

Employee, contractor or volunteer?

A guide for community organisations

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Overview



Overview

This guide covers:

- ▶ the importance of correctly classifying different working relationships
 - ▶ the basic legal differences between employees, independent contractors and volunteers
 - ▶ some of the main legal obligations an organisation owes to its employees, independent contractors and volunteers
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Note

This guide provides information on different working relationships and the legal obligations an organisation owes to its employees, independent contractors and volunteers. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before making a decision about what to do.

Please refer to [the full disclaimer](#) that applies to this guide.

Different categories of working relationships

The law recognises different categories of relationships where one party (a worker) performs work for another party in exchange for payment or reward.

These include the relationships of:

- employer and employee, and
- principal and independent contractor

The law also recognises a separate category of worker known as a 'volunteer'. This type of worker performs work for another without an expectation of, or a legal right to, payment or reward.

The legal distinction between the different types of workers is not always easy to make.

When is a worker an 'employee', 'contractor', or 'volunteer'?

While much employment law is now set out in legislation, the issue of whether a worker is an employee, independent contractor or volunteer is based on principles that have been established through case law over time (judge-made law).

Where there is doubt about whether a worker is an employee or an independent contractor, the courts have previously considered numerous factors relating to what actually occurred in the working relationship (which may have differed to what was in the written contract) to make a determination on the true classification of the worker. This sometimes resulted in a worker who, for example, may be an independent contractor but deemed to be an employee by the courts if, in practice, there were a number of factors consistent with an employee relationship.



This approach has recently shifted, with the High Court moving away from an examination of the totality of the relationship between the employer and employee or contractor. Instead, the Court placed a higher importance on the terms of the written contract to determine whether a relationship is one of employee or independent contractor.

The two recent High Court decisions reflecting this approach are summarised below.

In certain circumstances, consideration of the parties' conduct will still be relevant and considered. These circumstances could include:

- where the contract (or agreement) is not in writing, or is partly written and partly oral
- where the terms of the written contract are being challenged as invalid (as a sham) or varied (changed), or
- where a party to the contract may be asserting rectification, estoppel or any other legal, equitable or statutory rights or remedies



Case example – Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA

In this case, McCourt signed an 'administrative services agreement' with Personnel Contracting Pty Ltd (trading as **Construct**), a labour hire organisation. Under the agreement, Construct would offer McCourt an opportunity to provide labour to third-party building companies, who would oversee McCourt's day-to-day work and directly pay Construct, who in turn paid McCourt.

In finding that McCourt was an employee of Construct (and not an independent contractor), the High Court held:

- where it has not been argued that a contract is a sham, is ineffective, has been varied or otherwise displaced by the parties' conduct (for example, conduct giving rise to an estoppel or waiver), the rights and obligations under the contract are primary, and
- it is not required to look beyond the terms of the contract and review the parties' subsequent conduct to determine if an employment relationship exists

Parties should still be wary of relying on labels given to a relationship in a contract as determinative of its character. In this case, while McCourt's contract described him as a contractor, the nature of the rights and obligations between the parties under the contract rendered him an employee of Construct.



Case example – ZG Operations Australia Pty Ltd v Jamsek [2022] HCA

From 1977 to late 1985, Jamsek and Whitby were employed by a company as truck drivers. In 1986, the workers agreed to 'become contractors', by forming partnerships with their respective spouses and re-engaging under fresh contracts between the company and these partnerships, while also purchasing their own trucks.

After the working relationship was terminated in 2017, the nature of the working relationship was disputed by Jamsek and Whitby, who alleged they were employees throughout the period and therefore made claims for payment of entitlements that would have been paid if they were employees rather than contractors.

In the absence of a reason to doubt the contract's validity (such as being a sham or otherwise ineffective at law), the High Court of Australia considered the rights and obligations under the contract to determine the relationship between the parties and find that the workers were independent contractors from 1986.



Why is it important for your community organisation to know which category of 'worker' is undertaking work in your organisation?

Depending on whether the worker is an employee, an independent contractor or a volunteer, different legal entitlements and obligations apply to your organisation.



Example

If your organisation incorrectly classifies a worker as a contractor, you may fail to:

- provide them with their legal entitlements, or
- meet your obligations under tax, insurance and superannuation law

This could result in legal claims being made against your organisation, and your organisation may be found liable to pay penalties.

The purpose of this guide is to help not-for-profit community organisations understand how the law treats different kinds of working relationships.

The guide is made up of the following five parts:



Links to more information are included in the guide.



