



Guide for Victorian community organisations:
Employee, contractor or volunteer?

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Overview

The law recognises many different categories of relationships where one party (a worker) performs work for another party (an employer, or principal), in exchange for payment or reward. These include, among others, 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 legal requirement of, payment or reward.

It is important for your community organisation to know which category of 'worker' is undertaking work in your organisation. This is because different legal rights, financial benefits, entitlements and obligations apply, depending on whether the worker is an employee, an independent contractor or a volunteer.

If your organisation incorrectly classifies a worker, you may fail to provide them with their legal entitlements. This could result in legal claims being made against your organisation and you may be found liable to pay penalties.

This fact sheet is to help Victorian not-for-profit community organisations to understand how the law treats different kinds of working relationships. It outlines:

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

Note: The information contained in this fact sheet is intended as a guide only, and is not legal advice. If you or your organisation has a legal problem you should talk to a lawyer before making a decision about what to do. The information in this fact sheet is written for people and organisations resident in, or affected by, the laws that apply in Victoria, Australia and is current at 1 October 2008.

Employees

When is a worker an 'employee'?

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

Although a great deal of employment law is now prescribed by legislation, the issue of whether a worker is an employee, independent contractor, or volunteer is decided by the courts, based on principles established in cases over time. In the cases, the courts have decided whether a 'worker' is an 'employee', by assessing the entire relationship between the worker and the organisation.

As a general rule, the level of control exercised over the worker by the organisation will be the most important factor. If the worker is directed and supervised in their duties on a day-to-day basis, then it is likely that the worker is an 'employee'.

However, to determine whether a worker is an 'employee' or an 'independent contractor' requires consideration of a number of different elements of the working relationship. A worker will normally be found to be an employee when the following elements exist:

EMPLOYEE ATTRIBUTES	
Type of Work	Payments and Benefits
An employee:	An employee :
<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 (i.e. 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 cannot delegate their work to 'outsiders' (i.e. 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"> works hours set by the employer, a workplace agreement or an industrial award 	<ul style="list-style-type: none"> receives paid leave (for example, sick leave, personal/carers' leave, annual or recreation leave, or long service leave)
<ul style="list-style-type: none"> is recognised as an integral part of the employer's business and holds themselves out to the public as being part of that business (e.g. wearing a uniform, using a business card) 	<ul style="list-style-type: none"> does not pay for their own insurance, and is covered by professional indemnity, public liability and workers compensation insurance premiums paid by the employer

EMPLOYEE ATTRIBUTES	
Type of Work	Payments and Benefits
<ul style="list-style-type: none"> does not take commercial risks and cannot make a 'profit' or 'loss' from the work performed 	<ul style="list-style-type: none"> generally has all 'tools of the trade' provided by the employer to carry out the work (e.g. desk, computer, stationary).

Other factors may also be relevant and of importance in particular cases. Whilst it is often straightforward to determine whether a worker is an employee, where there is doubt, the organisation should seek legal advice.

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

The law requires that employers provide their employees with certain benefits. 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. A summary of the basic legal entitlements that employers owe to their employees is set out below in this document at [Legal obligations owed by community organisations.](#)

Independent contractors and volunteers are not owed all of the same entitlements as employees. This is why it is important for your community organisation to be clear about the terms on which a person is becomes 'involved' in your community organisation.

Tip: The best way to be clear about the relationship between your community organisation and a person who is doing work for it is to write the agreement down – so both parties are clear about it. However read the section about "Calling an employee, a 'contractor' or a 'volunteer'" below to understand the effect of documenting the relationship.

Can legislation make someone an 'employee'?

Yes. Some Acts (legislation) may contain their own definitions of 'employee,' or may deem (regard) certain workers to be 'employees' just for the purpose of those laws. Where they do so, these laws will override the case-based (common law) definition of 'employee' as set out in the 'employee attributes' table above.

For example, the laws governing workers' compensation and superannuation contain 'deeming' provisions or provide a definition of an employee that is broader than the standard legal tests established by the courts (set out in the 'employee attributes' table above). The effect of this is that an organisation may owe duties to certain independent contractors and be liable to provide them with certain entitlements, as if the independent contractor was actually an employee.

Independent contractors

When is a worker an 'independent contractor'?

