
CREATIVE ENTERPRISE HUBS IN NSW: EMPLOYMENT ISSUES (FOR EMPLOYERS)

Introduction

Whether you operate as Administering Body of a Creative Enterprise Hub or as participant in a Creative Enterprise Hub, you must be aware of your obligations to any employee, contractor or volunteer who help with your project. Various requirements are necessary to comply with all applicable laws, so it is important that you read this information sheet carefully.

As of 1 January 2010, all New South Wales private sector employers and employees are covered by the federal industrial relations scheme, the *Fair Work Act 2009* (Cth). Accordingly, recent changes in the law may affect your project.

The difference between employees and contractors

Not every individual who performs services related to your project is considered an employee. Some will be considered contractors (independent contractors or freelancers) who perform specific services without detailed control. Whether an individual is characterised as an employee or contractor has important consequences, especially in terms of minimum conditions of employment, workers compensation, intellectual property and your tax and superannuation obligations.

Control test

The traditional test used to determine the difference between employees and contractors depends largely on control, the power (whether exercised or not) that you have to direct how the work is carried out. If the worker is running his/her own enterprise with independence in the conduct of his/her operations, the worker is most likely a contractor. However, if the worker operates as a representative of your business with little or no independence in the conduct of his/her operations, he/she is most likely an employee.

The situation of artists and otherwise skilled workers

However, in situations where specialised skills are required, workers often exercise more discretion over their work and rely less on your direct instructions or control. Similarly, you are unlikely to give, and

the worker to accept, directions about the manner in which the work should be done if a worker's task is to carry out skilful or creative work, for example a cartoonist supplying comic strip drawings to a newspaper. Such a person may, however, still be considered an employee for the purpose of determining your legal obligations. Therefore, a more flexible approach to the traditional "control test" is necessary in the artistic context or in other fields requiring a high level of skill.

In those situations, an "organisational test" is usually more appropriate to determine whether the person is an employee or a contractor:

- the person is an employee if he/she is employed as part of the business and his/her work is an integral part of it;
- the person is a contractor if his/her work is not integrated into the business but only an accessory to it.

Generally, other factors may be considered in determining whether a worker is an employee or contractor, including:

- whether the person receives a periodic wage (employee) or is paid per task (contractor);
- whether the person sells his/her labour (employee) or only the product of his/her labour (contractor);
- whether the person is supplied with equipment (employee) or provides his/her own equipment (contractor);
- whether the person is merely an individual worker (employee) or part of a company or sole trader (contractor); and
- whether the worker works exclusively for the employer (employee) or whether his/her work is non-exclusive/advertised to the world at large (contractor).

No one factor is conclusive. It is necessary to examine the entire relationship of the parties.

The Australian Taxation Office (**ATO**) (<http://www.ato.gov.au>) has made available on its website an online decision tool (<http://www.ato.gov.au/Calculators-and-tools/Employee-or-contractor/>) that is helpful in determining whether a worker is an employee or contractor:

Volunteers

Volunteers are neither employees nor contractors. They make a gift of their work without financial remuneration. They work in a charitable context with no intention to create legal relations with the organisation. Although volunteers are unlikely to have an enforceable employment contract with an organisation, you have certain obligations towards them.

Copyright and employment

As an arts organisation, you must be aware of the intellectual property rights of your organisation and its workers. Generally, when an employee makes a creative work in the course and within the scope of the employment relationship, the employer is the copyright owner unless there is an agreement to the contrary. However, when the person creating the work is a contractor or a volunteer, the contractor or volunteer generally retains copyright in the works they create for the organisation. Therefore, you may need to consider entering into a written licence agreement with the contractors/volunteers so that your

organisation can use their work. Alternatively, you can seek a written assignment from the contractor/volunteer who created the work to acquire full ownership of copyright in the work.

Workplace health and safety

Every employer has a duty to provide a safe working environment for employees, contractors and volunteers. Under occupational health and safety (**OH&S**) legislation, there is a general duty of care on employers to ensure the health, safety and welfare of workers by maintaining a safe workplace and facilities, ensuring the safe handling and use of equipment, and providing proper information, instruction, training and supervision. You must take all reasonably practicable measures to control risks against injuries that may occur to all workers in the workplace. For example, you must ensure that premises are structurally sound, that emergency exits are well-identified, and that the temperature and quality of the air do not endanger health.

