

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

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## Overview

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The law recognises many different categories of relationships where one party (a worker) performs work for another party 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 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 or fail to 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.

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 May 2011.

## Employees

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## 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, and is based on principles that have been established in cases over time (i.e. common law). 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 more likely that the worker is an 'employee'. However, this not a determinative 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 employee when the following elements exist:

EMPLOYEE ATTRIBUTES	
Type of Work	Payments and Benefits
An employee:	An employee :
<ul style="list-style-type: none"> <li>performs ongoing work under the control, direction and supervision of the employer</li> </ul>	<ul style="list-style-type: none"> <li>is paid for time worked</li> </ul>
<ul style="list-style-type: none"> <li>must perform the duties of their position</li> </ul>	<ul style="list-style-type: none"> <li>is paid regularly (i.e. weekly, fortnightly or monthly) and has income tax withheld from their salary by their employer</li> </ul>
<ul style="list-style-type: none"> <li>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)</li> </ul>	<ul style="list-style-type: none"> <li>is entitled to have superannuation contributions paid into a nominated superannuation fund by their employer</li> </ul>
<ul style="list-style-type: none"> <li>works hours set by the employer, a workplace agreement or an industrial award</li> </ul>	<ul style="list-style-type: none"> <li>is entitled to paid and unpaid leave (e.g. sick leave, personal/carers' leave, annual or recreation leave, or long service leave)</li> </ul>
<ul style="list-style-type: none"> <li>is recognised as a part of the employer's business and/or holds themselves out to the public as being part of that business (e.g. wearing a uniform, using a business card)</li> </ul>	<ul style="list-style-type: none"> <li>is covered by professional indemnity, public liability and workers compensation insurance premiums paid by the employer</li> </ul>
<ul style="list-style-type: none"> <li>does not take commercial risks and cannot make a 'profit' or 'loss' from the work performed</li> </ul>	<ul style="list-style-type: none"> <li>generally has all 'tools of the trade' provided by the employer to carry out the work (e.g. desk, computer, stationary).</li> </ul>

Other factors may also be relevant and of importance in particular cases. While it is often straightforward to determine whether or not 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 becomes 'involved' in your community organisation.

**Tip:** It is 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. However, merely labelling a worker an employee or independent contractor does not mean they are *in fact* an employee or independent contractor. If the matter went to court, the court would look beyond the label to the substance of the work relationship as a whole. To understand more about the risks of inaccurately describing a worker's status, see the section "Calling an employee, a 'contractor' or a 'volunteer'".

## Can legislation make someone an 'employee'?

Yes. Some Acts (legislation) may contain their own definitions of 'employee,' or may regard (deem) 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

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### 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. Unlike employees who are seen to be subject to the control and direction of their employer, independent contractors are often perceived as running their own business and provide services under commercial, rather than employment, contracts.

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"> <li>has control over how to carry out their work and has the expertise to do so</li> </ul>	<ul style="list-style-type: none"> <li>is paid for results achieved (for example, submits an invoice for work completed or is paid at the end of a project)</li> </ul>
<ul style="list-style-type: none"> <li>also provides services to the general public and other businesses</li> </ul>	<ul style="list-style-type: none"> <li>pays their own superannuation and GST and holds own insurance policies</li> </ul>
<ul style="list-style-type: none"> <li>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</li> </ul>	<ul style="list-style-type: none"> <li>may have their own registered business and Australian Business Number (ABN)</li> </ul>
<ul style="list-style-type: none"> <li>is free to accept or refuse work beyond the requirements of any current contract with the organisation</li> </ul>	<ul style="list-style-type: none"> <li>provides all or most of the necessary materials and equipment to complete the work (for example, uses their own tools)</li> </ul>
<ul style="list-style-type: none"> <li>is usually free to delegate work to others</li> </ul>	<ul style="list-style-type: none"> <li>is in a position to make a profit or loss from work</li> </ul>

Other factors may also be relevant in particular cases.