Part 1

Employees



Employees

When is a worker an 'employee'?

The legal distinction between a worker who is an employee, an independent contractor, or a volunteer is not always easy to make.

Depending on the circumstances, a court or tribunal will determine whether a person is an employee, an independent contractor, or a volunteer by examining:

- the terms of the contract between the parties
- the relationship between the parties, or
- both the contract and the relationship between the parties

Making a multi-factorial assessment of the relationship between the worker and the organisation (including considering the conduct of the parties) will be relevant and allowed in certain circumstances, including:

- where the contract (or agreement) is not in writing, or is partly written and partly oral,
- where the terms of the written contract are being challenged as invalid (as a sham) or varied (changed), or
- where a party to the contract may be asserting rectification, estoppel or any other legal, equitable or statutory rights or remedies

Evidence of the attributes listed below in a working relationship will suggest the worker is an employee. These attributes may be evident from the contract between the parties, the relationship between the parties, or both.

Employee attributes

Type of work	Payments and benefits
<ul style="list-style-type: none"> • performs ongoing work under the control, direction and supervision of the employer 	<ul style="list-style-type: none"> • is paid for time worked
<ul style="list-style-type: none"> • must perform the duties of their position 	<ul style="list-style-type: none"> • is paid regularly (such as, weekly, fortnightly or monthly) and has income tax withheld from their salary by their employer
<ul style="list-style-type: none"> • provides their personal services and can't delegate their work to 'outsiders' (ie. employees can't arrange for their work to be done by someone else who is not another employee) 	<ul style="list-style-type: none"> • is entitled to have superannuation contributions paid into a nominated superannuation fund by their employer
<ul style="list-style-type: none"> • work hours are set by the employer, an enterprise agreement or modern award (see part 5 below for further information) 	<ul style="list-style-type: none"> • is entitled to paid and unpaid leave (such as, sick leave, personal/carers' leave, annual or recreation leave, or long service leave)
<ul style="list-style-type: none"> • is recognised as a part of the employer's business or holds themselves out to the public as being part of that business (for example, wearing a uniform, using business cards) 	<ul style="list-style-type: none"> • is covered by professional indemnity, public liability and workers compensation insurance premiums paid by the employer



- doesn't bear commercial risks and can't make a 'profit' or 'loss' from the work performed
- generally, has all 'tools of the trade' provided by the employer to carry out the work (for example, desk, computer, stationery)

Other factors may also be relevant, depending on the circumstances of each particular case.

While it's often straight-forward to determine whether a worker is an employee, where there is doubt, the organisation should seek legal advice.

What does it mean for your organisation if a worker is an 'employee'?

The law requires that employers provide their employees with certain benefits.

As listed above, examples of these benefits include paid leave and superannuation, but there are many others.

The law also requires that employers treat their employees in a certain way. An example may be to provide an employee with a notice period (or payment instead of notice) before terminating their contract of employment.



More information

A summary of the basic legal entitlements that employers owe to their employees is set out in **part 4** of this guide.



Note

Independent contractors and volunteers are not owed all the same entitlements as employees.

This is why it's important for your community organisation to be clear about the terms on which a person becomes involved in your community organisation.



Tip

It's a good idea to have a written agreement documenting the nature of the relationship between your community organisation and any person doing work for it. This way both parties will be clear about the nature of the relationship.

With the courts now placing greater emphasis on the written agreement between the parties, rather than examining numerous factors of the working relationship, it's important to have a clear and unambiguous written agreement that accurately records the nature of the relationship.



Caution

A range of legal entitlements apply differently to different types of workers.

Although it's generally true that employees are owed more entitlements than volunteers or independent contractors, some workplace entitlements aren't so clearly confined.

For example, many protections under Workplace (or Occupational) Health and Safety laws apply to broader categories of workers, including volunteers and independent contractors.

There are also circumstances in which independent contractors are treated as employees for specific purposes, like superannuation entitlements or worker's compensation.



Part 2

Independent contractors



Independent contractors

When is a worker an 'independent contractor'?

There are many circumstances in which a community organisation may wish to engage an independent contractor or consultant to provide services to the organisation.



Example

An organisation may wish to engage an independent contractor when it has a short-term project which requires a person with specialist skills to complete a task – such as an independent evaluation of the organisation's services or programs.

The organisation hiring a contractor is sometimes referred to as the 'principal'.