Employers have a duty to consult with their employees on matters of health and safety and to respond to employee concerns. Employees have a corresponding duty to take care of others and cooperate with employers in the implementation of health and safety measures.

Although most arts-related ventures may seem to pose little risk of injury to workers, you must be aware of all of the possible risks involved with your project or business (eg. dangerous substances such as clays, paints and photographic chemicals; environmental conditions of work including ventilation, air temperature, floor surfaces and lighting). You should engage in risk management by identifying any foreseeable hazard, assessing the risk from any hazard, and eliminating the hazard or (if this is not possible) controlling the risk from the hazard.

If an injury or illness occurs at your workplace, you must notify your workers compensation insurer within 48 hours. If there is a serious incident involving fatality or a serious injury or illness, you must also phone the government body that oversees workplace safety laws, WorkCover NSW (www.workcover.nsw.gov.au) immediately on 13 10 50.

Workers compensation

Under the *Workers Compensation Act 1987* (NSW), workers compensation insurance is compulsory for all employers who pay more than \$7,500 in cumulative wages across all employees (including overtime, leave payments, superannuation etc) in a financial year, employ an apprentice or trainee or in other specific circumstances. Importantly, independent contractors may be deemed to be employees for the requirement of obtaining workers compensation coverage. However, workers compensation insurance does not cover volunteers. As a result, you should consider obtaining a separate volunteer insurance policy if your project involves the assistance of volunteers

Workers compensation provides compensation to workers who suffer a work-related injury or disease. Employees and contractors injured at the workplace may be entitled to weekly payments, lump sum for permanent impairment (including pain and suffering), payment of medical bills, rehabilitation assistance and provision of legal assistance. If you are uninsured, an injured worker can make a claim under the uninsured liability and indemnity scheme and receive payment from WorkCover NSW, which can then recover the amount from you.

Discrimination in the workplace

Under federal and state laws, it is illegal for an organisation to discriminate against an employee or contractor because of that person's race, colour, sex, sexual preference, age, physical or mental

disability, marital status, carer's/family responsibilities, pregnancy, political opinion, religion, national extraction or transgender status. In the context of employees, an employer may not discriminate in hiring or promotion decisions, termination or other discipline, or terms and conditions of employment.

Similar anti-discrimination provisions apply to contract workers. An organisation may not discriminate against a contractor in relation to the following issues: the terms and conditions on which the contract worker is allowed to work; whether to allow the person to work or continue work; access to opportunities or benefits associated with the contract; and subjecting the person to some other detriment.

Although volunteers are not explicitly covered by the *Anti-Discrimination Act 1977 (NSW)*, it may be against the law in some circumstances to discriminate against volunteers who receive any kind of benefit (other than out of pocket expenses) in return for their voluntary work. Furthermore, it is good business practice not to discriminate against your volunteers.

Laws prohibiting sexual harassment apply to all three categories of workers: employees, contractors and volunteers.

Minimum conditions and other employer obligations

National Employment Standards

The *Fair Work Act 2009 (Cth)* sets out the National Employment Standards (**NES**), which include ten entitlements related to minimum working conditions. Accordingly, all employers are obligated to provide the following entitlements to their **employees** (not contractors or volunteers):

- **Maximum weekly hours of work:** 38 hours plus reasonable overtime;
- **Requests for flexible working arrangements:** parents/carers of children under school age or children with disabilities under 18 may request a change in working arrangements;
- **Parental leave and related entitlements:** 12 months unpaid leave, with the right to request an additional 12 months;
- **Annual leave:** 4 weeks paid leave per year;
- **Personal/carer's leave and compassionate leave:** 10 days paid personal/carer's leave, two days unpaid carer's leave as required, and two days compassionate leave (unpaid for casual workers);
- **Community service leave:** unpaid leave for voluntary emergency activities and leave for jury service, with up to 10 days paid leave for jury service;
- **Long service leave:** transitional entitlement for certain employees who had long service leave entitlements before 1 January 2010, pending development of uniform national standards;
- **Public holidays:** paid days-off on public holidays, except where reasonably requested to work;
- **Notice of termination and redundancy pay:** up to 4 weeks notice of termination (5 weeks if the employee is over 45 and has at least 2 years of continuous service) and up to 16 weeks redundancy pay (i.e. payments made when a position is eliminated due to genuine operational needs), both based on length of service. Small businesses under 15 employees are not required to make redundancy payments;
- **Provision of a Fair Work Information Statement:** employers must provide this statement to all new employees.

