals who are uncertain as to whether the contractor can be classified as *carrying on business* should contact the Victorian WorkCover Authority or their individual WorkCover agent who will help them apply the Indicative Test.

Test two

The aim of the second test is to ensure that bona fide contractors who provide services to the public generally will not be regarded as 'workers' under workers compensation laws. The test is complex and there are a number of exemptions. Advice should be sought from the Victorian WorkCover Authority or individual WorkCover agent before entering into any contracts which are for work alone (no goods being provided) if the contractor does not contract to the public generally as part of their business.

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What about the contractor's employees in Victoria?

Regardless of whether the contractor is classed as a 'worker', if any of a contractor's employees are injured and the contractor does not have insurance, the contract principal (the farmer) will be taken to be the employer and be liable under the workers compensation laws. It is therefore extremely important to insist upon seeing evidence of workers compensation insurance before any work begins.

Share farmers in Victoria

In Victoria, share farmers are classed as 'workers' under workers compensation laws if *either* of the following apply:

- they are not entitled to more than 1/3rd of the gross income (in kind or in cash or both) which is earned from the property or
- the share farming agreement specifically provides that the owner of the land will pay workers compensation payments.

South Australia

In South Australia, except for some specific industries unrelated to farming (e.g. the construction industry), the workers compensation law uses the common law 'control test' to determine whether a person is a 'worker'.

What about the contractor's employees in South Australia?

If a contractor employs workers, but is not registered as an employer under the act, the contract principal (the farmer) will be taken to be the employer of those workers and be liable under workers compensation laws. It is therefore extremely important to insist upon seeing evidence of workers compensation insurance before any work begins.

Tasmania

The workers compensation law in Tasmania classes contractors as 'workers' for workers compensation laws if *all* of following three criteria are met:

- the contract is for work in excess of \$100; and
- the contractor does not carry on a trade or business in their own name or a business name; and
- the contractor does not subcontract the work or employ workers to do the work.

Note: If the contractor has their own valid personal accident insurance they will *not* be taken to be a 'worker'. The contractor must, by law, tell the contract principal (the farmer) whether they have/don't have personal accident insurance.

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Western Australia

The definition of 'worker' under workers compensation laws is different to the common law 'control test' and may apply to contractors in farming industry.

If the following two criteria are met the contractor will be classed as a 'worker':

- the work is for the contract principal's (the farmer's) trade or business; and
- the payment is mainly for personal manual labour or services.

What about the contractor's employees in Western Australia?

Both the contract principal (the farmer) and the contractor are considered to be the employer of any workers the contractor may employ and an injured worker can claim against *either or both*. Therefore, farmers employing contractors should take out workers compensation for all employees of any contractors engaged on the farm.

Australian Capital Territory

In the ACT, contractors who are engaged on a regular and systematic basis or engaged with an expectation of engagement on a *regular and systematic basis*, are classed as 'workers' under workers compensation laws.

The following questions help to decide what is a *regular and systematic basis*:

- what are the terms of all relevant contracts?
- what is the working relationship between the contract principal (the farmer) and the contractor and all associated circumstances?
- what is/are the period or periods of the engagement?
- how frequent is the work?
- how many hours are worked?
- what is the type of work?
- what are normal arrangements for someone engaged to perform that type of work?

Personal Services Income Legislation

Personal Services Income is income which is mainly payment for effort or skill. The 'Personal Services Income' legislation determines whether a contractor can be treated as a business for tax purposes. This legislation contains a series of tests which must be met for the person to receive a 'Personal Services Business Determination' from the ATO.

Personal services income does *not* include income which is mainly:

- for the supply of goods;
- generated by an income producing asset (e.g. a bulldozer);
- from the granting of a right to use property (e.g. the right to a computer program); or
- generated by a business structure (an accountant working for a large accounting firm).

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The Personal Services Income Test

The following questions need to be answered to satisfy the ATO that the contractor is a business for tax purposes:

1. Does the person receive personal services income?
2. Does the person meet the 'Results Test' as follows?

All of the following must apply to 75% of the personal services income in order to satisfy the 'Results Test':

- the person is an independent contractor at common law; and
- the person is paid to achieve a specified result or outcome; and
- the person has to provide their own tools or equipment (if necessary) to do the work; and
- the person is liable for rectifying defects

3. If the person does not meet the 'Results Test' and more than 80% of the personal services income comes from one client, the person must get a "personal services business determination" from the ATO.

4. If the person does not meet the 'Results Test' but less than 80% of the personal services income comes from *one client*, one or more of the following tests must also be met:

- Does the personal services income come from two or more clients who are not associated with each other or the person, and
- Is the personal services income a direct result of making offers to the public, and/or
- Does the person have employees or engage sub-contractors who perform at least 20% of the principal work (this does not include support staff but can include spouses and family members but not companies, trusts or partnerships associated with the person), and/or
- Does the person meet the "Business Premises Test"?

The 'Business Premises Test' will be met if every day in the income year when the personal services income is earned the person has the right to occupy and use business premises that are as follows:

- owned or leased by the person;
- mainly used to conduct the work from which the personal services income is derived (more than 50% of the use);
- used exclusively by the person;
- physically separate from the person's residence; and
- physically separate from the person's clients.
- The Personal Services Income legislation does not apply to GST or PAYG obligations.