The courts now place an emphasis on the terms of the written agreement between the parties to determine the working relationship. If there is an intention to engage someone as an independent contractor, it's therefore important that the written agreement specifies that the worker is an independent contractor, and the terms of the agreement are consistent with that type of working relationship.

There are some key factors that separate an employee from an independent contractor. Unlike employees who are seen to be subject to the control and direction of their employer, independent contractors are often recognised as running their own business and providing services under commercial, rather than employment, contracts.

Evidence of the attributes listed below in a working relationship suggest the worker is an independent contractor. These attributes may be evident from the contract between the parties, the relationship between the parties, or both.

Independent contractor attributes

Type of work	Payments and benefits
<ul style="list-style-type: none"> has control over how to carry out their work and has the expertise to do so 	<ul style="list-style-type: none"> is paid for results achieved (for example, submits an invoice for work completed or is paid at the end of a project)
<ul style="list-style-type: none"> also provides services to the general public and other businesses 	<ul style="list-style-type: none"> pays their own superannuation and GST and holds own insurance policies
<ul style="list-style-type: none"> is contracted to work for a set period of time or do a set task and can decide what hours are required to complete that work 	<ul style="list-style-type: none"> may have their own registered business and Australian Business Number (ABN)



- is free to accept or refuse work beyond the requirements of any current contract with the organisation
- provides all or most of the necessary materials and equipment to complete the work (for example, uses their own tools)
- is usually free to delegate work to others
- is in a position to make a profit or loss from work

Other factors may also be relevant in particular cases.



More information

The Australian Tax Office (**ATO**) has [an employee/contractor decision tool](#) to help you understand whether individual workers in your organisation are employees or contractors so you can comply with tax and superannuation obligations.

What does it mean for our organisation if a worker is an independent contractor?

Many of the laws which protect employees' rights and provide for their entitlements don't apply to independent contractors, or they apply differently.



More information

A summary of the basic legal entitlements and obligations that apply to independent contractors is set out in **part 4** of this guide.



Part 3

Volunteers



Volunteers

Who is a 'volunteer'?

There is no strict legal definition of a 'volunteer' in the context of employment law in Australia.



Volunteering Australia

Volunteering Australia describes volunteering as:

'Time willingly given for the common good and without financial gain.'

Volunteering Australia has [published resources with more information about this definition.](#)



The Fair Work Ombudsman

The [Fair Work Ombudsman](#) has identified the following characteristics of a genuine volunteering arrangement:

- a volunteer is someone who does work for the main purpose of benefiting someone else
- the organisation and individual did not intend to create a legally binding employment relationship
- a volunteer is under no obligation to attend the workplace or perform work, and
- a volunteer does not expect to be paid for their work

The more formalised that volunteer engagements become, the greater the possibility that an employment relationship could be found to exist. For example, rostering workers on for shifts that they are required to attend may suggest that they are employees, rather than volunteers. However, it's less likely that an employment relationship will be found if the worker undertakes the work for selfless purposes and in the not-for-profit or community sector.

Community organisations need to be very careful that they don't inadvertently create an employment relationship with volunteers. While the courts look to the written agreement to determine the status of a worker, it will not be enough for the agreement to be titled a 'volunteer agreement' if the terms in the contract describe an employee relationship.

If it's found that a volunteer is in fact an employee, they will be entitled to:

- be paid the legal minimum rate of pay for the type of work they're doing
- the National Employment Standards, and
- the terms of any applicable awards or enterprise agreements (for example, annual leave loading, overtime pay)



More information

Awards and enterprise agreements are discussed in **part 4** of this guide.

Volunteer attributes

Type of work	Payments and benefits
<ul style="list-style-type: none"> works or provides services on an 'ex-gratia' basis, which means that they do so voluntarily, without a legally enforceable obligation to do so and with no expectation of payment for work performed 	<ul style="list-style-type: none"> generally, has no legally enforceable right to receive payments or benefits
<ul style="list-style-type: none"> any agreement between the volunteer and the organisation (whether verbal or written) does not contain any evidence that the parties intended to enter into a legally binding contract 	<ul style="list-style-type: none"> may receive payments like 'honoraria' or allowances, or non-cash benefits such as free use of facilities or free or reduced-price entry into an event (although as above, no legally enforceable right) However, such payments or benefits may attract taxation obligations, and if regularly received and/or of considerable value, may add weight to an argument that the 'volunteer' is an employee or contractor
<ul style="list-style-type: none"> the volunteer arrangement can be brought to an end at any time, either by the volunteer or the organisation 	<ul style="list-style-type: none"> may be reimbursed for out-of-pocket expenses



Note

In circumstances where it appears that a volunteer is in receipt of some benefit for the services they provide, distinguishing between an employee and a volunteer can be difficult. This may also pose problems in determining an organisation's tax liabilities.