The Australian Tax Office (ATO) has developed an employee/contractor decision tool which you can use to help you understand whether individual workers in your organisation are employees or contractors in order to comply with your tax and superannuation obligations. For details, see the Related ATO tools section at the end of this document.

## 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 and obligations that apply to independent contractors is set out below in this document at [Legal obligations owed by community organisations](#).

## Volunteers

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### 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 ATO advises that there is no legal definition of a 'volunteer' for tax purposes. The ATO refers to the dictionary definition 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"> <li>▪ works or provides services on an 'ex-gratia' basis, which means that they do so voluntarily, without a legally enforceable obligation to do so</li> </ul>	<ul style="list-style-type: none"> <li>▪ generally, has no legally enforceable right to receive payments such as honoraria, allowances or expenses</li> </ul>

VOLUNTEER ATTRIBUTES	
Type of Work	Payments and Benefits
<ul style="list-style-type: none"> <li>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</li> </ul>	<ul style="list-style-type: none"> <li>may be reimbursed for out-of-pocket expenses</li> </ul>
<ul style="list-style-type: none"> <li>the volunteer arrangement can end at any time, either by the volunteer or the organisation</li> </ul>	<ul style="list-style-type: none"> <li>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.</li> </ul> <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 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. 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). Such an agreement should ideally include an express acknowledgement from the volunteer that he or she: (i) is a volunteer and not an employee; (ii) does not have a contract with the organisation and (iii) does not have any intention to create a legal relationship with the organisation. The volunteer may also acknowledge that he or she has a social, cultural, religious or other community motivation for performing the work. However, this is not essential.

## 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 and obligations that apply to volunteers is set out below in this document at [Legal obligations owed by community organisations](#).

## Legal obligations owed by community organisations

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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 only summarised very briefly below. For more information on employees and their entitlements see the Related Resources section at the end of this document.

### Minimum employment standards

#### Employees

All employees employed in Victoria are entitled to 10 minimum standards of employment which are set out in the *Fair Work Act 2009* (Cth). These minimum standards (known as the National Employment Standards) relate to basic entitlements such as maximum weekly hours, requests for flexible working arrangements, parental leave and related entitlements, annual leave, personal/carer's leave and compassionate leave, community service leave, long service leave, public holidays, notice of termination and redundancy pay.

#### Independent contractors

Independent contractors have no statutory entitlement to minimum wages or other benefits such as paid leave. They are free to negotiate the terms of their contracts with the organisations that hire them. However, independent contractors are entitled to some '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) if either party is a constitutional corporation (see note below). Under that Act, either party can apply to a court for an order to have the contract (or a part of it) revoked or varied on the grounds that it is 'harsh' or 'unfair'. This could happen if the independent contractor believes that he or she is being paid at a rate that is, or is likely to be, less than an employee would get for performing similar work.

**Note:** Your organisation may be a 'constitutional corporation' even if it is a not-for-profit incorporated association or a not-for-profit company limited by guarantee if its trading activities form a substantial or significant part of its overall activities. Trading activities are activities which generate money regardless of whether or not they are for a profit. Examples of trading activities include: providing services to clients or members for a fee or subscription, selling goods, fundraising through auctions, raffles, lotteries and charging admission to an event that you host.

## **Volunteers**

The *Fair Work Act 2009* (Cth) and the *Independent Contractors Act 2006* (Cth) do 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. However, you may find guidance in the National Standards for Best Practice in the Management of Volunteers developed by Volunteering Australia. For details, see the Related Links section at the end of this document.

## **Application of industrial instruments (industry awards, collective agreements and determinations)**

### **Employees**

Employees and employers in certain industries and occupations may be bound by an industrial instrument such as a modern award, enterprise agreement or determination of Fair Work Australia. These instruments contain additional minimum entitlements that supplement the National Employment Standards (for example, penalty and overtime rates, loadings and allowances).