National Employment Standards for casual employees

Only certain NES entitlements apply to employees who are characterised as **casual employees** (generally engaged for short-term, irregular or seasonal work without the promise to provide work or be available for work on other occasions). The NES entitlements that apply to casual employees are:

- two days unpaid carer's leave and two days unpaid compassionate leave per occasion;
- maximum weekly hours;
- community service leave (except paid jury service);
- day-off on a public holiday, unless reasonably requested to work by the employer; and
- provision of the Fair Work Information Statement.

In addition, casual employees who have been employed for at least 12 months by an employer on a regular and systematic basis and with an expectation of ongoing employment are entitled to make requests for flexible working arrangements and parental leave.

In addition to the ten entitlements of the NES, there are several other obligations that you are required by law to fulfil for all employees:

- **Minimum wage:** the Federal Minimum Wage is \$14.31 per hour (\$543.78 per week), and will be replaced by the 'national minimum wage' on 1 July 2010. However, the minimum wage may be higher in different industry sectors, which are controlled by **awards** or **enterprise agreements** (i.e. legal document that set out the rights and obligations of employers and employees engaged in particular types of work);
- **Award display:** employers must display a copy of every award applying in the workplace in a place conspicuous to employees;
- **Payslips:** employers must give employees written particulars about their pay including: name and Australian Business Number (**ABN**) of the employer; name of employee; classification of the employee under any applicable award (including full-time, part-time and casual status); date when the payment was made; period of employment to which the payment relates; the amount of money paid before tax (gross amount); amount paid as overtime; amount deducted for tax; amount deducted for as employee contribution for superannuation; particulars of all other deductions; amount paid after tax (net amount);
- **Time and wage records:** employers must keep accurate time and pay sheets in their records for at least six years;
- **Leave records:** employers must keep the following records in relation to leave: any leave taken by the employee; the employee's entitlement from time to time to that leave; the accrual (build-up) of that leave;
- **Superannuation contribution records:** if an employer is required to make superannuation contributions for an employee, the employer must keep the following records: amount of contributions made; period over which contributions are made; when the contributions are made; name of the fund or funds to which the contributions are made and whether that fund is specified in the award or enterprise agreement or by the employee.

Tax matters

Employees

You have the following tax obligations in relation to your employees:

- **Pay As You Go (PAYG):** employers have a legal requirement to withhold a portion of employees' salaries for income tax purposes and remit the withheld amount to the Australian Taxation Office (ATO). The amount withheld is determined by using the tax tables published by the ATO and information provided by the employee on a tax file number declaration (and withholding declaration if applicable). New employers should register with the ATO before withholding payments;
- **Fringe Benefits Tax (FBT):** FBT must be paid on any non-salary benefits to employees or their associates (such as family members). Examples of fringe benefits include allowing an employee to use a work car for personal purposes or when an employer pays an employee's private health insurance costs.

Contractors

If a contractor working for you does not provide you with an ABN number, you are required to withhold 46.5% of the payment due and remit it to the ATO. You do not have to withhold this amount if the total payment you make to the contractor is \$75 or less (excluding Goods and Services Tax (GST)). In addition, GST may be payable as contractors provide a service.

Superannuation

Employee's contributions

You are required to make superannuation contributions on behalf of your eligible employees at least once each quarter. The minimum contribution is 9% of the employee's earning base (generally ordinary time earnings). These contributions are in addition to the employees' salaries and wages. You will be subject to the Superannuation Guarantee Charge (SGC), a quarterly levy, if you fail to provide the prescribed level of superannuation support for your employees.

Employees are eligible for compulsory superannuation contributions if they: (1) are aged between 18 and 70; (2) are paid \$450 (before tax) or more in a calendar month; and (3) work full-time, part-time or on a casual basis. In addition, you must pay superannuation for an employee under 18 who earns \$450 or more per month and works for more than 30 hours per week.

Contractors

You are **not** required to make superannuation contributions for self-employed contractors. However, you may not disguise an employee as a contractor for the purposes of avoiding superannuation payments. Several questions must be answered to determine whether a person is self-employed (i.e. a contractor) or is an employee for superannuation purposes:

1. Under whose 'control' is the person working? Who has the right to control how, when, and where the work is performed and who is performing it? Does the worker have discretion to accept or reject work?