Tip

The best way to be clear about the relationship between your community organisation and a volunteer is to write it down, for example, in the form of a volunteer agreement. This agreement should ideally include an express acknowledgement from the volunteer that they:

- are a volunteer and not an employee
- don't have a contract with the organisation, and
- don't have any intention to create a legal relationship with the organisation

The volunteer may also acknowledge that they have a social, cultural, religious or other community motivation for performing the work (but this is not essential).

Generally speaking, volunteer agreements must not be legally binding. This is because in a volunteer relationship there must be no intention to impose a legally binding obligation on the volunteer to attend work and perform work.

However, there may be some instances where you do need to create a legally binding relationship between your organisation and the volunteer (for example, clauses relating to confidentiality or intellectual property). See part 5 of our [National Volunteer Guide](#) for more information on how to make this work with your volunteer agreement.



More information

For more information about distinguishing between volunteers and other types of workers, see our ['National Volunteer Guide, part 2 - Volunteer, employee or independent contractor'](#).

What does it mean for our organisation if a person is a 'volunteer'?

Many laws that protect employees' rights and entitlements apply differently to volunteers or, in some instances, don't apply to them at all.



More information

A summary of the basic legal entitlements and obligations that apply to volunteers is set out in **part 4** of this guide.



Caution

It's important to understand the difference between volunteer and unpaid worker arrangements.

Certain obligations may arise under legislation and contract when work performed falls outside the scope of traditional volunteer arrangements.

Examples of unpaid work arrangements include:

- court-ordered volunteering and fine repayment schemes
- mutual obligation activities
- vocational placements
- unpaid internships, and



Part 4

**Legal obligations owed by
community organisations**



Legal obligations owed by community organisations

This part sets out a brief overview of some of the different legal obligations that a community organisation owes to its:

- employees
- independent contractors, and
- volunteers

Minimum employment standards

Obligations to employees

Under the *Fair Work Act 2009 (Cth)* (**Fair Work Act**), all employees are entitled to 11 minimum standards of employment.

These minimum standards are known as the National Employment Standards (**NES**) and include minimum entitlements for leave, public holidays, notice of termination and redundancy pay. All employers must comply with the NES.

The NES provides a safety net for all Australian employees and relates to:

- maximum weekly work hours
- requests for flexible working arrangements
- offers and requests to convert from casual to permanent employment
- parental leave and related entitlements
- annual leave
- personal/carer's leave, compassionate leave and unpaid family and domestic violence leave
- community service leave
- long service leave
- public holidays
- notice of termination and redundancy pay, and
- Fair Work Information Statement and Casual Employment Information Statement

Obligations to independent contractors

Independent contractors:

- have no statutory entitlement to minimum wages or other benefits such as paid leave (the NES don't apply to them), and
- are free to negotiate the terms of their contracts with the organisations that engage them

However, independent contractors are entitled to 'general protections' set out in the Fair Work Act including protection from unlawful discrimination.

Independent contractors and organisations may also have rights under the *Independent Contractors Act 2006 (Cth)* (**Independent Contractors Act**) if either party is a 'constitutional corporation' (see note below).



Under the Independent Contractors Act, either party can apply to a court to have the contract (or a part of it) revoked or varied on the grounds that it is 'harsh' or 'unfair'. This could happen, for example, if the independent contractor believes that they are being paid at a rate that is, or is likely to be, less than an employee would get for performing similar work.



Constitutional corporation

A 'constitutional corporation' is a body that:

- is incorporated under a federal or state Act (for example, a company limited by guarantee or incorporated association), and
- conducts trading or financial activities

The key question for most not-for-profit organisations in determining whether they are a constitutional corporation is whether they are 'trading'.

'Trading' in this context means the provision of goods or services for payment as well as the provision of services carried on for the purpose of earning revenue. Satisfying this definition does not depend on whether trading is attached to the organisation's 'dominant' activities or whether they are merely an 'incidental' activity. Further, it doesn't matter that the income from trading activities is used for charitable purposes.

Activities that have been classified as trading activities include:

- providing services in return for a fee or charge
- selling goods from a shop or stall
- international student fees
- patient charges
- fundraising activities
- charging car parking fees
- ticket sales and sales of publications
- advertising and broadcasting, and
- charging for admission

The receipt of government grants and subsidies to not-for-profit organisations are generally not regarded by the courts as trading activities.