### **Independent contractors**

Independent contractors are not covered by the terms of modern awards, enterprise agreements or determinations of Fair Work Australia. 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 generally entitled to long service leave in accordance with the *Long Service Leave Act 1992* (Vic). The basic entitlement is to 13 weeks' paid leave after 15 years of continuous employment. This entitlement applies to apprentices and casual or seasonal employees as well. However, employees who are covered by a pre-reform award or workplace agreement that provides for long service leave are entitled to long service leave in accordance with the terms of that award or agreement, rather than the *Long Service Leave Act*.

Importantly, an employment contract cannot legally contain a long service leave entitlement that is inferior to (worse than) the entitlement under the *Long Service Leave Act*. If you are in doubt about any of this, you can contact Business Victoria on 1800 287 287.

### **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**

Your organisation is required to make superannuation contributions for all employees (whether full time, part time or casual) who are aged between 18 and 69 and paid \$450 or more (before tax) in a calendar month. Your organisation may also be required to make superannuation contributions for employees under the age of 18 who work more than 30 hours per week. This is required by the *Superannuation Guarantee Charge Act 1992 (Cth)*.

### **Independent contractors**

Under superannuation law, the definition of an employee is expanded to include a person who is paid under a contract for the hours they work (rather than to achieve a result). 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.

The ATO has developed a Superannuation Guarantee (SG) 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 details see the Related ATO tools section at the end of this document.

However, these situations can be difficult and you should seek legal advice in case of doubt.

### **Volunteers**

Volunteers have no legal right to superannuation.

## Occupational 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. In Victoria, organisations that have at least one employee, trainee or apprentice, also have a duty under occupational health and safety (OHS) laws. This duty is to provide, so far as is reasonably practicable, a safe working environment and safe practices and systems of work. If your organisation falls under these laws, it will owe the duty to all people at the workplace, irrespective of their status. You should ensure that your workplace and any machinery and facilities used are safe, and that all workers have adequate training and supervision.

### Independent contractors

Even if your organisation does not 'employ' anyone, it will still be required to comply with OHS laws if it controls or operates a 'workplace'. As long as your organisation exercises a degree of control over the place at which the work is performed, it will have 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, volunteers and visitors.

### Volunteers

Even if your organisation is completely volunteer-based, it will be bound by OHS laws if it controls or operates a 'workplace'.

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 could apply to your organisation, see the Related PilchConnect 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 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 to take out workers' compensation insurance to cover workers that would otherwise be considered to be independent contractors. For example, a contractor may be deemed to be an employee for the purposes of workers compensation insurance if: (a) they personally perform at least 80% of the work under an arrangement with your organisation, and (b) the contractor's income under the arrangement forms at least 80% of his/her overall services income during the relevant period.

When you engage a contractor, you should check whether they have the necessary insurance because your organisation's policies may not cover them. These situations can be difficult and you should seek legal advice 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 take out personal accident insurance to cover your volunteers for out of pocket medical expenses if they are injured whilst performing 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.

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) each pay period. The organisation must then provide this tax to the Australian Taxation Office (ATO). 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 other workers each pay period (week, fortnight or month). See the Related Resources ATO tools section at the end of this document.

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.

**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.

### 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 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 hirers 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 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 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. 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.

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

## 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) of between 1 and 5 weeks depending on the employee's length of service and age. Section 117 of the *Fair Work Act 2009* sets out the applicable minimum notice periods. 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.

If your organisation dismisses an employee for an unlawful (e.g. discriminatory) reason or the termination is 'harsh, unjust or unreasonable', the employee may be able to make a claim against your organisation on the basis of unlawful termination or unfair dismissal.

Under the new workplace system if your organisation has fewer than 15 employees, it must follow the Small Business Fair Dismissal Code when dismissing employees. (Note: despite its name this Code applies to not-for-profit community organisations as well.) Fair Work Australia has developed a checklist to help organisations comply with this Code. For more information see the Related Links section at the end of this document.