Note: A Personal Services Determination does *not* mean that the contractor will be an independent contractor at common law or for the purposes of the Independent Contractors Act.

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The Independent Contractors Act

The Independent Contractors Act 2006 (Cwlth) commenced on 1 March 2007. The main impact of this legislation for farmers is the creation of federal unfair contracts laws which set up a new system for challenging the terms of work contracts.

The act uses a definition of 'independent contractor' which is the same as the common law 'control test'.

The act also overrides state industrial laws (this does not include workers compensation laws, OH&S laws and discrimination laws) which take some types of contractors to be employees regardless of whether the common law 'control test' applies.

However, these changes are not relevant to the farming industry.

Unfair contracts under the Independent Contractors Act

The Independent Contractors Act, establishes a process in the federal Magistrates Court to review, vary and/or set aside contracts which are found to be unfair. These laws apply if at least one of the parties to the contract trades as a company and the contract is for performance of work, other than domestic or private work.

However, independent contractors which trade as companies *and* employ others to do the work, cannot take advantage of the federal unfair contracts laws. To be eligible, the contract *must relate to work being done by working directors or family members of directors only*.

Independent contractors who operate as sole traders can take advantage of the laws only if the contract principal (the other party) trades as a company.

The Independent Contractors Act also applies as follows:

- if at least one party is a resident in a territory;
- if at least one party is a company that is registered in a territory;
- if the work to be performed is in a territory;
- if the contract is entered into in a territory; or
- if a party to the contract is a Commonwealth authority.
- In deciding whether a contract is unfair the federal Magistrates Court must consider the following:
 - the relative bargaining strengths of the parties to the contract;
 - any undue influence, pressure or unfair tactics which may have been used;
 - whether the payment to the independent contractor is less than an employee doing the same work would have received; and
 - any other relevant matters.

Note: If the federal unfair contracts laws apply, contractors will not be able to use state and territory unfair contracts laws.

General Protections

The federal industrial laws (the Fair Work Act) provide a number of protections for certain workplace rights and the right to exercise these rights.

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These protections extend to independent contractors and prospective independent contractors.

All independent contractors, prospective independent contractors, and contract principals, have the right to protection from any “adverse action” as a result of them exercising workplace rights.

They are also protected against coercion or misrepresentation in the workplace.

Workplace Rights

An independent contractor, or prospective independent contractor has a workplace right if they:

- are entitled to a benefit under workplace laws;
- can bring proceedings, an inquiry, or complaint under workplace laws;
- can participate in proceedings under workplace laws.

Adverse action

Adverse action may involve the termination of a contract with an independent contractor for an unlawful reason, injuring them or altering their position to their detriment, refusal to use their services or to supply goods and services to them for an unlawful reason.

The federal industrial laws prohibit a person from taking adverse action against another person because that person:

- has a workplace right;
- has or has not used a workplace right;
- proposes to, or proposes not to, use a workplace right;

Coercion

It is unlawful for a person to organise or take action (or threaten to) with the intent to coerce another person or third party to:

- use or not use a workplace right, or use it in a particular way;
- engage or not engage a particular independent contractor;
- allocate or not allocate certain duties or responsibilities to a particular independent contractor;
- give an independent contractor certain duties and responsibilities.

Misrepresentation

A person must not knowingly or recklessly make a false or misleading representation about:

- the workplace rights of another person;
- the use, or the effect of the use, of a workplace right by another person;

Compliance

The Fair Work Ombudsman can investigate allegations of contraventions of the general protections provisions.

The Fair Work Ombudsman can initiate legal action for penalties.

For further information about General Protections as they apply to independent contractors, visit thepeopleindairy.org.au/engagement-reward/federal-industrial-laws.htm#protections

Sham contracts

The federal industrial laws (the Fair Work Act) prevent employers from engaging employees as contractors just to avoid paying employee entitlements. These are called 'sham contracts'.

The following are prohibited and significant penalties can be imposed:

- dismissing an employee for the sole or main purpose of engaging them as an independent contractor;
- representing an employment relationship as independent contracting; or
- making a false statement for the purpose of influencing or persuading an individual to enter into an independent contract.

CONTACT LIST

Organisation	Telephone	Online
<i>WORKERS COMPENSATION</i>		
QLD	1300 362 128	workcover.qld.gov.au
NSW	13 10 50	workcover.nsw.gov.au
ACT	(02) 6205 0200	workcover.act.gov.au
VIC	1800 136 089	workcover.vic.gov.au
TAS	1300 366 322	workcover.tas.gov.au
SA	13 18 55	workcover.com
WA	1300 794 744	workcover.wa.gov.au
TAXATION	13 28 66	ato.gov.au/businesses
SUPERANNUATION	13 10 2 0	ato.gov.au/super
IMMIGRATION /WORK RIGHTS		immi.gov.au/employers/index.htm
Entitlement Verification Online (EVO)		immi.gov.au/evo
Work Rights faxback facility	1800 505 55	
Employer's Work Rights Checking Line (this is a 24 hour 7 day service)	1800 040 070	