There are many circumstances where a community organisation may wish to engage an independent contractor or consultant to provide services to the organisation. This may be when the organisation has a short term project which it requires someone with specialist skills to complete – such as an independent evaluation of the organisation's services or programs.

The legal test to determine whether a worker is an employee or an independent contractor requires consideration of a number of different elements of the working relationship. A 'worker' will normally be found to be an 'independent contractor' when the following elements exist:

INDEPENDENT CONTRACTOR ATTRIBUTES	
Type of Work	Payments and Benefits
An independent contractor:	An independent contractor :
<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 of work are required to complete that work 	<ul style="list-style-type: none"> may have their own registered business and Australian Business Number (ABN)
<ul style="list-style-type: none"> is free to accept or refuse work beyond the requirements of any current contract with the organisation 	<ul style="list-style-type: none"> provides all or most of the necessary materials and equipment to complete the work (for example, uses their own tools)
<ul style="list-style-type: none"> is usually free to delegate work to others 	<ul style="list-style-type: none"> is in a position to make a profit or loss from work

Other factors may also be relevant and of importance in particular cases.

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 do not apply to independent contractors, or will apply differently. A summary of the basic legal entitlements that organisation's owe to their independent contractors is set out below in this document at [Legal obligations owed by community organisations](#).

Volunteers

Who is a 'volunteer'?

In Victoria, there is no generally applicable or accepted legal definition of a volunteer.

Several Victorian laws contain a definition of 'volunteer', but the definition generally only applies for the purpose of that law. For example, Victoria's *Occupational Health and Safety Act 2004* (Vic) describes a volunteer as a 'person who is acting on a voluntary basis (irrespective of whether the person receives out-of-pocket expenses)'.

Another example is the *Wrongs Act 1958* (Vic) which states that a 'volunteer' is 'an individual who provides a service in relation to community work on a voluntary basis'. The definition further provides a number of situations where a person will still be regarded as a volunteer, including if they receive out-of-pocket expenses or remuneration they would have received whether or not they had performed the volunteer work.

The Australian Taxation Office (ATO) advises there is no legal definition of a 'volunteer' for tax purposes. The ATO refers to the dictionary explanation of a volunteer as 'someone who enters into any service of their own free will, or who offers to perform a service or undertaking'. The ATO recognises that volunteers may be provided with payments or other benefits in the course of undertaking work for an organisation, and provides guidelines to determine how these payments are different from a salary and how they should be treated for tax purposes.

Volunteering Australia defines volunteering as an activity with the following characteristics:

- ▶ to be of benefit to the community and the volunteer;
- ▶ of the volunteer's own free will and without coercion;
- ▶ for no financial payment or gain; and
- ▶ in designated volunteer positions only.

From these definitions, we can work out some generally accepted attributes of volunteers:

VOLUNTEER ATTRIBUTES	
Type of Work	Payments and Benefits
A volunteer:	A volunteer :
<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 	<ul style="list-style-type: none"> ▪ generally, has no legally enforceable right to receive payments such as honoraria, allowances or expenses

VOLUNTEER ATTRIBUTES	
Type of Work	Payments and Benefits
<ul style="list-style-type: none"> the 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 be reimbursed for out-of-pocket expenses
<ul style="list-style-type: none"> the volunteer arrangement can end at any time, either by the volunteer or the organisation 	<ul style="list-style-type: none"> may receive payments like an 'honoraria', or allowances, or non-cash benefits such as free use of facilities or free or reduced price entry into an event. <p>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.</p>

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 taxation liability.

Tip: The best way to be clear about the relationship between your community organisation and a volunteer is to write it down – so both parties are clear. As a general rule, if a person is described as a volunteer in a document governing the arrangement, then it would usually be considered that there is no intention to create a contractual or legal relationship (as long as, in reality, the relationship is truly a voluntary one).

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

Many laws which protect employees' rights and entitlements do not apply to volunteers. A summary of the basic legal entitlements that organisation's owe to their volunteers is set out below in this document at [Legal obligations owed by community organisations](#).

Legal obligations owed by community organisations

We have included a brief overview of some of the different legal obligations that a community organisation owes to its:

- ▶ employees
- ▶ independent contractors
- ▶ volunteers

The main obligations owed by an organisation employer to its employees are quite detailed and are summarised very briefly below. For more information on employees and their entitlements see the Related Resources section at the end of this document.