2. Is the person 'integrated' with the business of the employer? Does the provider of the labour or service do so as a truly independent contractor carrying on their own business (as a contract for services: a contractor) or individually as an integral part of another business organisation (as a contract of service: an employee)? Is the worker presented to the public as part of the business of the hiring organisation? For whose benefit is the work performed?

For more information see Arts Law's information sheet on [Superannuation and contract for services](#).

Terminating employees

Employer-employee relationships do not always work out as smoothly as planned. Sometimes, you might have to terminate an employment relationship, and you must be aware of the various legal requirements applicable when dismissing an employee (but not a contractor).

Notice requirements

An employer wishing to terminate an employment relationship must provide the employee with **advanced written notice** (1-4 weeks, depending on length of employment) or **payment in lieu of notice** (the full amount the employee would have been paid during the applicable notice period). Notice (or payment) is **not** required when the employee engaged in serious and wilful misconduct (eg. theft, fraud, violence) entitling the employer to instantly or summarily dismiss the employee.

Termination pay

Employees should receive the following entitlements in their final pay:

- Outstanding wages owed to the employee;
- Accrued annual leave entitlements;
- Accrued or pro-rata long-service leave (if applicable); and
- Redundancy pay entitlements (if applicable).

Unfair dismissal

Certain eligible employees may be able to file an unfair dismissal claim against their employers if the circumstances surrounding their termination were harsh, unjust or unreasonable.

- **Requirements for unfair dismissal:** an employee can file an unfair dismissal claim if he/she has been: (1) dismissed; (2) the dismissal was harsh, unjust, or unreasonable; and (3) the dismissal was not a case of genuine redundancy.
- **Employees eligible to file an unfair dismissal claim:** to be eligible to make an unfair dismissal claim, an employee must: (1) have worked for you for a minimum of 6 months; and (2) earn less than \$108,300 per year (unless covered by an award or enterprise agreement).
- **Consequence of unfair dismissal:** if Fair Work Australia determines the dismissal was unfair, an employer can be ordered to reinstate the employee or compensate the employee for up to 26 weeks pay (up to a maximum of \$54,150).

Special considerations for small Businesses

If you employ fewer than 15 full-time employees, the Small Business Fair Dismissal Code applies to you. If you follow this code when dismissing an employee, you will not be subject to an unfair dismissal claim.

- **Eligibility:** to be eligible to make an unfair dismissal claim, the employee must have: (1) worked for you for at least **12 months**; (2) be covered by a modern award/enterprise agreement; and (3) earn less than \$108,300 per year.
- **Summary dismissal:** it is fair to dismiss an employee without notice or warning when you believe on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal (eg. theft, fraud, violence, breach of occupational health and safety procedures).
- **Other dismissals:** prior to dismissing an employee, you must give the employee a reason why he/she is at risk of being dismissed (based on the employee's conduct or capacity to perform the job). If there is no improvement, you should warn the employee (preferably in writing), and give the employee the opportunity to respond to the warnings and a reasonable chance to rectify the problem (which may include additional training and ensuring the employee knows the job expectations).
- **Evidence of compliance:** A small business employer will be required to provide evidence of compliance with the code if the employee makes a claim for unfair dismissal, including evidence that a warning has been given (except in cases of summary dismissal).

Unlawful termination

It is illegal for an employer to dismiss an employee based on any of the following reasons:

- A person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (some rare exceptions apply, such as where it's based on the inherent requirements of the job);
- Temporary absence from work because of illness or injury;
- Trade union membership (or lack thereof);
- Seeking office as, or acting as, a representative of employees;
- Being absent from work during maternity leave or other parental leave;
- Temporary absence from work to engage in a voluntary emergency management activity;
- Filing a complaint or participating in proceedings against an employer.

Further information

You can find additional information about these topics on the following government websites:

- **Australian Taxation Office** (www.ato.gov.au)
- **Australian Workplace** (www.workplace.gov.au)
- **Fair Work Australia** (www.fairwork.gov.au) and (www.fwa.gov.au)
- **New South Wales Industrial Relations** (www.industrialrelations.nsw.gov.au)

- **WorkCover NSW** (www.workcover.nsw.gov.au)

Other Arts Law publications on employment issues include:

- [Superannuation and Contract for Services](#) information sheet

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (**Arts Law**) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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