If you are unsure whether your organisation fits the description of a 'constitutional corporation', seek legal advice.

Obligations to volunteers

The Fair Work Act and the Independent Contractors Act don't apply to volunteers.

A volunteer doesn't have any legally enforceable right to hours of work or payment.

Some organisations may have policies about paying out-of-pocket expenses and other payments for volunteers, but generally there is no legally enforceable obligation for the organisation to do so.

While volunteers may not have any enforceable rights to hours of work or payment, it's important to be aware that other obligations may apply under laws such as work, health and safety legislation.



More information

Your organisation may refer to [Volunteer Australia's National Standards for Volunteer Involvement](#) for guidance on best practice for management of volunteers (note this does not cover legal issues in managing volunteers).

Application of industrial instruments (modern awards and collective agreements)

Employees

Employees and employers in certain industries and occupations may be bound by an industrial instrument.

These instruments contain additional minimum entitlements that supplement the NES (for example, minimum wages for particular jobs, penalty and overtime rates, loadings and allowances).

Industrial instruments include:

- **modern awards**, which are industry- or occupation-based and cover all employers and employees in that sector (most industries have a modern award), and
- **collective agreements** (also known as **enterprise agreements**), set out conditions of employment for a group of employees at one or more workplaces, and which apply instead of a modern award. Employees covered by a collective agreement must be 'better off overall' than if the relevant modern award applied.

In addition, employers and employees are bound by determinations of the Fair Work Commission, an independent body which operates like a court and hears workplace disputes. For example, the Fair Work Commission may 'determine' that an employee was dismissed unfairly and should be reinstated.

Independent contractors

Independent contractors are not covered by the terms of modern awards, enterprise agreements or determinations of the Fair Work Commission. An independent contractor's entitlements are set out in the contract between the contractor and the organisation.

Volunteers

Volunteers are not covered by the terms of industrial instruments or determinations of the Fair Work Commission.

Other laws still apply to volunteers in relation to work health and safety, as well as discrimination.

Long service leave

Employees

Employees are generally entitled to long service leave after a long period of working for an employer. For most employees, their long service leave entitlements come from the laws in the state or territory where they are working. These laws set out how long an employee has to work to get long service leave and details of how long service leave is calculated.

For example, in New South Wales the *Long Service Leave Act 1955* (NSW) provides full-time, part-time and casual workers with two months (8.6667 weeks) paid long service leave when they have completed a continuous period of ten years' service, and further paid leave after each additional period of five years of service with that employer.



More information

To find out more about long service leave entitlements, contact the long service leave agency in your state or territory. For a list of these agencies, see the [Fair Work Ombudsman's website](#).

Superannuation

Employees

Under the *Superannuation Guarantee (Administration) Act 1992 (Cth)*, your organisation is required to make minimum prescribed superannuation contributions for all eligible employees (whether full time, part time or casual):

- over 18 years, or
 - under 18 years who work more than 30 hours a week,
- who are paid \$450 or more (before tax) in a calendar month.



Note

From **1 July 2022**, the \$450 superannuation guarantee threshold will be removed, so employers will be required to make super guarantee contributions to an eligible employee's super fund regardless of how much the employee is paid.

The [Australian Tax Office has published a note](#) on this change.

Independent contractors

Under the *Superannuation Guarantee (Administration) Act 1992 (Cth)* a contractor is entitled to superannuation contributions if they work under a contract that is 'wholly or principally for the labour of the person'.

A contractor may be considered 'wholly or principally for labour' if:

- they are paid wholly or principally for their personal labour and skills
- they perform the contract work personally, and
- they are paid for hours worked, rather than to achieve a result

For superannuation requirements to apply, the contract must be directly between the contractor and the employer. It can't be through another person or through a company, trust or partnership.



More information

The Australian Tax Office has developed a [superannuation guarantee eligibility decision tool](#) to help you understand whether you need to make superannuation contributions for individual workers (including any contractors who are treated as employees for superannuation purposes).

However, these situations can be complex, so seek legal advice if you are unsure.



Volunteers

Volunteers have no legal entitlement to superannuation.

Work health and safety

Employees

Your organisation has a legal duty under common law to take reasonable care to avoid exposing employees to likely risks of injury.

There is also legislation in every state and territory regarding workplace health and safety (**WHS**). All states and territories except Victoria have adopted Commonwealth WHS legislation (referred to here as **WHS Laws**).



