



Independent Contracting

Policy Background

- Hiring independent contractors has become commonplace in many industries across Australia.
- There are more than one million independent contractors (including some 330,000 in the construction industry) contributing to the economy.
- Contractors fulfil an important function, not just because they are flexible and efficient, but also because they provide the economy with small business entrepreneurial drive and create much needed jobs for others.
- For the housing industry, the use of independent contractors over employees has suited the industry well and been pivotal to housing affordability.

Policy Issues

- The political and legal landscape for independent contracting for HIA members appears to be dramatically changing.
- In the view of HIA, governments have progressively challenged the status of independent contractors with laws that variously deem them to be employees, for payroll tax, workers compensation, OH&S and industrial relations purposes.
- In 2010 the Australian Building and Construction Commission also commenced an inquiry into 'Sham Contracting', and has progressively shifted resources from policing industrial lawlessness in the building industry to investigating the use of contracting arrangements.
- Sham contracting is where employees, at fact and law, are forced into service contracts or are deliberately mislabelled as contractors. HIA does not accept the proposition that sham contracting is 'rife' nor 'rampant' in the residential construction industry.
- HIA does not condone sham contracting where it occurs and supports the current laws and penalties against sham arrangements.
- The differences between an employee and a contractor in a practical sense are well understood in the building and construction industry.
- However, HIA considers that the existing measures to address sham contracting could be improved by providing a statutory 'safe harbour' mechanism for those who genuinely wish to enter into a commercial contracting relationship, not by tilting the tax or enforcement scales against contractors.
- The common law has clear, well settled tests for determining independent contractor status, such as control over the conduct of the work, contracting to achieve a specified result, the sources of income for the contractor and whether the contractor uses his or her own equipment.
- The task of governments should be to preserve and enhance genuine independent contracting businesses, not force small business to become employees.

- Rather than continuing the fixation of defining a relationship that is already the subject of clearly established common law tests, the focus should be on allowing those businesses that display the real world hallmarks of an independent business to operate without unnecessary regulatory interference.

HIA's Policy Position on Independent Contracting

HIA recognises the following as hallmarks of an independent business operating in the housing sector. Where contractors display these hallmarks they should, prima facie, be considered independent contractor businesses for industrial relations and taxation purposes.

1. Intent to be covered by commercial arrangements

An independent business, and the principal that contracts the independent business, intend to enter into a commercial arrangement and do not intend for a relationship of employee/employer to arise from the commercial arrangement. The parties to the commercial arrangement intend that the independent business will not receive employment related entitlements and that no deduction of income tax is to be made from the payments (subject to any voluntary withholding agreement available under the taxation laws), signifying a mutual intention that the relationship not be one of employee/employer.

2. Business registrations and licensing

An independent business will have:

- An ABN;
- A registered company name and/or business trading name (unless trading under an individual's own name);
- GST registration (if required by law); and,
- Any occupational or OHS licenses that are required by law in relation to the works that the independent business has been contracted to carry out.

3. Provision of own tools and equipment

Where practicable an independent business will provide the tools and equipment that a business carrying out work of the nature contracted by the principal would reasonably be expected to provide to satisfy the terms of the contract. The value or quantum of such tools and equipment is immaterial provided the tools are sufficient to discharge the obligations arising under the contract. The independent business will be responsible for the maintenance of the tools and equipment necessary for the job.

4. Ability to subcontract work or employ persons to assist in doing the work

An independent business will provide the skills and labour that a business carrying out work of the nature contracted by the principal would reasonably be expected to provide to satisfy the terms of the contract. The discretion to subcontract or employ other people to provide skills and labour will lie with the independent business and whether the independent business elects to exercise this discretion is immaterial provided the discretion to delegate is inherent within the terms of the contract.

5. Working methods

An independent business will have the discretion to adopt any working methods it sees fit to complete the scope of works agreed to under contract, subject to any requirement imposed by the principal contractor with respect to compliance with the law and occupational health and safety requirements. It matters not that the principal contractor does or seeks to exercise some level of control if this does not amount to a right to control.

6. Right to work for others

An independent business will have a right to:

- Work on multiple projects concurrently;
- Work for multiple principal contractors; and
- Come and go and have a choice of work.

Whether this right is actually exercised is a business decision and a matter of no consequence. It is sufficient that the right exists.

7. Works in hope of profit but at risk of loss

An independent business chooses to enter into a commercial contract in order to make profit from undertaking the work and in doing so consciously takes on a risk of loss.

Starting any business is fraught with risk and some individual projects may be accompanied with greater commercial risk than others.

Whilst an independent business person has eschewed the guarantees of employment law this is in exchange for the freedom to develop one's own business and the long term potential rewards that accompany that decision.

8. Responsibility for defective workmanship at own expense

An independent business is responsible for rectifying its own defective workmanship.

9. Responsible for own business expenses

An independent business is responsible for business expenses such as income tax and insurance.

10. Paid for the product of a result, with discretion in how and when work is performed

Payment is on a project specific basis. The frequency and amount of payment is of no consequence provided there is a clear contractual intention to be bound for the duration of the project only, with no expectation of indefinite ongoing work beyond the life of the project. The negotiation and securing of contracts for multiple contracts to run concurrently or in succession does not however, amount to an expectation of indefinite ongoing work.

Payments to independent businesses will ordinarily be made on the basis of output (including for time on the job) and results rather than working for a fixed wage.

An independent business will have the ability to decide upon times of work subject to any contractual deadline imposed by the principal contractor and any requirements reasonably necessary to accommodate the production sequence and engagement of other contractors and trades.