

Article Information

Service: Employment & Labour

Sector: Health & Life Sciences

Time for a Health Check: Contracting Life Skills for Life Sciences

Two major test case decisions handed down by the High Court of Australia, earlier this year, have caused businesses taking a long hard look at their contracting arrangements to make sure they can protect against the common types of legal action associated with the engagement of contractors.

The most common form of legal action usually relates to contractors later claiming they are:

- in essence an employee and not a contractor, and are therefore entitled to employment entitlements such as annual leave, redundancy, paid personal leave etc; and
- an 'employee' for the purposes of the superannuation guarantee entitlement on the basis that they fall within the expanded definition in the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**Superannuation Legislation**) and are therefore entitled to superannuation.

The High Court of Australia decisions in *Construction, Forestry, Maritime, Mining and Energy Union v. Personnel Contracting Pty Ltd* and *ZG Operations Australia Pty Ltd v. Jamsek* are particularly important to many businesses in the Life Sciences sectors given the very common practice of engaging individuals as independent contractors at the start-up stage, where specialised skills or services are required and there is no business case for employing the relevant people full time.

Legal Analysis of the Decisions

These two decisions have been a step forward from the approach previously taken by Courts and Tribunals. The High Court of Australia has now provided businesses with a greater degree of confidence that:

1. if they are contracting with someone who meets the criteria of a contractor; and
2. the contract properly reflects the arrangement as a contractor,

then it will be far more likely that the individual concerned will be found to be a contractor and not an employee.

If you do not have the correct arrangements set up, as referred to in a) and b) above, then the fact that an individual either freely agreed to be a contractor, or even asked to be one, will not be determinative as to the outcome. Your organisation may find itself unable to rely upon the terms of the written agreement if the arrangements do not match the characteristics and the contract likewise falls short of what is required.

If you're interested in reviewing our article containing a broader legal analysis of the decisions, then please click **here**.

Superannuation

The issue of superannuation, for individuals who are engaged as contractors directly, is both potentially much clearer, while at the same time confusing to many reasonable rational organisations. The reason for this dichotomy is that the Superannuation Legislation includes an expanded definition of an 'employee' for the purposes of superannuation entitlements.

The expanded definition is contained in section 12(3) of the Superannuation Legislation:

If a person works under a contract that is wholly or principally for the labour of the person, the person is an

employee of the other party to the contract.

This quite clearly captures a great number of individuals who might very well be considered to be contractors when assessed under the common law and will apply when:

- there is a contract (written or oral);
- the contract is wholly or principally for the labour of a person; and
- that person works under that contract.

It will not be determinative if the contractor conducts their own business, as long as the contractor was directly engaged by the employer to provide their labour.

The moral of this story is that you may have contractors that you should be paying superannuation for. The issue of superannuation cannot generally be dealt with by including a provision in the contract stating that superannuation is inclusive in any hourly rate or other payment, as payments under the Superannuation Legislation require that superannuation be paid to a complying fund.

Ramifications of getting it wrong

The risks associated with getting it wrong on the issue of whether an individual should properly be paid and treated as an employee, are:

- the repayment of any shortfall in entitlements otherwise payable as an employee (this may include salary/wages and leave entitlements);
- the risk of penalties for the deemed employer, of up to \$66,600 per breach of the workplace laws and any industrial instrument for a corporation, and up to \$13,320 per breach of the workplace for individuals or persons involved in the contravention(s); and
- the risk of reputational damage.

The risks associated with getting it wrong on the issue of superannuation, are:

- back-payment of any underpaid superannuation; and
- penalties.

Solution

It is not much of an effort to conduct a quick check at the point of engagement to make sure that an individual is properly being engaged as a contractor.

In addition, you need to make the modest investment in a well drafted contract that:

- protects your organisation against a finding that the person was really an employee;
- protects other valuable aspects of the business such as confidentiality and customer connections; and
- clearly sets out your organisation's rights to own the intellectual property that you are paying the contractor to create. For more insights on managing IP created by contractors, please see our article [Who owns what? Why life sciences companies need intellectual property policies](#)

Contact us if you want a best practice contract or need advice on your contracting conundrums.