Note

Although there are some differences across states and territories, a common element is a duty is to provide, so far as is reasonably practicable, a safe working environment and safe practices and systems of work.

If your organisation operates in any state or territory apart from Victoria:

- It will have to comply with the WHS Laws if it's considered to be a 'person conducting a business or undertaking' (**PCBU**). Subject to the below exception in relation to volunteer associations, this is a broad category that encompasses not-for-profit organisations that run an operation or enterprise of an ongoing, organised nature.
- There is an exception for 'volunteer associations', which are organisations that don't employ anyone and consist solely of volunteers. If your organisation is entirely volunteer run, it will not be subject to the WHS Laws. However, if it employs anybody (even just one person on a casual or part-time basis), it must comply with the WHS Laws.
- Once an organisation falls within the WHS Laws it will owe WHS duties to **all** workers, that is – any person who carries out work in any capacity for the organisation, whether they are paid or not.



Caution

Even if your organisation doesn't fall within the WHS Laws, there are common law duties to provide employees and other workers with a safe workplace.

All employers have a duty to take reasonable care to avoid exposing employees (and others who might be exposed to risks from the organisation) to reasonably foreseeable risks of injury.

- The duties of PCBUs include:
 - An overarching duty to ensure as far as reasonably practicable the health and safety of workers while they are at work and others who may be affected by the carrying out of work such as visitors, clients or customers. This duty is very broad.
 - Duties regarding workplace safety if the organisation 'manages or controls a workplace'. A 'workplace' in this context means any place where work is carried out.
 - Various other duties such as a duty to report any incidents, provide adequate training and supervision, and to consult with workers.



If your organisation operates in Victoria:

- It will have to comply with the Victorian occupational health and safety laws (**OHS Laws**) if it is an 'employer', that is – if it employs one or more other persons under contracts of employment or contracts of training.
- Even if the organisation is completely volunteer based, if it manages or controls a workplace (that is, anywhere where employees or self-employed persons work), it may have duties regarding workplace safety.
Note – There is no 'volunteer association' exception in Victoria, so even entirely volunteer-run organisations may have OHS duties.
- The OHS Laws include duties to provide a safe working environment, monitor the conditions of the workplace and the health of employees, and protect other people from risks arising from the organisation's activities. There are various other duties too.

Independent contractors

If your organisation is bound by the WHS Laws, as above, it will owe WHS duties to all workers. The definition of 'workers' is broad and includes independent contractors.

If your organisation falls within Victoria's OHS Laws, its duties will generally extend to independent contractors too.

Volunteers

If an organisation falls within the WHS Laws, it will owe WHS duties to all workers – which includes volunteers. Although the 'volunteer association' exception means that organisations which are fully run by volunteers are exempt from the WHS Laws, if an organisation has **at least one employee**, it will owe WHS duties to all workers including volunteers.

For organisations covered by the Victorian OHS Laws, most of their duties will apply to volunteers. As there is no 'volunteer association' exception, even if your organisation is completely volunteer-based, it will be bound by WHS laws if it controls or operates a 'workplace'.



Caution

It's important to note that even if your organisation is not covered by the relevant legislation, or if a particular duty does not apply to volunteers under the legislation, your organisation owes a general duty of care to its volunteers and should adopt effective practices to ensure the safety of volunteers while working for the organisation.

In particular, be aware of volunteers with special needs, who may require a higher standard of care and a more intensive level of supervision in their work for the organisation.



More information

This part of the guide is only intended to provide an overview of the WHS legal framework. For more information about WHS laws, see [our webpage on WHS laws](#).

Insurance

Employees

Employers are required by all state and territory health and safety laws to take out workers' compensation insurance to cover their employees and the organisation. Workers' compensation insurance provides



benefits to employees, usually including lost wages and medical expenses, if an employee is injured at work or becomes sick due to their work. The specific requirements vary between the states and territories.

Depending on its activities and functions, your organisation may also need to take out public liability and professional indemnity insurance to cover its own liability and that of its employees to other people.

Independent contractors

Unlike employees, independent contractors are typically required to organise their own insurance cover, such as accident compensation, public liability and professional indemnity. In some cases, both the organisation engaging a contractor and the contractor itself may have insurance and compensation obligations.

When you engage a contractor, you should check whether they have the necessary insurance because your organisation's insurance policies may not cover them. It's important to understand what your insurance policies do and don't cover. Workers' compensation insurance does not usually cover contractors. These situations can be complex, and you should seek legal advice in cases of doubt.