Finally, if your organisation has 15 or more employees and dismisses an employee (who has been working for you for at least one year) because your organisation (a) no longer requires that employee's job to be done by anyone; or (b) has become insolvent or bankrupt, the employee may be entitled to redundancy pay under the National Employment Standards (NES). However, it is important that you check whether the employee concerned is covered by a modern award or enterprise agreement or has a written contract of employment, as that award, agreement or contract may provide for entitlement to redundancy pay even though your organisation has less than 15 employees. The redundancy entitlements (if any) contained that award, agreement or contract may be more generous than those contained in the NES. Working out whether an employee is entitled to redundancy pay and if so, how much, can be difficult. You should therefore seek legal advice if you are thinking about making a position redundant.

### 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 (a) your organisation can terminate by giving notice; and (b) whether 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.

Depending on the terms of your contract, your organisation may also be able to terminate a contract if the contractor is in serious breach of the contract. Again, it is important to look carefully at the terms of the contract because some contracts require you to give the independent contractor a 'notice to remedy a breach' and an opportunity to fix it before terminating the agreement.

Unlike employees, independent contractors cannot 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 is also worth noting that if a person whom your organisation regards as an 'independent contractor' can establish in court that they are properly classified as an employee (see table 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 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'

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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 that *'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 decisive.

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 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 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 the worker minimum rates of pay and leave or superannuation entitlements), they may face serious penalties under the *Fair Work Act 2009*. 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

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### Related legislation

*Fair Work Act 2009 (Cth)*

*Independent Contractors Act 2006 (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)*?

For online legal information resources for Victorian community organisations about:

- ▶ volunteers see [www.pilch.org.au/volunteers](http://www.pilch.org.au/volunteers)
- ▶ employees see [www.pilch.org.au/employees](http://www.pilch.org.au/employees)
- ▶ independent contractors see [www.pilch.org.au/contractors](http://www.pilch.org.au/contractors)
- ▶ insurance and risk management see [www.pilch.org.au/insurance](http://www.pilch.org.au/insurance)
- ▶ occupational health and safety see [www.pilch.org.au/ohs](http://www.pilch.org.au/ohs)
- ▶ tax see [www.pilch.org.au/tax](http://www.pilch.org.au/tax)

### Related ATO tools

The ATO has designed the following tools which may help you work out your obligations:

- ▶ Employee/contractor decision tool see [www.ato.gov.au/nonprofit/](http://www.ato.gov.au/nonprofit/) and select What do you want to do? > [Pay staff](#) > [Employee, contractor or volunteer?](#) > [Employee/contractor decision tool](#).
- ▶ Superannuation Guarantee eligibility decision tool, see [www.ato.gov.au/nonprofit/](http://www.ato.gov.au/nonprofit/) and select What do you want to do? > Pay staff > SG eligibility decision tool.
- ▶ Tax withheld calculator, see [www.ato.gov.au/nonprofit/](http://www.ato.gov.au/nonprofit/) and select find a rate or calculator > PAYG withholding > tax withheld calculator

## Related links

Fair Work Australia, see [www.fairwork.vic.gov.au](http://www.fairwork.vic.gov.au)

For information on termination and to download a copy of the Small Business Fair Dismissal Code and Checklist, see [www.fairwork.vic.gov.au/termination](http://www.fairwork.vic.gov.au/termination)

For information on long service leave, see [www.business.vic.gov.au](http://www.business.vic.gov.au) and select Workforce > Long Service Leave

For information on independent contractors and to download a copy of Independent Contractors: the essential handbook, see [www.business.gov.au](http://www.business.gov.au) and select View More Topics > Independent Contractors.

For the National Standards for Best Practice in the Management of Volunteers, see [www.volunteeringaustralia.org](http://www.volunteeringaustralia.org) > Publications > National Standards.

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