Minimum statutory entitlements

Employees

All employees employed in Victoria are entitled to certain minimum standards of employment as set out in the *Workplace Relations Act 1996* (Cth) and the prescribed Australian Fair Pay and Conditions Standard (the Standard). These minimum standards relate to basic entitlements such as minimum pay, hours of work, leave etc).

Independent contractors

Independent contractors have no entitlement to minimum wages or other benefits such as paid leave. Any payment or other obligations are set out in the contract that was agreed between the organisation and that independent contractor.

Volunteers

The *Workplace Relations Act 1996* (Cth) does not apply to volunteers. A volunteer does not 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.

Application of industrial instruments

Employees

Certain organisations may be bound by an industrial instrument made under the *Workplace Relations Act 1996*, such as an award, certified agreement, workplace agreement, or common rule declaration. If an industrial instrument applies to your organisation, the employees covered by it may have legal entitlements to certain additional benefits (for example, penalty and overtime rates, redundancy pay).

Independent contractors

Independent contractors are generally not covered by the terms of industrial instruments. 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.

Long service leave

Employees

In Victoria, employees are entitled to long service leave under the *Long Service Leave Act 1992 (Vic)*.

Independent contractors

The *Long Service Leave Act 1992 (Vic)* does not apply to independent contractors. Any leave or other entitlements of an independent contractor are set out in the contract between the contractor and the organisation.

Volunteers

Volunteers are not covered by the *Long Service Leave Act 1992 (Vic)* and have no legal entitlements to long service leave.

Superannuation

Employees

As an employer, your organisation is required to make superannuation contributions payments for all employees aged between 18 and 70 who are paid \$450 (before deduction of tax) or more in a calendar month. This is required by the *Superannuation Guarantee Charge Act 1992 (Cth)*.

Independent contractors

Superannuation law applies an expanded definition of an employee. The effect of this is that in certain circumstances your organisation may be required to make superannuation payments on behalf of workers you consider to be independent contractors. These situations can be difficult and legal advice should be sought in case of doubt.

Volunteers

Volunteers have no legal right to superannuation.

Occupational health and safety

Employees

In Victoria, under occupational health and safety (OHS) laws, your organisation has a duty to provide, so far as is reasonably practicable, a safe working environment and safe practices and systems of work for employees.

Independent contractors

Your organisation has a duty to provide, so far as reasonably practicable, a safe working environment and safe practices and systems of work. This duty applies to all people in the 'workplace' including employees, independent contractors and others.

Volunteers

In Victoria, your organisation has a duty to provide so far as is reasonably practicable, a safe working environment and safe practices and systems of work. This duty applies to all people in the 'workplace' including employees, contractors, volunteers and visitors.

Organisations also have a general duty of care to their volunteers and should adopt effective practices to ensure the safety of volunteers while working for the organisation. In particular, you should 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.

For more information about how OHS laws apply to community organisations, see the Related Resources section at the end of this document.

Insurance

Employees

If your organisation's annual financial payroll is expected to be more than \$7500 a year, you will be required to take out WorkSafe Injury Insurance (i.e. workers' compensation insurance) to cover the organisation's employees.

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

Typically independent contractors are required to provide for themselves all necessary insurance, such as accident compensation, public liability and professional indemnity.

However, workers compensation law provides that in some cases a worker may be deemed to be an 'employee' even if, applying the ordinary meaning that worker is an 'independent contractor'. The effect of this is that in certain circumstances your organisation may be required by law to take out a WorkSafe Injury Insurance policy (workers' compensation insurance) to cover workers you would otherwise consider to be independent contractors. For example, in some circumstances, a person may be deemed to be an employee, if they are providing labour, or work as a member of a partnership, or are employed by a family company. These situations can be difficult and legal advice should be sought in case of doubt.

Volunteers

Unlike the requirement to take out workers compensation for employees, there is no legal requirement to take out insurance to cover injuries to your volunteers. However, it is a good idea for your organisation to ensure it is adequately insured for the work undertaken by volunteers (through volunteer personal accident insurance and public liability insurance).