Volunteers

Generally, volunteers are not covered by workers' compensation insurance. Therefore, it is a good idea for your organisation to take out personal accident insurance to cover your volunteers for out-of-pocket medical expenses if they are injured while working on behalf of your organisation. You should also ensure that your public liability policy covers your organisation for loss caused by negligent acts or omissions of your volunteers.

If you are a volunteer, it's important to check that the organisation you volunteer for has insurance that covers you and the activities you are engaging in.



More information

For more information about insurance for your community organisation, see our [guide to risk and insurance for community organisations](#).

For more information about the workers' compensation scheme in your state or territory, contact the relevant workplace health and safety regulator:

- Australian Capital Territory: [Worksafe ACT](#)
- New South Wales: [SafeWork NSW](#)
- Northern Territory: [NT WorkSafe](#)
- Queensland: [WorkSafe Queensland](#)
- South Australia: [SafeWork SA](#)
- Tasmania: [WorkSafe Tasmania](#)
- Victoria: [WorkSafe Victoria](#)
- Western Australia: [WorkSafe WA](#)

Taxation

Employees

If your community organisation is an employer, it's required to withhold income tax from wage payments to employees (**PAYG withholding**) each pay period. The organisation must then provide this tax to the Australian Taxation Office (**ATO**).



More information

The ATO website contains a [tax withheld calculator](#) that you can use to work out how much tax you need to withhold from payments you make to your employees (and, in some cases, other workers) each pay period (week, fortnight or month).

Other taxes, such as fringe benefits tax, may also apply to employees. In addition, depending on the size of your organisation and the total remuneration paid by it in its payroll, it may also be liable to pay payroll tax to the State Revenue Office.



Caution

Some not-for-profit community organisations are eligible for an exemption from paying income tax. This means the organisation doesn't have to pay tax on any income that comes into the community organisation (for example, on money received as part of a grant).

However, this exemption only applies to the community organisation's income tax liability. It doesn't mean employees of the community organisation are exempt from paying income tax. All employers are required to comply with the ATO's income tax withholding obligations in relation to payments of income to employees.

Independent contractors

Typically, independent contractors are paid after they provide a tax invoice to your organisation. The independent contractor is responsible for any income tax liability that may flow from that payment. As a general rule, the community organisation usually doesn't have to withhold income tax in respect of payments made to independent contractors.

However, there is also scope under taxation laws for independent contractors to enter into voluntary agreements authorising the organisation to withhold taxation from payments. Before entering into such a voluntary agreement with an independent contractor, your organisation should contact the ATO or seek legal advice to ensure that the necessary requirements for an arrangement of this type are met.

If your organisation is registered or required to be registered for GST purposes, it may have GST obligations in relation to services provided by an independent contractor.

It's important to note that certain tax laws (such as payroll tax laws) apply an expanded definition of employee or deem an independent contractor to be an employee in some cases. The effect of this is that in certain circumstances your organisation may be liable to pay tax in relation to workers that would otherwise be considered independent contractors.

Volunteers

In certain circumstances volunteers may be provided with payments or other benefits in the course of undertaking work for an organisation. This may include cash payments, non-cash benefits, or both. These payments are given various descriptions, including honoraria, reimbursements and allowances. Honorary or ex-gratia payments by the organisation to a volunteer are generally not legally enforceable.

How an amount is described does not determine its treatment for tax purposes. Whether a payment is assessable income in the hands of a volunteer depends on the nature of the payment and the recipient's circumstances.

As a general rule, volunteers don't have to pay tax on payments or benefits they may receive in their capacity as a volunteer for a not-for-profit organisation. Community organisations are similarly not liable to withhold income tax or fringe benefits tax for payments or benefits they provide to volunteers. There are, however, exceptions to these general rules and the ATO has further information on this issue.



More information

For more information about the tax obligations of community organisations, see [our webpage on tax](#).

Termination

Employees

In relation to the termination of their employment, most full-time and part-time employees are entitled to a notice period (or pay in lieu of such a notice period) in accordance with the NES. If the employee is covered by a modern award or enterprise agreement or has a written contract of employment, that award, agreement or contract may specify a greater period of notice. Casual employees are not entitled to notice of termination unless their contract of employment provides for one.

If your organisation dismisses an employee for a reason that contravenes the general protection provisions of the Fair Work Act or for a reason that is discriminatory, or if the termination is 'harsh, unjust or unreasonable', the employee may be able to make a claim against your organisation.

Always seek legal advice before proceeding with the termination of any employee's employment.