For more information about insurance for community organisations see the Related PilchConnect Resources section at the end of this document.

Taxation

Employees

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

Beware: Some not-for-profit community organisations are eligible for an exemption from paying income tax. This means the organisation does not 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 income tax liability. It does not mean that 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.

Other taxes, such as fringe benefits tax may also apply to employees. Also, 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.

Independent contractors

Typically independent contractors are paid upon provision by them of a tax invoice to your organisation. The independent contractor is responsible for any income tax liability that may flow from

that payment. With this approach, as a general rule, the community organisation usually does not 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 their payers 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, your organisation may have GST obligations in relation to services provided by an independent contractor.

It is important to note that certain tax laws (such as Victorian 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 taxation in relation to workers you would otherwise consider to be 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 not generally 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 do not have to pay tax on payments or benefits they may receive in their capacity as a volunteer for a not-for-profit organisation (although there are exceptions to this rule). Community organisations are similarly not liable to withhold income taxation or fringe benefits taxation 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.

For more information about the tax obligations of community organisations, see the Related Resources section at the end of this document.

Termination

Employees

Most employees are entitled to notice of termination of their employment or payment instead, of between 1 and 5 weeks depending on the employee's length of service and age. The *Workplace Relations Act 1996* (Cth) sets out minimum notice periods.

Subject to certain exceptions, where an employee is dismissed for an unlawful reason or the dismissal is harsh, unjust or unreasonable, an employee may be able to make a claim against the organisation of unlawful termination or unfair dismissal.

Independent contractors

The notice period an organisation is required to give to an independent contractor to end their work, is governed by the contractual agreement under which they were engaged. The contract will usually specify a period and a process for providing the contractor with notice of termination. In some circumstances the contract will say that no notice needs to be provided (that is, the agreement can be ended immediately by the organisation). Advice should be sought, particularly if the contract does not have any express provision dealing with termination.

Unlike employees, independent contractors cannot make unfair or unlawful dismissal claims. However, it is worth noting that if a person who your organisation said was an 'independent contractor' is able to establish in court that they had the attributes of an employee (see table above for 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.

Volunteers

There is 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 cannot make unfair or unlawful dismissal claims. However, it is 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 table above for 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.

Calling an employee, a 'contractor' or a 'volunteer'

Often the parties to a contract for the performance of work will try to describe the legal nature of the relationship between them. While it is a good idea to write down the terms of the relationship in a document (contract), so both parties are clear about the arrangement, this document is not decisive.

Example: A contract may state *'this agreement does not create a relationship of employment' or that 'the parties agree that their relationship is one of principal and independent contractor'.*

The question of whether a person is an 'employee' or an 'independent contractor' (or volunteer) is decided by looking at the entire relationship between the worker and the other party. The terms of the contract between them are one factor that will be considered. However, employment law is focused on the substance of the relationship. If the matter went to court, the court would look behind the description of a situation in documents to what is actually 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 table above for employee attributes), 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, then 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 pay employee leave or superannuation entitlements), they may face serious penalties under the *Workplace Relations 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.

Tip: Be careful not to falsely or incorrectly label an employee as an independent contractor e.g. 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 cannot 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.

Related Resources

Related legislation

Workplace Relations Act 1996 (Cth)

Superannuation Guarantee Charge Act 1992 (Cth)

Income Tax Act 1986 (Cth)

Occupational Health and Safety Act 2004 (Vic).

Accident Compensation Act 1985 (Vic)

Payroll Tax Act 2007 (Vic)

Long Service Leave Act 1992 (Vic)

Wrongs Act 1958 (Vic)

Related PilchConnect Resources

PilchConnect Fact Sheet: Volunteer civil liability protection

PilchConnect Checklist: Is our organisation liable for its volunteers under the *Wrongs Act 1958* (Vic)?

Related links

For online legal information resources for Victorian community organisations about:

- ▶ volunteers see www.pilch.org.au/volunteers
- ▶ employees see www.pilch.org.au/employees
- ▶ independent contractors see www.pilch.org.au/contractors
- ▶ insurance and risk management see www.pilch.org.au/insurance
- ▶ occupational health and safety see www.pilch.org.au/ohs
- ▶ tax, see www.pilch.org.au/tax