More information

For more information, see [our fact sheet on your legal obligations if you want to terminate an employee's employment](#).

Independent contractors

If your organisation has a contract with an independent contractor, that contract will ordinarily end when the independent contractor has completed the work and received payment from your organisation. However, if your organisation wants to terminate the agreement before the completion of the work, it can only do so in accordance with the terms of the contract or if otherwise allowed by the law (for example, it may be possible to terminate the contract if it cannot be completed for reasons outside the control of either party).

You need to check the terms of your contract to see whether:

- your organisation can terminate by giving notice, and
- you are required to pay the contractor for costs they incurred up to the date of termination

These situations can be difficult, and you should seek legal advice, particularly if the contract does not have any express provision dealing with termination.

Your organisation may also be able to terminate a contract if the contractor is in serious breach of the contract. This will depend on the terms of the contract, so again, it is important to look carefully at the terms. For example, some contracts require you to give the independent contractor a 'notice to remedy a breach' (that is, an opportunity to fix the breach before terminating the agreement).

Unlike employees, independent contractors can't make unfair or unlawful dismissal claims. However, if your organisation attempts to terminate its contract with an independent contractor other than in accordance with the terms of that contract, the independent contractor may take legal action against your organisation for breach of contract.

It's also worth noting that if a person who your organisation regards as an 'independent contractor' can establish in court that they are properly classified as an employee (see part 1 above for attributes of an employee), then they will be able to make any claims available to an employee, including an unfair dismissal application.



Volunteers

There's no notice period or other requirements to terminate a volunteer relationship – the voluntary nature of the relationship means that it can be ended by either party at any time.

Volunteers can't make unfair or unlawful dismissal claims. However, it's worth noting that if a person who your organisation said was a 'volunteer' is able to establish in court that they had the attributes of an employee (see part 1 above for the attributes of an employee) and the court accepts that they were an employee, then they may be entitled to lodge an action for unfair dismissal or make a claim for other employment benefits.



Part 5

**The risks of describing a worker's
status inaccurately**



The risks of describing a worker's status inaccurately

Often the parties to a contract for the performance of work will try to describe the legal nature of the relationship between them.

For example, a contract may state:

- 'this agreement does not create a relationship of employment' or
- 'the parties agree that their relationship is one of principal and independent contractor'

While it is a good idea to write down the terms of the relationship in a contract so both parties are clear about the arrangement, the label you give your worker is not necessarily decisive.

The question of whether a person is an 'employee', 'independent contractor', or 'volunteer' is decided by looking at any contract governing the arrangement as well as the entire relationship between the worker and the other party.

The way a contract classifies or labels a worker is just one factor that will be considered. If the matter went to court, the court would look behind the description of a relationship in documents to what is actually set out in the terms of the contract.

The courts used to adopt a 'multi-factorial' approach where the terms of the contract were relevant but not decisive, in particular, if in practice the relationship played out contrary to the terms of the contract. The High Court has adopted a different approach in that the focus is on the rights and obligations set out in the terms of the contract occurring in practice.

So, if a person who is called an 'independent contractor' actually has all or many of the attributes of an employee (see **part 1** above for employee attributes) in the terms of the contract, the court may decide that the person is an 'employee' and entitled to the legal benefits of being an employee.

Similarly, if a person who is called a 'volunteer' actually has all or many of the attributes of an employee in the terms of the contract, that person could try to argue in a court that they are an 'employee' and entitled to the legal benefits of being an employee.

Where an employer intentionally tries to disguise an employment relationship as an independent contracting arrangement (usually for the purpose of avoiding having to provide the worker with minimum rates of pay and leave or superannuation entitlements), they may face serious penalties under the Fair Work Act. The Act prohibits these kinds of 'sham contracting arrangements' by making it an offence for organisations to:

- intentionally disguise a worker's employment or an offer of employment as an independent contracting arrangement
- dismiss or threaten to dismiss a worker for the sole or dominant purpose of re-engaging the worker as an independent contractor, or
- make a knowingly false statement for the purpose of persuading a worker to become an independent contractor



More information

For more information about clarifying a volunteer relationship, go to [our webpage on volunteers](#).

**Tip**

Be careful not to falsely or incorrectly label an employee as an independent contractor (for example, in a written contract or letter of engagement).

If the true legal nature of the relationship between the parties is that of employer and employee, the parties can't alter the truth of that relationship by calling it something else. If you are unsure of the true nature of the relationship between your organisation and a worker, you should seek legal advice.

